12-0661-cv

United States Court of Appeals
for the
Second Circuit

ERIK H. GORDON,

Plaintiff-Appellant,

– v. –

JOHN DOES 1 THROUGH 10,

Defendants,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF and SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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ARON LEIFER, aka Jack Loren, Bodyguards.com,

Defendant-Cross-Defendant-Cross-Claimant,

ABC CORPORATIONS 1 THROUGH 5, JOHN DOES 1 THROUGH 5,

Defendants-Cross-Defendants,

– and –

SOFTECH INTERNATIONAL, INC., REID RODRIGUEZ,
ARCANUM INVESTIGATIONS, INC., DAN COHN, aka Dan Cohn,

Defendants-Cross-Claimants-Cross-Defendants-Appellees.

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INTRODUCTION

This action arises out of the Reseller Defendants' unlawful acquisition, disclosure, and use of Plaintiff-Appellant Erik H. Gordon's ("Gordon" or "Plaintiff") personal information without his authorization in violation of the Federal Driver's Privacy Protection Act of 1994 (the "DPPA").

At the time of the events in question, Plaintiff owned an antique London-style cab (the "Cab") that was registered with New York's Department of Motor Vehicles ("DMV"). In October 2009, following an argument with Plaintiff's driver, an individual named Aron Leifer decided to use the Cab's license plate number to identify the Cab's owner. To do so, Leifer visited Docusearch.com, a web site operated by Defendants-Appellees Arcanum Investigations, Inc. ("Arcanum") and its owner, Dan Cohn ("Cohn" and together, the "Arcanum Defendants"). Using a fake name that did not match his credit card and claiming to work for a nonexistent company, Leifer filled out an online form requesting the motor vehicle records associated with the Cab's license plate. As his purported "Permissible Purpose" for the search, Leifer selected "Insurance Other" – a purpose that does ***not*** appear in the DPPA's list of permissible uses, and is not a use for which Arcanum was authorized to request or disclose information.

Despite these and other discrepancies in Leifer's request, Arcanum forwarded the request to Softech International, Inc. ("Softech"). Although Arcanum was required

to provide Softech with the identity and permissible purpose of the end-user (Leifer), Softech's automated process provided Arcanum no opportunity to do so. Thus, the request from Arcanum to Softech reflected only that Arcanum, a private investigative agency, sought the motor vehicle records for an unspecified permissible purpose.

Neither the DPPA nor Softech's contract with the DMV allowed Softech to request or disclose records on these grounds. However, Softech and its Chief Operating Officer Reid Rodriguez (together, the "Softech Defendants") did not ask Arcanum what its purported permissible purpose was. Rather, Softech retrieved Erik Gordon's motor vehicle records from the DMV and passed them to Arcanum. Arcanum, in turn, resold the records to Leifer.

Leifer promptly began a series of harassing phone calls to Gordon's father, mother, and assistant, during which Leifer lied about his identity and purposes and threatened to physically hurt Gordon. Afraid for his safety and the safety of his family and employees, Gordon incurred considerable expense upgrading security and trying to determine the source of the threats. Eventually, he filed suit against Leifer, the Arcanum Defendants, and the Softech Defendants for violations of the DPPA.

Under the DPPA, it is unlawful to obtain, disclose, or use another person's motor vehicle record absent a statutorily enumerated "permissible use." The Softech and Arcanum Defendants (together, the "Resellers" or "Reseller Defendants") should be liable to Gordon for the damages he suffered because they obtained and disclosed Gordon's

personal information without any such permissible use. Further, to the extent the statute incorporates a duty of care as to resellers, the Resellers breached this duty by failing to implement reasonable procedures to screen improper customer requests. Finally, because their actions reflected a willful or reckless disregard of their obligations under the DPPA, they should also be liable for punitive damages.

In its decision on the defendants' Joint Motion for Summary Judgment, the District Court held that the DPPA was not a "strict liability" statute, and that the Reseller Defendants could not be "strictly liable" for making a disclosure based on Leifer's representation of a permissible use. But rather than allow the DPPA claims to proceed on Plaintiff's other theories of liability – negligence, willful blindness, and (as the statute expressly allows) "reckless disregard" – the District Court dismissed the DPPA claims against the Reseller Defendants outright. The District Court failed to address any alternative theories of liability, and made no mention of the considerable evidence supporting DPPA liability based on the Resellers' negligence, recklessness, and willful blindness.[1]

In doing so, the District Court effectively inserted an actual intent requirement into the DPPA. That is, by dismissing the DPPA claims without regard to evidence that the Reseller Defendants acted negligently or recklessly as to the existence of a

[1] This omission was all the more puzzling given the District Court's conclusion that "material questions of fact appear to exist" as to whether Leifer had lied about his purported permissible use. (A. 880 (refusing to dismiss DPPA claims against Leifer).)

