Case No. 10-2021

In The

United States Court of Appeals

For the Fourth Circuit

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

Appellants,

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,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT SPARTANBURG

BRIEF OF THE APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal arises from an action under the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq.* ("DPPA"), seeking damages and injunctive relief as a result of Defendant-Appellees' violations of the privacy rights of Plaintiff-Appellants and the putative class members. The District Court had subject matter jurisdiction under 18 U.S.C. § 2724 and 28 U.S.C. § 1331. Subject matter jurisdiction over this appeal lies in this Court under 28 U.S.C. § 1291.

The District Court filed its Opinion & Order granting Defendants' motion for summary judgment in part and denying Plaintiffs' motion for partial summary judgment on August 4, 2010. By Opinion & Order entered August 26, 2010, the District Court confirmed that its August 4, 2010 Order had also effectively dismissed as moot a counterclaim that Defendants had made. Consequently, no issues remain pending before the District Court. Plaintiffs timely filed their Notice of Appeal on September 1, 2010.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellants [hereinafter sometimes referred to as "the Drivers"] present the following issues for this Court's review:

I. Whether the District Court erred when it found that despite the overwhelming record evidence to the contrary, the Defendants-Appellees [hereinafter sometimes referred to as "the Lawyers"] had

not obtained, used, or disclosed DPPA-protected Personal Information to solicit clients.

II. Whether the District Court erred by ruling that even if the Lawyers had obtained, used, or disclosed DPPA-protected Personal Information for the statutorily impermissible purpose of soliciting clients, the use of such Personal Information for a permissible purpose under the statute would excuse the use for an impermissible purpose.

III. Whether the District Court erred in finding that as a matter of law, the Lawyers had obtained, used, or disclosed DPPA-protected Personal Information for the statutorily permissible purposes embodied in the "litigation exception" and the "state action exception" to the DPPA.

STATEMENT OF THE CASE

Plaintiffs-Appellants filed this class action to hold Defendants-Appellees (four attorneys and their respective law firms)[1] accountable for their violations of the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq.* ("DPPA"). The DPPA protects the confidentiality of information collected by the state departments of motor vehicles in government databases. The Appellee-Lawyers obtained the

[1] Hence the shorthand term, "the Lawyers."

"Personal Information"[2] of Appellant-Drivers and the putative class members through multiple Freedom of Information Act requests to the South Carolina Department of Motor Vehicles ("SCDMV"). The Lawyers then used that Personal Information to send letters to over 36,000 recipients in an attempt to solicit clients. The Lawyers have disclosed the Personal Information of the Drivers and the class members by filing it of public record with the South Carolina Office of Disciplinary Counsel.

On motion by the Lawyers, the District Court stayed the case for six months. (JA at 192-97.) At the time the stay was put in place, no discovery had yet been conducted, and the Lawyers had not even provided complete initial disclosures under Fed. R. Civ. P. 26(a)(1). In issuing the stay, the District Court cited the Lawyers' claims that they would be prejudiced if they were forced to produce any documents or information in discovery. (JA at 195-197.) The Drivers then asked the Court to modify the stay so that the parties could move forward with class certification proceedings, but the District Court refused this request because the Lawyers claimed that they would need discovery from the Drivers and would therefore be prejudiced. (JA at 203.) On its own motion, the Court lifted the stay for the limited purpose of allowing the parties to file Motions for Summary

[2] The DPPA defines "Personal Information" as including, among other things, an individual's name and address (except for the 5-digit zip code), which are the forms of personal information relevant to this case. 18 U.S.C. § 2725(3).

Judgment. (JA at 199-200, 203.) Counsel for the Drivers expressly reserved the right to be permitted discovery insofar as might be required to respond adequately to the Lawyers' Motion for Summary Judgment. (JA at 200.)

The Drivers filed a Motion for Partial Summary Judgment[3] supported by affidavits and certified copies of documents in the public record. By contrast, the Lawyers filed no sworn evidence to support their Motion for Summary Judgment or in response to the Drivers' Motion for Partial Summary Judgment, relying primarily upon representations of counsel in their supporting memorandums, unauthenticated documents from a state court proceeding, and statements in their own pleadings. Ignoring the lack of admissible evidence supporting the Lawyers' contentions, without regard for the effect of the stay of discovery on the Drivers' ability to test or contravene the Lawyers' unsworn self-serving contentions about their motives and conduct, disregarding the Rule 56(f) affidavit filed by counsel for the Drivers (JA at 1445), and rejecting the holdings of all other courts that have considered issues similar to those in this case, the District Court granted summary judgment to the Lawyers. (JA at 1466-92.)

This appeal followed.

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[3] "Partial" because class certification issues would still need to be resolved and the amount of damages would remain to be determined.

STATEMENT OF THE FACTS

The Drivers and the putative class members are all persons whose federal privacy rights have been violated by the Lawyers. The Personal Information of the Drivers and the class members, including their names and addresses, was provided to the SCDMV in connection with automobile purchases that they had made in the State of South Carolina. The DPPA protects this Personal Information from disclosure except for certain limited permitted purposes. In direct violation of the DPPA, the Lawyers obtained the Personal Information of the Drivers and the class members, used the Personal Information as part of a mass advertising campaign, and disclosed it in the public record, all for the impermissible purpose of soliciting clients. The undisputed facts are as follows:

June 23, 2006: Lawyer Harpootlian mailed a letter to the SCDMV requesting, *inter alia*, the names and addresses of car buyers who had purchased automobiles in Spartanburg County during the week of May 1-7, 2006. (JA at 206-09.) Harpootlian asserted that the exception found at 18 U.S.C. § 2721(b)(4) of the DPPA (the "litigation exception") permitted the SCDMV to disclose this information, and further stated that he was attempting to determine whether certain conduct of car dealers was a "common occurrence." (*Id.*) The SCDMV provided the requested information. (*See* JA at 183 ¶ 50.)

August 24, 2006: Harpootlian mailed a letter to the SCDMV requesting, *inter alia*, the names and addresses of car buyers who had purchased automobiles in Charleston County, Richland County, York County, Lexington County, and Greenville County during the week of May 1-7, 2006. (JA at 211-12.) Harpootlian again invoked the litigation exception of § 2721(b)(4) as authority for his request, but this time offered no ostensible explanation for why he sought this information. (*Id*.) Nevertheless, the SCDMV provided the requested information. (*See* JA at 183 ¶ 50.)

August 29, 2006: The Lawyers filed a lawsuit (the "*Herron* lawsuit") on behalf of four named plaintiffs against fifty-one car dealers in the Court of Common Pleas for Aiken County. (JA at 214-34.) The *Herron* lawsuit alleged that the car dealers had improperly charged "administrative fees" in violation of the South Carolina Regulation of Manufacturers, Distributers, and Dealers Act, S.C. Code Ann. § 56-15-10, *et seq*. (the "Dealers Act"). (JA at 231-33.) Although the *Herron* lawsuit named fifty-one car dealers as defendants, according to the complaint, the four plaintiffs named in that action had purchased vehicles from, and paid associated "administrative fees" to, only four of the defendant car dealers. (*Id*.) The complaint sought actual and compensatory damages, statutory double damages under the Dealers Act, punitive damages, disgorgement of all "administrative fees" collected by the defendant car dealers, and a permanent

injunction barring them from charging such fees in future transactions. (JA at 233.)