DPPA permissible use, the Court held that a reseller could never be liable absent *actual knowledge* that its customer's purpose violated the DPPA. But such a requirement cannot be reconciled with the plain language, or purpose, of the statute. To the contrary: it would immunize resellers from liability in virtually every instance, and completely eviscerate the protections Congress intended when it passed the DPPA.

The District Court later denied Gordon's motion for reconsideration – again without addressing whether DPPA liability could be premised on the Resellers' negligence, recklessness, or willful blindness. This appeal followed.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because this case arose under the laws of the United States, namely the Federal Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721, et seq.

This Court has jurisdiction over this appeal from a final decision of a U.S. District Court under 28 U.S.C. §§ 1291 and 1294. Plaintiff Erik Gordon appeals the following decisions of the United States District Court for the Southern District of New York by the Honorable Richard M. Berman: (1) the "Decision and Order dated November 30, 2011 granting summary judgment in favor of the [Reseller Defendants]"; (2) the "Order of Discontinuance dated January 17, 2012, which purported to discontinue the action as to all parties"; and (3) the final Decision and

Order dated February 15, 2012, through which the Court denied Plaintiff's Motion for Reconsideration. (A. 911.) Plaintiff filed a Notice of Appeal on February 16, 2012.

STATEMENT OF THE ISSUES

Plaintiff respectfully presents the following issues for review:

1. Did the District Court err by dismissing Plaintiff's DPPA claims outright on the grounds that the DPPA was not a strict liability statute, without allowing the claims to proceed on theories of negligence, recklessness, or willful blindness?

2. Did the District Court err by holding that a defendant cannot be subject to civil liability under the DPPA unless the defendant specifically intended to violate the DPPA?

3. Did the District Court err by rejecting Plaintiff's argument that Section 2724 of the DPPA applies a strict liability standard as to the existence of a permissible use?

4. Did the District Court err by implicitly rejecting (without discussion) Plaintiff's alternative argument, which was also adopted by Defendant's counsel, that Section 2724 of the DPPA applies a negligence standard?

5. Did the District Court err by implicitly holding that no rational trier of fact could have found that the Reseller Defendants acted with willful or reckless disregard of the law?

6. Did the District Court err by finding as a matter of law that the Reseller Defendants did not violate the DPPA even though they obtained personal information from Plaintiff's motor vehicle records and disclosed it to an end-user without any procedures in place to confirm the end-user's claimed identity and purported purpose for obtaining the information, both of which proved to be false?

STATEMENT OF THE CASE

On November 30, 2011, the District Court issued a Decision and Order which, in pertinent part, denied summary judgment for Leifer and granted summary judgment in favor of the Reseller Defendants.[2] As to Leifer, the District Court held that "material questions of fact" existed as to whether Leifer had lied about his purported permissible purpose for requesting DMV information. "These questions," the District Court noted, "must be resolved by a jury." (A. 880.)

At the same time, however, the District Court found that the Resellers could not face DPPA liability because their disclosures were "based on" Leifer's claimed permissible purpose. Although the District Court purported to limit its holding to whether the DPPA was a "strict liability" statute, it dismissed Gordon's DPPA claims against the Resellers outright – failing to address whether these claims could proceed based on the Resellers' alleged negligence, recklessness, or willful blindness. In

[2] The District Court also denied Plaintiff's cross-motion for summary judgment on its DPPA claims. (A. 887.) The decision is published as *Gordon v. Softech International, Inc.*, 828 F. Supp. 2d 665 (S.D.N.Y. 2011).

refusing to allow Plaintiff to proceed on these grounds, the District Court held, in essence, that liability could not arise absent a specific intent to violate the DPPA.

On December 8, 2011, pursuant to Judge Richard Berman's individual practices, Plaintiff submitted a letter seeking permission to move for reconsideration of the dismissal of the DPPA claims against the Resellers. (A. 889.) Plaintiff argued that the District Court misread the DPPA, which does not contain a specific intent requirement. Plaintiff also argued that the District Court had overlooked evidence that the Reseller Defendants had acted in willful or reckless disregard of the DPPA, and that such evidence reflected issues of fact sufficient to preclude summary judgment. On December 14, 2011, the District Court issued an Administrative Order, which stated, "[a]s to Gordon's motion for reconsideration, the Court will take it under advisement (and may solicit more complete memoranda of law from the parties)." (A. 903.)

On January 17, 2012, Plaintiff's counsel submitted a letter advising the District Court that Plaintiff and Leifer had settled and expected to submit a stipulation and proposed order dismissing the claims against Leifer. That same day, perhaps on the mistaken belief that *all* defendants had settled, the District Court issued an Order of Discontinuance as to the entire case. (A. 907.)

On February 14, 2012, Plaintiff's counsel submitted a letter to the District Court seeking its endorsement of a stipulation and proposed order, which incorporated the Settlement Agreement and General Release between Plaintiff and Leifer ("Leifer

Settlement Agreement"). (A. 912.) Plaintiff's counsel also inquired whether the District Court continued to take Plaintiff's motion for reconsideration under advisement and, if so, asked the District Court to consider the affidavit of Aron Leifer, which was attached as an exhibit to the Settlement Agreement and General Release. In this affidavit, Leifer confirmed facts that rendered him ineligible for the purported DPPA purpose that he claimed when he requested Gordon's motor vehicle records.

On February 15, 2012, the District Court issued a Decision and Order refusing to endorse the stipulation and proposed order and ruling that the motion for reconsideration was rendered "moot" by the January 17, 2012 Order of Discontinuance. (A. 909-10.) Even "assuming *arguendo* that the motion for reconsideration had not been rendered moot," the District Court stated, the motion "would have been denied for substantially the same reasons set forth in the Court's [November 30, 2011 summary judgment decision]." Again, the District Court failed to address the possibility of DPPA liability based on negligence, recklessness, or willfulness.

The next day, on February 16, 2012, Plaintiff filed a notice of appeal. The Notice indicated that Plaintiff was appealing: (1) the "Decision and Order dated November 30, 2011 granting summary judgment in favor of the [Reseller Defendants]"; (2) the "Order of Discontinuance dated January 17, 2012, which purported to discontinue the action as to all parties"; and (3) the final Decision and

Order dated February 15, 2012, through which the Court denied Plaintiff's Motion for Reconsideration. (A. 911.)

Plaintiff later learned that, when the record was forwarded to the Court of Appeals, it did not include Plaintiff's February 14, 2012 letter enclosing the Leifer Settlement Agreement. Because the letter had been submitted manually instead of electronically (to preserve confidentiality), it was not docketed until after the record was forwarded, even though it was submitted before then. On April 26, 2012, in response to an application by the Reseller Defendants to preclude Plaintiff from referencing the Aron Leifer affidavit in this appeal, the District Court issued a Decision and Order finding that the record "need not be corrected or amended" to include the affidavit attached to Plaintiff's February 14 letter, because the affidavit was not before the Court in rendering its November 2011 summary judgment decision. (A. 914-16.) The District Court did not address the fact that it had the affidavit before it in issuing its February 15 decision, which is also a subject of this appeal.

STATEMENT OF FACTS

The Softech Defendants

Softech is a Florida corporation in the business of purchasing information from state departments of motor vehicles and reselling the information to clients such as Arcanum. (A. 32, 46, 552, 13:7-17.) Softech had an agreement with the DMV

("Softech DMV Contract") that allowed Softech to obtain and resell information for certain purposes permitted under the DPPA. (A. 713-18; A. 555, 23:11-24:23.)

In obtaining information from New York's DMV, Softech was governed both by the DPPA and by the Softech DMV Contract. The Softech DMV Contract emphasized that, "[p]ursuant to the DPPA, [Softech] must have a DPPA Permissible Use to search DMV records." (A. 714.) Of the fourteen possible "permissible" purposes listed on the contract form, Softech selected eleven. Thus, Softech was authorized to obtain and resell motor vehicle information for only these eleven purposes. *(Id.)*

Both the DPPA and the Softech DMV Contract required Softech to maintain records identifying anyone who receives information from it, and the permitted purpose for which the information will be used. 18 U.S.C. § 2721(c); (A. 715.) Ostensibly in keeping with these requirements, Softech's agreement with Arcanum required Arcanum to "provide Softech, at the time it requests the [motor vehicle records], the name of the ultimate end user of [those records] and each permissible purpose for which such information is furnished." (A. 721.) However, Softech admitted that its automated request process was designed so that Arcanum was never asked (and had no opportunity) to enter such information. (A. 565, 65:2-13.)