September 2006: The defendant car dealers in the *Herron* lawsuit began filing motions to dismiss asserting that the plaintiffs lacked standing to pursue claims against car dealers with whom they had transacted no business. (JA at 184 ¶¶ 54, 55.)

October 26, 2006: Harpootlian mailed the first of four additional letters to the SCDMV requesting information in direct response to the car dealers' motions to dismiss. (JA at 185 ¶ 59; 236-46.) The first letter requested, *inter alia*, the names and addresses of car buyers who had purchased automobiles during the weeks of May 1-14, 2006 from a list of 328 car dealers located throughout the State. (JA at 236-46.) Harpootlian again invoked the litigation exception of § 2721(b)(4) as authority for his request. (*Id*.) The SCDMV provided the requested information. (JA at 186 ¶¶ 60-61.)

October 31, 2006: The Lawyers filed an amended complaint in the *Herron* lawsuit. (JA at 248-320.) This amended complaint named eight purchasers as plaintiffs, which included the four original plaintiffs and four new plaintiffs, and increased the number of car dealer defendants to 324. (*Id*.) As with the original complaint, the eight plaintiffs named in the amended complaint had each purchased only one vehicle. (JA at 308-09 ¶¶ 374-89.) Consequently, the

amended complaint was necessarily limited to charging specific violations against only eight of the 324 defendant car dealers. (*Id.*) Although the amended complaint added a civil conspiracy claim, the relief that the amended complaint sought was still identical to that sought in the original complaint. (JA at 319.)

Fall and Winter 2006: The defendant car dealers filed additional motions to dismiss the *Herron* complaint, ultimately filing over 183 motions to dismiss the car buyers' claims for lack of standing. (JA at 184 ¶ 54.)

January 4, 2007: The Lawyers solicited clients to bring new claims against the dealers from whom the existing plaintiffs had made no purchases. Specifically, they used names and addresses they had obtained from the SCDMV to send form solicitation letters to 2,255 car buyers. (JA at 185-86 ¶¶ 61-62; 484-90; R. at Docket Entry No. 71-2, pp. 6-49[4].) The form letter stated that the Lawyers represented "a group of consumers" in a pending lawsuit against car dealers that had charged administrative or other fees and that the Lawyers believed "[the] fees are being charged in violation of South Carolina law." (JA at 487.) The letter

[4] The Drivers are cognizant of the Court's preference that citations be made only to those items contained in the Joint Appendix. However, to avoid unnecessary duplication and cost, the Drivers have only designated selections from the attachments to the Affidavit of Records Custodian of the Office of Disciplinary Counsel. The Drivers have omitted from the Joint Appendix the more than 700 pages of zip codes of the Solicitation Letter recipients. These pages of zip codes are found in the Record at Docket Nos. 71-2 through 73-2.

further advised that the Lawyers understood that the recipient may have been charged one of these fees on his or her "recent purchase of an automobile." (*Id.*)

The letter went on: "**We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.**" (*Id.*) (Emphasis in original.) The letter, which was denominated "**ADVERTISING MATERIAL**," informed the recipient that the Lawyers "would like the opportunity [to] discuss your rights and options with you in a free consultation" and invited the recipient to return the enclosed postage-paid card to be contacted by the Lawyers. (*Id.*)

The letter did not in any way suggest that the Lawyers somehow already represented the recipient (in contrast to positions the Lawyers would take later) but instead concluded with the following paragraph:

> **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.**

(*Id.*) (Emphasis in original.) Pursuant to South Carolina Rule of Professional Conduct 7.3, the Lawyers filed a representative copy of the solicitation letter with the Office of Disciplinary Counsel ("ODC"), along with a list of the names and

addresses of the individuals to whom the letters had been sent. (JA at 484 ¶¶ 23; 486.)

January 19, 2007: Harpootlian mailed the second of the four letters to the SCDMV that were prompted by the car dealers' motions to dismiss. (JA at 185 ¶ 59; 322-23.) This letter requested, *inter alia*, the names and addresses of car buyers who had purchased automobiles during the weeks of June 1, 2006 through September 2, 2006 from a list of twenty-three car dealers. (JA at 322-23.) Harpootlian again invoked the litigation exception of § 2721(b)(4) as authority for his request. (*Id*.) The SCDMV provided the requested information. (JA at 185 ¶¶ 60-61.)

January 22, 2007: Harpootlian mailed the third of the four letters to the SCDMV resulting from the car dealers' motions to dismiss. (JA at 185 ¶ 59; 325.) In this letter, he again invoked the litigation exception, and he requested the names and addresses of car buyers who had purchased automobiles during the weeks of June 1, 2006 through September 2, 2006 from a list of seven car dealers. (JA at 325.) The SCDMV provided the requested information. (JA at 185 ¶¶ 60-61.)

January 23, 2007: Harpootlian mailed the Lawyers' final letter to the SCDMV. (JA at 185 ¶ 59; 327.) In this letter, Harpootlian requested, again invoking the litigation exception, the names and addresses of all car buyers who had purchased automobiles from South Carolina dealerships during the weeks of

September 1, 2005 through September 14, 2005 and December 10, 2005 through December 24, 2005. (JA at 327.) The SCDMV provided the requested information. (JA at 185 ¶¶ 60-61.)

Also on this date, the Lawyers used names and addresses they had previously obtained from the SCDMV to send form solicitation letters to an additional 1,283 car buyers. (JA at 185-86 ¶¶ 61-62; 91-92; R. at Docket Entry No. 71-3, pp. 3-24.) These solicitation letters were identical in all material respects to those that the Lawyers had sent on January 4, 2007. (JA at 487, 492.) The Lawyers once again filed a representative copy of the solicitation letter with the ODC, along with a list of the names and addresses of the individuals to whom the letters had been sent. (JA at 484 ¶¶ 2-3; 491.)

March 1, 2007: The Lawyers sent out a third set of form solicitation letters using names and addresses they had obtained from the SCDMV. (JA at 185-86 ¶¶ 61-62; 493-94.) These solicitation letters, which were also identical in all material respects to those that the Lawyers had sent out on January 4, 2007, were addressed to 2,443 more car buyers. (JA at 487, 494; R. at Docket Entry No. 71-4, pp. 3-53.) The Lawyers filed a representative copy of the solicitation letter with the ODC, along with a list of the names and addresses of the recipients. (JA at 484 ¶¶ 2-3; 493.)

March 5, 2007: The Lawyers once more used names and addresses they had obtained from the SCDMV to send out form solicitation letters, this time to 18,673 additional car buyers. (JA at 186-86 ¶¶ 61-62; 329-32, 495; R. at Docket Entry Nos. 71-5 through 72-2.) These solicitation letters were also identical in all material respects to those that the Lawyers had sent out on January 4, 2007. (JA at 329, 487.) The Lawyers filed a representative copy of this solicitation letter with the ODC, along with a list of the names and addresses of the recipients. (JA at 484 ¶¶ 2-3; 495.)

March 7, 2007: Attorney Greg Studemeyer (co-counsel for some of the *Herron* lawsuit defendants) sent a letter to Lawyer Lewis raising concerns about the form solicitation letters. (JA at 334-35.) In a letter misdated February 16, 2007, Lewis responded by asserting that the requests to the SCDMV were made pursuant to the "litigation exception" of the DPPA. (JA at 337.)