Softech also admitted that it should not provide motor vehicle records unless the stated purpose matched one of the DPPA permissible uses. (A.572, 91:17-92:6; *cf.* 18 U.S.C. § 2721(c).) Indeed, Softech claimed that if a customer requested information

for a purpose "not provided on [the customer's] affidavit of intended use," the request would be automatically "reject[ed]." (A. 560, 45:18-46:22, A. 567, 70:17-71:16.) Softech further acknowledged that if the end-user did not have a permissible purpose for the information, then Softech *could not lawfully disclose it*. (A. 572, 91:17-92:6.)

The Arcanum Defendants

Arcanum is a Virginia-based private security services business that operates Docusearch.com, a website that allows retail consumers to purchase information concerning social security numbers, telephone records, and motor vehicle records. (A. 596-97, 25:18-27:8.) Arcanum was one of Softech's clients and had a standing agreement with Softech to buy drivers' information and resell it to Arcanum's own clients. (A. 719.)

Arcanum's transactions with Softech were governed both by the DPPA and by Arcanum's agreement with Softech. As part of this agreement, Arcanum signed an "Affidavit of Intended Use," in which Arcanum selected from seven purportedly permissible uses under the heading, "Information May be Used Only for the Following Approved Purposes." (A. 725; A. 568, 74:5-75:9.)

According to the most recent version of this affidavit (A. 568, 74:5-75:9), Arcanum agreed to use information it obtained from Softech for only *three* purposes: (1) to verify information submitted to a legitimate business; (2) to provide notice to owners of towed or impounded vehicles; and (3) for use by someone who has obtained

the consent of the party in interest. (A. 725; A. 563, 55:12-56:14.) Although one of the seven options listed on the affidavit related to insurance, Arcanum did not select this purpose. (*Id.*)

Arcanum's website, however, allowed customers to select from *fourteen* purported "Permissible Purposes" – *several of which do not correspond to any use permitted under the DPPA.* For example, Docusearch's order form lists "Investigation," "Financial Issues," "Real-estate Transaction," and "Insurance Other" as so-called "Permissible Purposes" under the DPPA.[3] (A. 541.) None of these "purposes" appears in the DPPA's exclusive list of permissible uses. 18 U.S.C. § 2721(b). Nor do they appear in the abbreviated (and liberally paraphrased) summary of the DPPA that Arcanum separately makes available to users on the Docusearch website. (A. 539.)

Dan Cohn, the owner and sole employee of Arcanum, was unable to testify as to what "Insurance Other" actually meant. (A. 601-04, 43:8-55:8.) Because Docusearch also provided options for "Insurance Underwriting" and "Insurance Claims," Cohn speculated that "Insurance Other" would refer to something insurance-related that did not involve "underwriting and claims." (A. 603-604, 53:8-55:8.) However, he said he "honestly [did not] know." (A. 604, 54:25-55:8.) Cohn conceded that he deferred to

[3] Arcanum's owner, Dan Cohn, testified that the menu of purported "Permissible Purposes" was based on information that he had supplied to his programmer in an effort to summarize the DPPA's list of permissible uses. (A. 604, 54:14-24.)

the end-user to determine what "Insurance Other" meant and whether it complied with the DPPA. (A. 603, 53:8-54:13.)

The Events of October 10, 2009

On October 10, 2009, Gordon's Cab was parked outside a restaurant in Manhattan. (A. 152-53, 24:17-25:4; A. 163, 35:15-23.) Aron Leifer approached Gordon's driver and made threatening comments. (A. 151-54, 23:3-6, 25:17-26:3; A. 107, 92:5-7.) When Gordon's driver attempted to end the confrontation by driving away, Leifer pursued him in his SUV. (A. 90-91, 25:22-25, 26:3-4, 26:11-13, 29:11-13.) Leifer later claimed that the two vehicles had collided during the chase. (A. 102, 73:14-18.) However, the evidence makes clear that no collision occurred.[4]