May 8, 2007: The Lawyers sent out another bulk mailing of form solicitation letters using names and addresses they had obtained from the SCDMV. (JA at 186-86 ¶¶ 61-62; 496-97.) These solicitation letters were virtually identical to those that the Lawyers had sent out on January 4, 2007, and were mailed to 4,681 more car buyers. (JA at 487, 497; R. at Docket Entry No. 73-1, pp. 3-93.) The Lawyers filed a representative copy of the solicitation letter with the ODC, along with the names and addresses of the recipients. (JA at 484 ¶¶ 2-3; 490.)

May 9, 2007: The Lawyers used names and addresses they had obtained from the SCDMV to send form solicitation letters to 6,866 more car buyers. (JA at 185-86 ¶¶ 61-62; 498-99; R. at Docket Entry No. 73-2, pp. 3-141.) These solicitation letters were virtually identical to those that the Lawyers had sent out on January 4, 2007. (JA at 487, 499.) The Lawyers filed a representative copy of the solicitation letter with the ODC, along with a list of the names and addresses of the recipients. (JA at 484 ¶¶ 2-3; 498.)

March-May, 2007: The names and addresses of the Drivers were included in the DPPA-protected Personal Information that the Lawyers had received from the SCDMV. (*See* JA at 500-08.) Consequently, Plaintiff Maracich received one of the form letters sent out March 1, 2007. (JA at 500 ¶ 3; 502.) Plaintiff Weeks received a solicitation letter from one of the May mass mailings (both of which were dated May 8, 2007). (JA at 506 ¶ 3; 508.) And Plaintiff Tanner received one of the form letters from the Lawyers in the spring of 2007 (precise date of letter unknown). (JA at 503 ¶ 3; 505.)

None of the Drivers had provided their consent to the State of South Carolina to disclose their Personal Information for the purpose of solicitation. (JA at 500 ¶ 4; 504 ¶ 4; 506 ¶ 4.) Prior to receiving the letters from the Lawyers, none of the Drivers had made any attempt to recover fees paid in connection with their

vehicle purchases or raised any complaints about these fees. (JA at 501 ¶ 5; 504 ¶ 5; 507 ¶ 5.)

After receiving his solicitation letter, Mr. Tanner contacted Lawyer Harpootlian's office and spoke with Harpootlian. (JA at 1448 ¶¶ 4-8.) Harpootlian made an aggressive sales pitch to try to get Mr. Tanner to sign up as a client for a lawsuit against the dealership where Mr. Tanner had purchased his car. (JA at 1448 ¶ 6.) Neither Harpootlian nor anyone else at his office sought any information from Mr. Tanner or suggested that they needed or were interested in Mr. Tanner as a possible witness. (JA at 1448 ¶ 8.)

Spring 2007: The Lawyers' efforts to solicit business through the use of DPPA-protected Personal Information were indubitably effective. In response to the form solicitation letters that the Lawyers had sent out, "hundreds of Car Buyers came forward wanting to actively participate and join as named plaintiffs in the *Herron* litigation." (JA at 186 ¶ 64.)

June 5, 2007: The Lawyers filed a Motion to Amend the *Herron* complaint to add 246 new named plaintiffs to defeat the defendant car dealers' standing arguments. (JA at 186 ¶ 65; 340-449.) The proposed amended complaint included claims against a total of 208 defendants. (JA at 342-449.)

July 30, 2007: The Lawyers filed a Memorandum in Support of their Motion to Amend Complaint. (JA at 451-68.) In response to arguments that the

defendant car dealers raised about possible DPPA violations, the Lawyers again asserted that they had acted under the authority of the litigation exception in § 2721(b)(4). (JA at 460.) The Lawyers invoked none of the other statutory exceptions. (JA at 451-68.)

August 21, 2007: The *Herron* court denied the Lawyers' motion to amend the *Herron* complaint to add plaintiffs. (JA at 470-71.)

September 4, 2007: The Lawyers then filed a separate lawsuit styled *Adams v. Action Ford Mercury, Inc.*, Civil Action No. 2007-CP-02-1232, on behalf of certain named plaintiffs that the Lawyers had unsuccessfully attempted to add as plaintiffs in the *Herron* case in June 2007. (JA at 182 ¶ 43; 186 ¶ 65; 187 ¶ 68.) The *Adams* case was filed "in order to maintain the viability of the claims of hundreds of previously unnamed Car Buyers." (JA at 187 ¶ 68.)

September 20, 2007: The Lawyers filed another lawsuit styled *West-Cox v. Cale Yarborough Honda*, Civil Action No. 2007-CP-02-1154, on behalf of certain named plaintiffs that the Lawyers had unsuccessfully attempted to add as plaintiffs in the *Herron* case in June 2007. (JA at 182 ¶ 43; 186 ¶ 65; 187 ¶ 68.) Like the *Adams* case, the *West-Cox* case was filed "in order to maintain the viability of the claims of hundreds of previously unnamed Car Buyers." (JA at 187 ¶ 68.) The *Adams* and *West-Cox* cases were consolidated with the *Herron* lawsuit. (JA at 182

¶ 43.) The Lawyers then dismissed the claims against all car dealers that did not have a corresponding named plaintiff car buyer. (JA at 187 ¶ 68.)

June 23, 2009: The Drivers filed this class action to hold the Lawyers accountable for their violations of the DPPA. (JA at 19-89.)

August 3, 2009: The Lawyers filed a Motion to Dismiss in this case, claiming, apparently for the first time, that they were acting as "private attorneys general" and that the "state action exception" found at § 2721(b)(1) had authorized their actions. (JA at 135-37.)

October 12, 2009: The state court in the *Herron* litigation, agreeing with the Lawyers' position that the case could proceed as a "group action," granted a motion seeking to substitute a named plaintiff to represent the interests of others similarly situated and, in the alternative, referred to the named plaintiffs in *Herron* and the Lawyers as "private attorneys general." (JA at 480.)

SUMMARY OF ARGUMENT

In 18 U.S.C. § 2721(b)(12), the DPPA plainly prohibits the use of DPPA-protected Personal Information for "solicitations" unless the State has first obtained the solicitee's consent. In the face of overwhelming evidence to the contrary, the District Court erred by accepting the Lawyers' self-serving, unsworn assertions of fact that they had not used the Personal Information they had obtained from the South Carolina DMV to solicit clients after all. The District Court

compounded the error by accepting the Lawyers' legal fiction that they could not have been soliciting clients in any event because they already represented every car buyer in the State of South Carolina by virtue of having initiated the *Herron* lawsuit (regardless of whether a given car buyer had consented to such representation and the requirements of due process).

Second, the District Court made a mistake by accepting the Lawyers' fallback argument that even if they had used DPPA-protected information for the impermissible purpose of soliciting clients, that conduct was not actionable so long as they also obtained and used the information for a permissible purpose (i.e., the "litigation exception" or the "state action exception"). The District Court's ruling cannot be squared with the statutory text, and the only other court that has passed on the substance of the Lawyers' argument (the Third Circuit) has rejected it.

Finally, the District Court committed reversible error by ruling that as a matter of law, both the litigation exception and the state action exception were applicable. Setting aside the statutory construction issue, the Lawyers offered no admissible evidence to support their contention that their conduct fell within the litigation exception. And regardless of their belated self-labeling as "private attorneys general," the Lawyers did not meet the statutory requirements of acting on behalf of the State and carrying out a function of the State.

ARGUMENT

Simply put, the District Court's ruling strips the motorists of South Carolina of any DPPA protection from the unsolicited (and from the perspective of many, unwelcome) importunings of lawyers, who now enjoy (if the District Court's ruling is allowed to stand) effectively unlimited access to the SCDMV's files and unfettered freedom to use the Personal Information they contain. The lower court's decision, for all practical purposes, creates a "lawyer exception" to the DPPA that is completely untethered from the statute's text and purpose and mocks the very idea of "driver privacy protection."

While lawyers may enjoy a qualified right to solicit clients in the post-*Bates* world, they do not enjoy the right to do so by obtaining and exploiting Personal Information that Congress has seen fit to protect (with certain exceptions inapplicable here). This is especially so when lawyers can go about their soliciting in any number of other ways. While the point is probably collateral to the statute's proper construction, the Drivers are constrained to observe that as a matter of public policy, the interest in driver privacy that Congress attempted to foster in the DPPA far outweighs the public interest in lawyer solicitation, particularly when there are so many other ways to go about it.

The DPPA generally prohibits the disclosure of Personal Information (including individuals' names, addresses, and telephone numbers) that is contained

in the records of state motor vehicle departments. 18 U.S.C. §§ 2721(a), 2725(3). However, it also sets forth a number of "permissible uses," or exceptions, for which Personal Information may be disclosed. 18 U.S.C. § 2721(b). These exceptions include the "state action exception" found at subsection (b)(1) and the "litigation exception" found at subsection (b)(4), which state:

> Personal information … 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.
> >
> > (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.

18 U.S.C. § 2721(b)(1), (b)(4).

Congress gave the DPPA teeth by creating a private right of action for the benefit of individuals whose personal identifying information was obtained, used or disclosed in violation of the Act. The Act provides:

> 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.

18 U.S.C. § 2724(a). The Act is intended to prevent the acquisition and use of this information, not merely for some unlawful purpose, but more broadly to prevent

use of this state-compiled information for private commercial purposes. The statute is written in the disjunctive, so each act of obtaining, disclosing, or using protected information constitutes a separate violation of the DPPA.

It is undisputed that the Lawyers obtained the personal identifying information of the Drivers, and that of thousands of other citizens, from the SCDMV, and used that information to put together a direct mail advertising campaign seeking clients for lawsuits against car dealers. (*See* JA at 484-99.) The Lawyers have sought succor under the "state action exception" of § 2721(b)(1) and the "litigation exception" of § 2721(b)(4).

Breaking from all other courts that have considered similar issues, and relying to a large extent upon the Lawyers' self-serving (but unsworn) characterizations of their own conduct, the District Court found that these two exceptions applied to shield the Lawyers from liability in this case. By excusing the Lawyers' behavior in this way, the District Court effectively expanded these exceptions to the DPPA to create the "lawyer exception" adverted to above, a result neither intended by Congress nor condoned by any other jurisdiction that has interpreted the reach of the DPPA. That decision cannot stand.

I. Standard of Review

The standard for reviewing a district court's decision to grant summary judgment is well settled. The court of appeals reviews an opinion granting

summary judgment de novo, applying the same legal standards as the district court. *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010). Summary judgment should be granted 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 judgment as a matter of law. *Id*. 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. *Id*. In 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." *Id*. (quoting *Hunt v. Cromartie*, 526 U.S. 541, 552, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999)). To overcome a motion for summary judgment, 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. *Id*.

However, the nonmoving party has the right to such discovery as may be necessary to develop relevant facts. *See, e.g.*, *Ingle v. Yelton*, 439 F.3d 191, 195-97 (4th Cir. 2006); *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244-45 (4th Cir. 2002). 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. *See Ingle*, 439 F.3d at 195-97; *Harrods Ltd.*, 302 F.3d at 244-45, 247. The denial of discovery prior to the determination of a summary judgment motion is reviewed under an abuse of discretion standard. *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995).

II. The District Court Erroneously Concluded That the Lawyers Did Not Even Use DPPA-Protected Personal Information to Solicit Clients.

By its plain terms, the DPPA affirmatively prohibits the use of Protected Information for "solicitations" unless the State "has obtained the express consent of the person to whom such personal information pertains." 18 U.S.C. § 2721(b)(12). Because there was no such consent in this case, the Lawyers strained mightily in their summary judgment arguments to win the point that their conduct did not amount to solicitation at all. The District Court ruled in the Lawyers' favor on this issue, and its Order correspondingly devotes considerable space to the question of solicitation *vel non*. (*See* JA at 1473-77.) This finding simply does not withstand critical examination, however.

A. The District Court Relied Upon the Lawyers' Unsworn Assertions and Ignored the Plain Language of the Lawyers' Solicitation Letters When It Found that They Did Not Use Personal Information to Solicit Clients.

There is no dispute that the Lawyers used the Personal Information they obtained from the SCDMV to send form letters, on letterhead listing all of the Lawyers, to approximately 36,000 individuals, including the Drivers, advising the

recipients of the pending *Herron* lawsuit and offering free consultations. (*See* JA at 185-86 ¶¶ 61-62; 329; 484-99; R. at Docket Entry Nos. 71-2 through 73-2.) The Lawyers knew that they were using the Personal Information to send the form letters to the Drivers and the putative class members, and, in fact, informed the recipients of the letters of this fact in the letters themselves. (JA at 329, 487, 492, 494, 497, 499.)

Each of the form letters explained that the Lawyers "would like the opportunity to discuss your rights and options with you in a free consultation" and invited the recipients to contact them if they were "interested in participating in the case or in a free consultation." (*Id.*) The Lawyers admitted that they sent these letters to find car buyers to pursue claims in the *Herron* litigation. (JA at 185-86 ¶¶ 56, 61-62.) The letters prominently included the words "**ADVERTISING MATERIAL**" at the top. (JA at 329, 487, 492, 494, 497, 499.) They also included all of the statements required by South Carolina Rule of Professional Conduct 7.3(d) in written communications soliciting professional employment, including the suggestion that: "***You may wish to consult your lawyer or another lawyer instead of us. . . . 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.***" (*Id.*) (Additional emphasis supplied.)

The District Court accepted the Lawyers' argument that the language of Rule 7.3 was not required and was "placed on the letters in an effort to be cautious," citing to the Lawyers' summary judgment memorandum. (JA at 1474.) This explanation was also repeated in a letter sent by Lawyer Lewis to one of the attorneys representing defendants in the *Herron* case, which the District Court likewise accepted as fact. (*Id*.)

Regardless of how the Lawyers might wish to characterize their use of the Personal Information they obtained from the SCDMV, these letters demonstrate on their face that the purpose in sending out these form solicitation letters was to solicit clients. The point is self-evident. And the solicitations worked – the Lawyers signed up hundreds of new clients who came forward in response to the form letters wanting to actively participate and join as named plaintiffs in the *Herron* litigation. (*See* JA at 186 ¶ 64.)