The next day, Leifer visited Docusearch.com, a website operated by the Arcanum Defendants, to look up information on the Cab's owner. Leifer had previously created an account with Arcanum using the alias "Jack Loren," and claiming to work for a nonexistent company called Bodyguards.com. (A. 709; A. 609, 77:8-15; A. 91, 29:8-23.) As his business address, Leifer had provided a private mailbox – the same mailbox he falsely represented to the lower court was his "principal address and his full-time residence." (A. 546; A. 89, 19:12-23; A. 24.3-24.4, ¶¶ 6-7.) In total, Leifer conducted 38 separate searches for motor vehicle records using

[4] Leifer admitted that any damage to his SUV from any purported collision was an "illusion." (A. 104, 81:9-12.) Likewise, Plaintiff noticed no markings on the Cab. (A. 151, 23:6-10; A. 181, 38:20-39:3.) Because of the Cab's flimsy nature, the slightest contact with another car would have been visible. (A. 181, 38:15-19.)

this false identity. (A. 709-12; A.536, ¶ 18.) To pay for these searches, Leifer used his own credit card, but falsely claimed that the name on the card was "Jack Loren." (A. 546, A. 97, 50:9-18.)

It was through this account with Arcanum that Leifer, on October 11, 2009, purchased Gordon's personal information. Leifer selected "Insurance Other" from the drop-down menu of so-called "Permissible Purposes" on Docusearch's order form, and agreed to the terms of the Docusearch contract without reading it. (A. 546; A. 112, 112:18-113:24.) As already noted, "Insurance Other" is not a permissible use under the DPPA. (*Supra* at 12.)

Arcanum Submits the License Plate Request to Softech

The Arcanum Defendants automatically forwarded the request to Softech. (A. 597, 26:13-27:8; A. 604, 54:14-18; A. 615, 99:12-24: A. 606, 64:11-65:13.) Because there were no screening procedures in place and Cohn did not bother to review Leifer's request, Cohn did not notice that "Jack Loren" was a false name that did not match the credit card provided. He also did not discover that Bodyguards.com was a nonexistent business, or that Leifer did not have a "permissible use" for the information he requested. (A. 97, 50:9-23; A. 91, 29:8-23.) In fact, Cohn did not bother to review any of Leifer's 38 requests for motor vehicle records. (A. 613, 91:20-92:18.)

Months later, after being served with this lawsuit, Cohn finally took the time to look up the website of Jack Loren's company, "bodyguards.com." He did not find the

information he expected to see on a "respectable" website "such as contact information and so forth," which led him to "question . . . the legitimacy of Mr. Loren" and conclude that "Mr. Loren may have been less than truthful." (A. 609, 74:18-75:12.)[5] Had Cohn performed this simple task before processing Leifer's request, he would not have sold Leifer the information relating to Plaintiff. (A. 611, 82:2-83:13.)

Nonetheless, on October 12, 2009, the Arcanum Defendants forwarded Leifer's record request to Softech. (A. 709; A. 536, ¶ 16.)

Softech Sells Gordon's Information to Arcanum Who Resells It to Leifer

The request that Softech received from Arcanum on October 12, 2009 did not identify any of the three purposes Cohn had selected in Arcanum's Affidavit of Intended Use. (A. 725.) Nor did it identify any of the purposes that Cohn had *not* selected on the affidavit. Instead, Arcanum indicated only that the information was to be used by Arcanum, a private investigative agency, for an unspecified permitted purpose. (A. 559, 39:3-15.)

The DPPA and the Softech DMV Contract did not allow Softech to disclose motor vehicle records to private investigators who fail to specify an underlying permissible purpose. (A. 559, 39:16-41:24; A. 725.) Further, Softech was required by this contract and by the DPPA to maintain specific records of its clients' identities and

[5] Cohn could also have searched for "bodyguards.com" in New York's online database of companies to determine, within seconds, that no such company existed. (A. 707, 794.1-794.2.)

permissible uses. 18 U.S.C. § 2721(c); (A. 715.) Softech claimed a policy of complying with federal laws by "verify[ing] that the person we are dealing with is, in fact, the person they claim to be . . . [b]ecause we cannot disclose information, private information to any party." (A. 738, 32:13-21.)

However, Softech did not inquire about the underlying purpose of the request or about the end-user's identity. (A. 559, 39:3-15; A. 601, 42:9-12.) Indeed, its request process provided no opportunity for Arcanum to enter such information. (A. 656, 65:2-13.)