As if more proof were necessary, the letter's purpose was further confirmed in the conversation Driver Tanner had with one of the Lawyers after he received the solicitation letter. (*See* JA at 1448.) Mr. Tanner spoke with Lawyer Harpootlian, who made an aggressive sales pitch to try to get Mr. Tanner to sign up as a client for a lawsuit against the dealership where Mr. Tanner had purchased his car. (JA at 1448 ¶ 6.) Neither Harpootlian nor anyone else at his office sought any

information from Mr. Tanner or suggested that they were interested in Mr. Tanner as anything other than a client. (JA at 1448 ¶ 8.)

Despite the plain language of the letters, the sworn declaration of Mr. Tanner, and the fact that the Lawyers submitted no record evidence in support of their position, the District Court improperly credited the unsworn arguments of the Lawyers' counsel and hearsay statements of Lawyer Lewis to disregard the unassailable proof that these letters were sent to solicit clients. (*See* JA at 1474-75, 1481, 1483.) In what can only be described as a complete non sequitur, the District Court also found that because solicitation might be appropriate in some circumstances in class actions, "the Defendants did not solicit the unnamed Car Buyers as a matter of law." (JA at 1477.) The simple reality is that the Lawyers' solicitation letters were, both as a matter of law and fact, solicitations.

B. The District Court's Acceptance of the Lawyers' Claim That They Owed a Duty to All Unnamed Car Buyers Such That They Already "Represented" Them Creates a Special "Lawyer Exception" Not Found in the DPPA.

The District Court also made a mistake when it accepted the Lawyers' fiction that they were not soliciting and thus not required to comply with the DPPA because they already represented all unnamed car buyers in the State of South Carolina as a result of the "group action" they had filed in state court. (JA at 1475-76.) When examined, it becomes clear that this fiction is nothing more than a claim that lawyers owe a duty to the public at large and therefore do not need to

conform their actions to one of the enumerated exceptions found in the DPPA, but rather, are subject to a special "lawyer exception."

The Lawyers argued that when they filed a lawsuit against hundreds of car dealer defendants without any proper car buyer plaintiffs with standing to bring the claims, they accepted a fiduciary responsibility toward all unnamed car buyers. (JA at 537-38.) Therefore, the argument continued, the lawsuit allowed them to access a confidential, governmentally-required database of Personal Information in order to locate car buyer plaintiffs to pursue those claims. (JA at 538-39.) This circular, *post hoc* justification ignores the fact that the creation of an attorney-client relationship must be consented to by both attorney and client. The District Court's acceptance of this reasoning legitimized the Lawyers' violation of the privacy rights that Congress believed should be protected, and, in the process, validated the violations of the unnamed car buyers' due process rights taking place in the state litigation (by way of the astounding conclusion that they were being represented by counsel without their consent).

The District Court's finding that the Lawyers "represented all unnamed Car Buyers" from the inception of the *Herron* lawsuit finds no support in the law. Even in the class action context, class counsel "do not possess a traditional attorney-client relationship with absent class members." *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortgage Loan Litig.*, 418 F.3d

277, 313 (3d Cir. 2005). "While lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty *does not create an inviolate attorney-client relationship with each and every member of the putative class*." *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000) (emphasis added).

The District Court found that the Lawyers' "representation of the Car Buyers in the *Herron* litigation is distinct, yet analogous to attorney representation in a class action." (JA at 1475.) Recognizing that an attorney-client relationship in a class action does not arise until the class is properly certified and notified, the District Court attempted to dispatch this clear law by distinguishing the undefined "group action" filed in *Herron* from class actions. (JA at 1475-76.) Citing an order from the *Herron* court, the District Court determined that the *Herron* litigation "is a group action arising from a substantive right to proceed as a class without the procedural constraints of Rule 23." (JA at 1476.)

This finding ignores well-settled law that when a lawsuit seeks to bind absent plaintiffs, *due process* requires that the absent plaintiffs be afforded the protections found in Rule 23. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). These due process protections have been recognized by the South Carolina Supreme Court. *See Hospitality Mgmt. Assocs. Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 616 (S.C. 2004) (citing *Shutts* and noting the due process requirements

of "(1) notice; (2) an opportunity to be heard; (3) an opportunity to 'opt out;' and (4) adequate representation"). These requirements protect the right of the individual to decide, and to choose, whether he wishes to be represented and by whom. Although the District Court (like the Lawyers themselves) was content to look to class action law only to the extent that it fit within the fiction it adopted from the Lawyers' arguments, by looking to class action law, it actually becomes clearer that the Lawyers could not have had an attorney-client relationship with individuals who never had notice the *Herron* lawsuit had been filed or an opportunity to decide if they wanted to be a part of the lawsuit.

Furthermore, the Lawyers' own actions demonstrate that they did not somehow represent all unnamed car buyers in the State of South Carolina. For example, the Lawyers did not in any way suggest in the solicitation letters that they already represented the recipients. (JA at 329, 487, 492, 494, 497, 499.) Instead, the letters informed each recipient that the Lawyers wanted "the opportunity [to] discuss your rights and options with you in a free consultation." (*Id.*) The letters further encouraged the recipients to consult their own attorneys or attorneys other than the Lawyers, which is impossible to square with the proposition that the Lawyers already represented the recipients. (*Id.*)

In fact, the Lawyers even abandoned the claims of unnamed car buyers they now say they represented, when faced with questions about standing in the *Herron*

court. After sending out solicitations and locating plaintiffs to pursue claims against only 204 of the 324 car dealers they had named in the First Amended Complaint, the Lawyers simply dismissed the claims filed against those car dealers for whom they had not found corresponding car buyer plaintiffs – approximately 100 car dealer defendants in all. (JA at 186 ¶ 65; 187 ¶ 68; 248-320; 342-449.) The Lawyers' act of dismissing these claims belies their belated argument that they already represented and owed a fiduciary duty to all unnamed car buyers in the State.

Additional evidence that the unnamed car buyers were not automatically joined into the case (and thus did not become the Lawyers' "clients") merely by the filing of the *Herron* case as a "group action" is found in the Lawyers' actions after a settlement was reached with one of the car dealers. In the course of seeking approval for the settlement, the Lawyers amended the claim against that dealer to expressly make it a class action under Rule 23. (*See* JA at 935-36.) In discussing the settlement with the *Herron* court, one of the Lawyers admitted that the claims included in that settlement were re-filed as a class action so that the settlement would be "res judicata for those *outlying people*" (i.e., unnamed parties who transacted business with the settling car dealer). (*Id.*) (Emphasis supplied.) "Outlying people," whatever else they might be, are not a lawyer's "clients," as

evidenced by the fact that the Lawyers took actions directly contrary to their interests.

The strained fiction that the Lawyers became counsel for all car buyers in the State of South Carolina upon the filing of the *Herron* case does not sustain the conclusion that there was, therefore, no solicitation of clients.

III. The District Court Erred by Ruling That The Existence Of A Permissible Purpose Excuses All Impermissible Ones.

Above and beyond § 2721(b)(12)'s plain prohibition against the use of Protected Information for solicitation without the motorist's express consent, it was critical for the Lawyers to convince the District Court (which they did) that there had been no solicitation of clients at all in view of the Third Circuit's decision in *Pichler v. UNITE*, 542 F.3d 380, 395-97 (3d Cir. 2008) ("*Pichler V*").[5] The

[5] The *Pichler* litigation – a class action arising from DPPA violations by the Union of Needletrades, Industrial and Textile Employees AFL-CIO ("UNITE") – has had a lengthy procedural history, including multiple appeals. After denying UNITE's motion to dismiss and certifying a class to proceed against UNITE, the district court considered the parties' cross motions for summary judgment. *See Pichler v. UNITE*, 339 F. Supp. 2d 665 (E.D. Pa. 2004) ("*Pichler I*") (denying motion to dismiss); *Pichler v. UNITE*, 228 F.R.D. 230 (E.D. Pa. 2005) ("*Pichler II*") (certifying class); *Pichler v. UNITE*, 446 F. Supp. 2d 353 (E.D. Pa. 2006) ("*Pichler III*") (ruling on cross motions for summary judgment). The district court issued a separate opinion concerning the proper calculation of statutory damages, and regarding the plaintiffs' requests for punitive damages and injunctive relief. *Pichler v. UNITE*, 457 F. Supp. 2d 524 (E.D. Pa. 2006) ("*Pichler IV*"). The parties then appealed to the Third Circuit, which affirmed the district court's ruling that UNITE had violated the DPPA. *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008) ("*Pichler V*"). The issue of punitive damages was again considered by the district court on remand. *Pichler v. UNITE*, 646 F. Supp. 2d 759 (E.D. Pa. 2009) ("*Pichler*

Pichler V court affirmed the district court in that case, which had examined the language of the DPPA to determine whether a defendant who obtains Personal Information for multiple purposes can rely upon a lawful purpose to excuse the obtaining, use, or disclosure of Personal Information for an unlawful purpose. *See Pichler III*, 446 F. Supp. 2d at 367; *Pichler V*, 542 F.3d at 395-96.

Because the DPPA imposes liability whenever a person obtains, discloses, or uses Personal Information "for a purpose not permitted" by the DPPA, 18 U.S.C. § 2724(a), the district court found that "one who obtains information *is liable each time* one gets information 'for a purpose not permitted.'" *Pichler III*, 446 F. Supp. 2d at 367 (emphasis supplied). Therefore, the district court reasoned, if UNITE had three purposes for obtaining, disclosing, or using the plaintiffs' DPPA-protected information and two of those were "permissible uses" but the third was not, UNITE was still liable for its conduct related to the third purpose. *Id*.

The Third Circuit agreed, finding that the language of the statute is clear – it does not excuse an impermissible use merely because it was executed contemporaneously with a permissible use. *Pichler V*, F.3d 542 at 395. UNITE had claimed that it was working to vindicate employee rights and that it was not

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VI"). The Third Circuit has also considered an appeal from the district court's refusal to modify a protective order. *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009) ("*Pichler VII*"), *cert. denied sub nom. Nat'l Right to Work Legal Def. Found., Inc. v. UNITE*, 178 L. Ed. 2d 22 (Oct. 4, 2010). The district court recently granted preliminary approval of the settlement of the class claims against UNITE and has scheduled a final fairness hearing for February 18, 2011.

merely recruiting new union members, but was also actively assisting in investigating and bringing lawsuits. *Pichler III*, 446 F. Supp. 2d at 368-69. However, because UNITE had indisputably obtained and used the confidential information for an impermissible purpose (union organizing), the Third Circuit held that the DPPA had been violated regardless of what other permissible purpose UNITE might have had. *Pichler V*, 542 F.3d at 395.

Even more recently, a case from the Eastern District of New York illustrates the relationship between permissible and impermissible purposes in a defendant's distinct acts of obtaining and using protected Personal Information. *See Menghi v. Hart*, Case No. CV 02-1085, 2010 U.S. Dist. LEXIS 105649 (E.D.N.Y. Sept. 30, 2010). In *Menghi*, the plaintiff was arrested by the defendant police officer for driving under the influence. *Id*. at *2. During the three years following her arrest, the plaintiff received harassing and threatening anonymous phone calls at her home, and the defendant was ultimately identified as the caller. *Id*. At the trial, the jury was instructed as a matter of law that "the obtaining of plaintiff's DMV records at the time of her arrest was permissible under the DPPA" but that the jury was to determine whether the defendant "subsequently used the information permissibly obtained at the time of the arrest for a later impermissible purpose." *Id*. at *15. The jury found the defendant (and his employer) liable for violating the DPPA. *Id*. at *4-5. The district court held that there was sufficient evidence for

the jury to find that the defendant used the information permissibly obtained at the time of the arrest for a later impermissible purpose. *Id*. at *16.

Rejecting the *Pichler* courts' reasoning and instead relying on two opinions from the Eleventh Circuit, *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008), and *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009), as well as the dissent in *Pichler V*, the District Court held that even if the Lawyers obtained, used, or disclosed the Personal Information for the purpose of solicitation, they did not violate the DPPA as long as they also had a permissible purpose for obtaining, using or disclosing the Personal Information. (JA at 1477-80.) Neither of these Eleventh Circuit cases actually supports the District Court's ruling that, in effect, if an individual obtains DPPA-protected Personal Information for a lawful purpose, he is then free to do whatever he wants with it.

The passage from *Thomas* that the District Court cited addressed whether the defendant had violated the DPPA if he obtained Personal Information "for the purpose of creating a database of witnesses for prospective, not-yet-filed litigation – as opposed to currently pending cases." *Thomas*, 525 F.3d at 1115 n.5. The Eleventh Circuit correctly found (albeit in dicta, because the underlying argument had been waived) that this was permitted by the DPPA because it fell within the "litigation exception." *Id*. As the Eleventh Circuit noted, the "litigation

exception" expressly permits the use of DPPA-protected information for "investigation in anticipation of litigation." *Id*. Importantly, the attorney in *Thomas* was seeking *witnesses*, not soliciting clients, which the DPPA clearly prohibits unless the State has obtained the solicitee's consent. 18 U.S.C. § 2721(b)(12). In short, there was no unlawful purpose being pursued in *Thomas*.

Likewise, the *Rine* court did not speak to the situation here. The issue in *Rine* was not whether an individual's permissible purpose would excuse any other impermissible purposes, but rather, whether a single act that was permitted by one exception was impermissible because it did not satisfy other exceptions as well. In *Rine*, the Eleventh Circuit found that the defendant's acts were permitted by a particular exception to the DPPA (the "state action exception"). *Rine*, 590 F.3d at 1225.

The court then addressed the plaintiff's facially-tenuous argument that the acts must also have satisfied other exceptions that could potentially apply. *Id*. at 1225-26. Not surprisingly, the court found that the exceptions are not mutually exclusive, meaning that any one or more of them may be applicable to a given situation. *Id*. at 1226.

The District Court also adverted to Judge Sloviter's dissent in *Pichler V*. (JA at 1478-79.) By reference to footnote 5 of the Eleventh Circuit's *Thomas* decision, Judge Sloviter would have excused UNITE's impermissible use of

DPPA-protected information so long as it also had a permissible purpose. *See* 542 F.3d at 401-02.