Had Softech implemented any screening procedures or conducted any inquiry at all and discovered that Leifer had provided a false name and claimed to work for an unregistered business, Softech (by its own admission) would not have released the information to Arcanum. (A. 564, 60:4-17.) But the Softech Defendants did not have any screening procedures in place and did not perform any inquiry. (A. 565, 65:6-13.) Instead, on the same day they received the request from Arcanum, the Softech Defendants obtained Plaintiff's records from the DMV and automatically disclosed them to Arcanum. (A. 708; A. 567, 72:2-14.) Hours later, the Arcanum Defendants disclosed Plaintiff's name and address to Leifer. (A. 547.)

Leifer Makes Threatening Phone Calls

Leifer used this information to obtain phone numbers associated with Plaintiff. (A. 100, 64:9-19.) Less than an hour after Arcanum's disclosure, Leifer began

making threatening and harassing calls. On October 12 and 13, 2009, Leifer placed three calls to Travis Braha, Plaintiff's personal assistant. He lied about his identity and – when he failed to get Plaintiff on the phone – became increasingly aggressive.[6] (A. 240, 32:3-33:8; A. 374; A. 680-82, ¶¶ 5-8, 17-18.) In the second call, which Braha found "particularly chilling," Leifer warned that "when stupid people hire stupid people, that is when they get hurt." (A. 240, 32:3-33:8; A. 681-82, ¶¶ 17-18.)

Leifer also called Plaintiff's mother, Sally Gordon, and threatened to go to the media regarding a (fictional) sexual assault in her son's car. (A. 738, 33:2-6; A. 681, ¶ 15; A. 437-38, 61:23-62:13.) Ms. Gordon, who was battling cancer at the time, became hysterical. (A. 778 ¶ 14; A. 437, 61:23-24.) Plaintiff also learned that Leifer had called Plaintiff's father at his office and had told similar lies to his father's secretary. (A. 449-51, 73:2-75:5.)

Softech Falsely Claims That It Did Not Disclose Plaintiff's Information

Shortly after the calls took place, Plaintiff consulted with John Loughery, a former officer from the New York Police Department (the "NYPD"). (A. 182, 44:12-45:11.) Mr. Loughery advised Plaintiff that, because the NYPD would take only limited, if any, actions in response to the calls, Plaintiff should engage a private

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[6] All three calls were made from numbers that appeared to be scrambled to avoid caller identification systems. (A. 681-82, ¶¶ 10, 20, 26; A. 282, 23:7-11; A. 185, 55:2-5.)

It is unclear why Leifer did not attempt to contact Plaintiff directly, as Leifer indicated to Braha that he had Plaintiff's home phone number. (A. 240, 33:18-23; A. 376; A. 682, ¶ 25.)

security firm to ensure his safety. (*Id.*) Plaintiff retained Insite Security, Inc. ("Insite"). (A. 464, 88:18-24.)

Insite conducted an investigation to determine who made the calls. (A. 281, 22:20-25.) After submitting a Freedom of Information Law request, Insite learned that Reid Rodriguez and Softech had performed a license lookup and obtained Plaintiff's name and address from the DMV. (A. 288-321, 29:22-30:10, 32:4-9, 34:20-35:14, 61:16-62:7; A. 773-74.) Insite therefore contacted Softech to inquire about the search. (A. 764; A. 740.)

Softech's account manager, Lourdes Sanz, denied that Softech had disclosed Plaintiff's information: "No report was issued on Erik Gordon, on the date provided …." (A. 767; A. 742-44, 46:20-47:3, 54:3-56:2.) Ms. Sanz later admitted that this statement was false. (A. 744.)

Plaintiff retained counsel to pursue further communications with Softech. (A. 771, 58:8-21.) In early 2010, counsel left multiple voice mail messages for Ms. Sanz, and sent two letters and a fax. (A. 772, 63:6-13; A. 746.) All communications were ignored by Softech. (A. 769-70; A. 745-47, 61:14-21, 65:23-67:18, 71:3-72:8; A. 771-72.) In fact, Ms. Sanz admitted that she did not even bother to read the entire letter faxed by Plaintiff's counsel. (A. 748, 72:9-24.)