There is, however, an important qualification to Judge Sloviter's dissenting opinion that the District Court overlooked. Looking to cases arising out of the Title VII and Internal Revenue Code contexts, Judge Sloviter would leave it to the fact-finder to determine whether the defendant's "primary purpose" was permitted under § 2721(b). *Id*. at 402-03. Only then would the impermissible purpose be excused. Assuming arguendo that the Court might find Judge Sloviter's dissent to be persuasive, the Court should still reverse and remand the case so that the Drivers can pursue discovery on the fact-bound question of what the Lawyers' "primary purpose" was.

IV. The District Court Erred When It Ruled That the Lawyers' Actions were Permitted by the "Litigation Exception" and the "State Action Exception" of the DPPA.

Even if this Court sees fit not to disturb the lower court's finding that the Lawyers' conduct did not even constitute impermissible solicitation (at least in part), or even if this Court were to agree that conduct with a permissible purpose under the DPPA can excuse conduct with an impermissible purpose (assuming that there is at least an issue as to whether the conduct did amount to solicitation and setting aside the "primary purpose" issue that Judge Sloviter's dissent raises), the Court must still find that there is no genuine issue of material fact as to whether the

Lawyers obtained, disclosed, or used Personal Information "for a purpose not permitted under" the DPPA. 18 U.S.C. § 2724(a).[6] The District Court found as a matter of law that both the "litigation exception" to the DPPA (18 U.S.C. § 2721(b)(4)) and the "state action exception" (18 U.S.C. § 2721(b)(1)) affirmatively permitted the Lawyers' conduct. (JA at 1492.) The Drivers will address each in turn.

A. The District Court's Analysis Of The "Litigation Exception" Is Fatally Tainted By Its Reliance Upon The Unsworn Assertions Of The Lawyers' Counsel In The Memorandum Supporting Their Motion For Summary Judgment And Other Materials That The District Court Should Not Have Considered In Favor Of The Lawyers' Summary Judgment Motion.

The "litigation exception" allows state DMVs to 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 pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4).

There is a bright line distinction to be drawn under the DPPA between activities that relate to the *business* of law, like sending out an advertisement to

[6] The District Court recognized as much by observing that "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." (JA at 1480.)

solicit a new car buyer as a client, and the acquisition or use of DPPA-protected information in connection with the practice of law, such as locating a witness or to use as evidence in a case. Every court other than the District Court in this case has respected this distinction, holding that the "litigation exception" permits lawyers to access DPPA-protected information to develop evidence for a case, not to find a client who might hire them to bring a case. *See Pichler v. UNITE*, 585 F.3d 741, 751 (3d Cir. 2009) ("*Pichler VII*"), *cert. denied sub nom. Nat'l Right to Work Legal Def. Found., Inc. v. UNITE*, 178 L. Ed. 2d 22 (Oct. 4, 2010) (explaining that "the litigation exception of the DPPA requires something more than merely using the protected records to identify potential litigants"); *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1012 (D.C. 2005) (holding that "acquiring 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)").

A law firm (or, as in this instance, a consortium of law firms) has no more right to access DPPA-protected personal information about new car buyers for purposes of a direct mail campaign to solicit customers than does a credit card company, insurance agency, or any other business which might profit if permitted to construct a mailing list of potential customers from the same source. No doubt, the Lawyers believed the services they were offering to be of value. The same

may be said of any other legitimate business enterprise. That makes no difference under the DPPA.

The District Court addressed the applicability of the litigation exception at pages 15-24 of its Order (JA at 1480-89), concluding that the obtaining, use (and, implicitly the disclosure) of the Personal Information that the Lawyers originally acquired through their six FOIA requests was for the "permissible purpose" embodied in the litigation exception. (JA at 1489.)

In arriving at this conclusion, however, the District Court referred to the Defendants' Memorandum in Support of their Motion for Summary Judgment or its attachments no less thirteen times. (JA at 1481, 1483-84, 1485, 1487.)[7] The Order even contains a lengthy (14 lines), single-spaced block quotation from the Lawyers' own Answer in this very case. (JA at 1488, quoting Ans. ¶ 68.)

A fair reading of the Order demands the conclusion that the District Court's finding that the Lawyers' conduct was for the "permissible purpose" allowed by the litigation exception (JA at 1489) is based on nothing more than the Lawyers'

[7] The cited attachments to Defendants' Memorandum comprise, in order: Ex. A (the "*Herron* First Compl.") (JA at 1484); Ex. C (the "*Herron* Am. Compl.") (JA at 1484, 1485); Ex. B (the "Car Dealers' Mot. Dismiss" in *Herron*) (JA at 1484-85, 1487 n.6); Ex. F (the "Car Buyers Mem. Opp'n Mot. Dismiss" in *Herron*) (JA at 1487 n.6); and Ex. H (the "Motion to Amend Complaint" in *Herron*) (JA at 1487). Although the District Court relied upon statements in these pleadings in its summary judgment Order, in its earlier Order denying the Lawyers' Motion to Dismiss, the Court explained that it could not take judicial notice of the contents of the *Herron* pleadings submitted by the Lawyers because the "facts in the *Herron* litigation remain in dispute." (JA at 167.)

own self-serving, unsworn assertions. At the risk of overstatement, it's almost as if the District Court simply took the Lawyers' word for it that they had met the litigation exception's requirements.[8]

It is beyond cavil that in adjudicating a summary judgment motion, a court may consider only evidence that would be admissible at trial. *E.g.*, *Toll Bros., Inc. v. Dryvit Sys., Inc.*, 432 F.3d 564, 568 (4th Cir. 2005) (cited at JA at 1470). The Lawyers did not come forward with any evidence that they could introduce at trial in support of their position on the applicability of the litigation exception. None. Consequently, the District Court's award of summary judgment to them on this issue constituted reversible error.

Moreover, even if there were support in the record for the District Court's assessment that the Lawyers' purpose for *obtaining* the DPPA-protected information of thousands of South Carolina citizens was such as to bring the

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[8] The only other evidentiary material that the District Court specifically referred to at all on the litigation exception issue consisted of the first two FOIA requests (which were exhibited to the Complaint) (JA at 1482), five sample solicitation letters attached to the Complaint (JA at 1486), the Declaration of Plaintiff John Tanner (JA at 1486-87), and two Orders entered in the *Herron* case (JA at 1487-88).

None of these materials advanced the Lawyers' cause on the litigation exception issue. The FOIA requests and the solicitation letters are part and parcel of the "verbal acts" giving rise to this action, whose interpretation is in controversy. By definition, the Declaration of Plaintiff John Tanner that the Drivers submitted did not support the Lawyers' Motion. And the two Orders from the *Herron* lawsuit (which the Drivers submitted as Exhibits) supplied nothing more than context. (*See* JA at 1487-88.)

acquisition of that information within the ambit of the "litigation exception," the District Court's failure to acknowledge the unrebutted evidence in the record before it of the Lawyers' *use* of that information for advertising purposes and impermissible *disclosure* of that information in the public record could not withstand review.