The Reseller Defendants Acknowledge Violations of Their Legal Obligations

During discovery, Softech admitted to several apparent violations of its contractual or statutory duties. For example, despite its statutory and contractual record-keeping obligations, Softech did not collect any information as to the end-user's identity or purported permissible purpose. (A. 565, 63:19-65:13.) Arcanum's request therefore indicated only that the requested records were to be used by Arcanum, a private investigative agency, for an unspecified permissible purpose. (A. 559, 39:3-15.) This was not one of the purposes for which Softech was authorized by its contract with the DMV to obtain or disclose records. (A. 559, 39:16-41:23; A. 725.)

As noted previously, Softech admitted that it should not provide motor vehicle information unless the stated purpose matched one of the DPPA permissible uses *and* the client's Affidavit of Intended Use. (A. 560-67, 44:7-18, 45:18-46:22, 70:17-71:16); *cf.* 18 U.S.C. § 2721(c). Softech admitted, however, that Arcanum's request did not specify a purpose permitted under *either* the DPPA *or* its Affidavit of Intended Use. (A. 571, 87:19-88:17 (Arcanum's request did not identify a purpose listed on its Affidavit of Intended Use); A. 561, 49:19-25 (under DPPA, private investigator cannot obtain protected information without a permitted purpose)); 18 U.S.C. § 2721(b)(8).

SUMMARY OF ARGUMENT

It is clear from the face of the DPPA that civil liability can arise without an intent to violate the statute. The statute provides for civil liability for the knowing acquisition or disclosure of protected information without a permissible purpose, and *separately* provides for heightened liability upon proof of willful or reckless disregard of the law. Because a statute must not be interpreted so as to render any part superfluous, the necessary conclusion is that something *less than intent* is required for civil liability.

Indeed, the parties agreed before the lower court that civil liability can arise without an intent to violate the law. Plaintiff argued that the DPPA could be read as a strict liability statute, but that – at the very least – liability could be premised on negligence, recklessness, or willful blindness. (A. 816-18; *see also* A. 817, n.5; A. 857-58, 10:19-11:14 (stating that the DPPA is either strict liability or reasonable diligence); *cf.* A. 889-91.) Leifer's counsel,[7] in turn, argued that civil liability under the DPPA is subject to a "reasonableness standard, a negligence standard" as to whether a permissible purpose existed. (A. 862-63, 15:21-16:20.)[8]

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[7] Mr. Leifer settled with Plaintiff in January 2012, several weeks after the lower court's summary judgment decision. However, the defendants' motion for summary judgment was filed jointly, on behalf of all the Reseller Defendants as well as Mr. Leifer.

[8] As the lower court indicated, reasonableness would ordinarily be "a question for the jury." (A. 863, 16:21-22.)

The District Court, however, dismissed Plaintiff's DPPA claims against the Resellers without ever addressing whether the Resellers could be liable on a theory of negligence, recklessness, or willful blindness. Rather, the District Court stated only that the DPPA was not a strict liability statute – and that resellers could not be "strictly liable" for disclosing records so long as the end-user had "represented" that he had a DPPA permissible purpose. By dismissing the DPPA claims outright, with no mention of the evidence suggesting a possible negligent, reckless, or willful violation, the court appeared to read a *specific intent* requirement into the DPPA. According to this reading, a defendant violates the DPPA only when it obtains or discloses personal information with actual knowledge that no permissible use exists.

The District Court's decision was plainly in error. As an initial matter, it is clear from the face of the DPPA that civil liability does not require an intent to violate the law. Indeed, the most natural reading of the statutory language suggests strict liability as to the existence of a permissible use. But even if this Court were to accept the conclusion that the DPPA does not apply strict liability in this regard, there were clearly (at a minimum) issues of fact as to whether the Resellers violated the DPPA negligently or in willful or reckless disregard of the law. Among other things, the record includes ample evidence (in the Resellers' own words) of numerous failures in

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The lower court also cited one of the many issues of fact on the record then before it – that there was "disagreement as to whether there was an auto accident," and thus a question as to whether Mr. Leifer was truthful in claiming "insurance" as a permissible purpose. (A. 863-64, 16:.21-17:8.)

fulfilling the motor vehicle record request at issue here. This evidence is sufficient to support a finding of civil liability under the DPPA[9] – or, at the very least, to create issues of fact requiring a trial. For this reason, the District Court erred in dismissing Plaintiff's claims.

Indeed, this same evidence should preclude dismissal *even if the District Court was correct* in holding that an end-user's representation of a permissible purpose necessarily relieves a reseller of all DPPA liability. As set forth below, there are substantial issues of fact as to whether the "Insurance Other" purpose certified by the end-user (even if truthful) was a DPPA permissible use at all.