It is an uncontroverted fact that the Lawyers obtained and used DPPA-protected Personal Information to send letters denominated as "Advertisements" to solicit people as clients to sue car dealers with which no current or prior client of any of these lawyers had done business; that when one of the Drivers called in response to the "Advertisement" he received, he was given a pitch about how much money he would get if he signed up as a client (and nobody expressed any interest in what he might know as a witness); and that the Lawyers have blithely disclosed in the public record the DPPA-protected personal information of the clients they solicited. (JA at 329, 484-99, 1448.) Yet the District Court *presumed* for purposes of its decision that the Lawyers' motives were as defense counsel portrayed them in argument; the District Court issued a blanket stay of discovery that protected the Lawyers from being required to answer any question under oath about what they did or why they did it, or to produce any contemporaneous notes, memoranda or correspondence which might shed light on their motives; and the District Court flatly refused to consider the commercial purposes and unjustifiable

conduct of the Lawyers evident from the certified copies of court records, affidavits, and properly authenticated documents the Drivers proffered. The District Court's granting summary judgment cannot stand in the face of that evidence.

B. The District Court Erred When It Ruled That the "State Action Exception" of the DPPA Permitted the Lawyers to Use DPPA-Protected Personal Information to Send Solicitation Letters.

In a very brief discussion (less than two pages), the District Court also adopted the Lawyers' argument that the "state action exception" protected them from liability essentially because after this action was filed, they successfully obtained a state court order stating that the Lawyers were pursuing the *Herron* litigation as "private attorneys general." (JA at 1489-90.) In reaching this conclusion, the District Court fundamentally ignored the fact that *this case* arises from the Lawyers' solicitation of the Drivers and the putative class members as clients, hardly the role of a "private attorney general" by any stretch of the term. But in any event, the Lawyers' conduct plainly does not pass muster under the "state action exception" as a matter of straightforward statutory construction.

1. The Lawyers Were Not Carrying Out a Function of the State or Acting on Behalf of the State When They Solicited Clients.

The "state action exception" of § 2721(b)(1) provides that Personal Information may be disclosed by the State "[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." 18 U.S.C. § 2721(b)(1). In the case of an otherwise private actor, application of this exception requires analysis of two questions: whether the private entity is carrying out a function of a government agency; and whether the private entity is acting on behalf of the government agency. *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1223 (11th Cir. 2009).

In *Rine* (the only federal decision that the District Court cites on the subject of the state action exception), the Eleventh Circuit found that the exception applied to the acts of a private entity, Imagitas, Inc., which had a contract with the Florida Department of Highway Safety & Motor Vehicles (FDMV). *Id*. at 1225. Each month, pursuant to its contract with the FDMV, Imagitas sent renewal notices to Florida drivers whose motor vehicle registrations were scheduled to expire the following month. *Id*. at 1219. The mailings from Imagitas included both public service information mandated by Florida law and commercial solicitations from Imagitas's client-advertisers. *Id*. The advertising revenues so generated were intended to offset the costs of producing and mailing registration renewals, and any remaining profits after costs and overhead were to be shared by Imagitas and the State of Florida. *Id*. at 1219-20. Imagitas used the information it received from the FDMV to develop marketing profiles for each recipient household to determine

advertisement placement for the solicitations included in the renewal envelopes. *Id*. at 1220.

In determining whether Imagitas was "carrying out a function" of the FDMV in its inclusion of commercial advertising in renewal envelopes, the court looked to state law and found that, through a number of statutes, Florida state government encourages its agencies to take advantage of commercial advertising to offset program costs and raise revenues. *Id*. at 1223-24. Accordingly, the court determined that funding public programs through commercial advertising is a legitimate agency function under Florida law and that Imagitas's program was carrying out a function of the FDMV. *Id*.

The court then turned to the question of whether Imagitas was acting on behalf of the FDMV. *Id*. at 1224. Because the phrase "on behalf of" is not defined in the DPPA, the court looked to its ordinary meaning and found that the phrase means "as the agent of" or "as representative of." *Id*. at 1224-25. The court found that the FDMV had actively sought bids from private companies to administer the renewal notice program on its behalf, and noted that the state retained control over the entire program and never relinquished ownership of its motor vehicle records. *Id*. at 1225. Therefore, the court found that Imagitas acted on behalf of the FDMV in its administration of the renewal notice program. *Id*.

In this case, the Lawyers were not "carrying out a function" of the Attorney General or "acting on behalf" of the Attorney General in any way cognizable under the *Rine* court's decision (and *Rine* is the only case, besides the ongoing *Herron* lawsuit in a State trial court, that the lower court invoked).

Moreover, the Lawyers' claim that they were acting "on behalf of" the Attorney General is belied by its timing. In their FOIA requests to the SCDMV, in correspondence attempting to justify their actions, and in pleadings filed in state court, the Lawyers relied solely upon the "litigation exception" to shield their solicitations. (JA at 205-12, 234-46, 321-27, 337, 451-68.) But after this action was filed, more than two years after the Lawyers had sent out their mass mailing solicitations, the Lawyers suddenly and for the first time labeled themselves as "private attorneys general." (JA at 135-37.) Their *post hoc* assumption of this role did not retroactively create a relationship between the Lawyers and the Attorney General, and the District Court should have rejected it for the sham that it was.

2. The *Herron* Court's "Private Attorney General" Label Does Not Insulate the Lawyers From Liability Under The DPPA.

Finally, even if the state court's characterization of the Lawyers as "private attorneys general" in their pursuit of injunctive relief was accurate as a matter of South Carolina law, that did not relieve the District Court from examining whether the Lawyers were actually "carrying out a function" of a government agency and whether they were also "acting on behalf of" that agency within the meaning of the

DPPA. *See Rine*, 590 F.3d at 1223. The courts have made clear that the label affixed to a party is not determinative of any issue under the DPPA.

The term "private attorney general" does not even appear in the DPPA. The district court in *Pichler III*, *supra*, expressly rejected the argument that a party's designation as "private attorney general" insulates the party from liability. 446 F. Supp. 2d. at 370-71. In *Pichler III*, UNITE had argued that because it had some involvement with the EEOC, "it was and is playing the role of a 'private attorney general' to eradicate discrimination." *Id*. at 370. However, this role-playing as a "private attorney general" did not mean that § 2721(b)(1) authorized UNITE's actions. *Id*. at 371. The district court found no evidence that UNITE provided the information it had obtained in connection with its activities to any government agency. *Id*. The court held that the record "does not support an inference that UNITE's tagging activities were undertaken *on behalf of* a government agency. *Its self-appointment as agency champion therefore fails*." *Id*. (emphasis supplied).

The same is true here. The Lawyers' calling themselves "private attorneys general" (and prevailing upon the state court to do the same) does not mean that they were carrying out a function of, and acting on behalf of, the South Carolina Attorney General within the meaning of § 2721(b)(1). Their self-appointment is a fiction that the District Court should not have honored.

CONCLUSION

For all of these reasons, the Court should reverse the District Court's ruling granting summary judgment in favor of Defendants-Appellees and remand the case for further proceedings in the District Court (including, but not limited to, the possibility of further consideration of Plaintiff-Appellants' motion for summary judgment in light of the Court' disposition of this appeal).

REQUEST FOR ORAL ARGUMENT

Appellants believe that oral argument would be helpful to a full and complete development and understanding of the issues and facts pertinent to this appeal. Appellants therefore request the scheduling of oral argument.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Attorney for Plaintiffs-Appellants

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I certify that on December 10, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Philip N. Elbert