ARGUMENT

I. APPLICABLE STANDARD FOR SUMMARY JUDGMENT

This Court reviews a district court's grant of summary judgment *de novo*. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003); *Hemphill v. Schott*, 141 F.3d 412, 415 (2d Cir. 1998); *see also, e.g.*, *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) (district court's interpretation of federal statute is reviewed *de novo*).

Summary judgment should not be granted unless "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." FED.

[9] It was on this basis that Plaintiff argued before the District Court in his cross-motion that summary judgment actually should have been granted in his favor against all the Defendants.

R. CIV. P. 56(c); *Ruggiero v. Cnty. of Orange*, 467 F.3d 170, 173 (2d Cir. 2006). A fact is material if it might affect the outcome of a suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* "The court construes all evidence in the light most favorable to the non-moving party, drawing all inferences and resolving all ambiguities in his favor." *Amore v. Novarro*, 624 F.3d 522, 529 (2d Cir. 2010).

Where a claim involves issues of fact as to mental state (such as willfulness or reckless disregard) or reasonableness, summary judgment is generally not appropriate. *See, e.g.*, *Lipton v. Nature Co.*, 71 F.3d 464, 472 (2d Cir. 1995) (absent "sufficient undisputed material facts," courts are "generally reluctant to dispose of a case on summary judgment when mental state is at issue"); *King v. Crossland Sav. Bank*, 111 F.3d 251, 259 (2d Cir. 1997) (unless non-moving party has failed to identify any factual disputes, "the assessment of reasonableness generally is a factual question to be addressed by the jury"); *cf. Kerman v. City of New York*, 374 F.3d 93, 116 (2d Cir. 2004) (questions as to willfulness or reckless disregard are ordinarily "questions of fact to be answered by the jury"). Thus, dismissal of claims before trial will often be improper in the context of a DPPA case – where a defendant's purpose or state of mind may be factors in assessing liability. *See, e.g.*, *Cowan v. Codelia*, No. 98 Civ. 5548(JGK), 2001 WL 856606, at *9 (S.D.N.Y July 30, 2001) (denying summary

judgment where reasonable jury could find that defendant's DMV searches and subsequent contact with plaintiff were "not for use in connection with a criminal proceeding but rather … to threaten or harass"); *Best v. Berard*, No. 09 Civ. 7749, 2011 WL 5554021, at *8 (N.D. Ill. Nov. 15, 2011) (denying summary judgment where reasonable jury could conclude that defendants knew they were disclosing personal information); *Pichler v. UNITE*, 542 F.3d 380, 389-90 (3d Cir. 2008) (emphasizing that "[t]rial issues of willfulness and recklessness are common factual issues for juries to determine").

II. THE DRIVER'S PRIVACY PROTECTION ACT

A. The DPPA Permits Disclosure for a Permissible Use Only

The Driver's Privacy Protection Act restricts the acquisition, use, and disclosure of personal information maintained in state motor vehicle records.[10] The DPPA lists fourteen permissible uses, one of which must be present before the DMV may release personal information. 18 U.S.C. § 2721. For example, such information may be released:

- for use by a government agency "in carrying out its functions";
- for use in connection with "motor vehicle product alterations, recalls, or advisories";

[10] The statute defines personal information as "information that identifies an individual" and expressly includes an individual's name and address. 18 U.S.C. § 2725(3).

- for use in "providing notice to the owners of towed or impounded vehicles"; or
- for use by an "insurer or insurance support organization, or by a self-insured entity … in connection with claims investigation activities, antifraud activities, rating, or underwriting."

Id. § 2721(b).

The DPPA was enacted in 1994 as a crime-fighting measure in response to the murder of an actress by an obsessed fan who obtained her address from the California Department of Motor Vehicles. *Margan v. Niles*, 250 F. Supp. 2d 63, 68 (N.D.N.Y. 2003). It was Congress's intent in enacting the DPPA to prevent harassers, stalkers, would-be criminals, and other unauthorized individuals from obtaining and using personal information from motor vehicle records. *Id.* Congress sought to prevent, for example, unscrupulous individuals from victimizing wealthy persons by targeting an expensive car, using the license plate number to obtain the address of the car's owner, and then robbing his or her home. *Id.* at 69.

Section 2724 of the DPPA enables an individual to whom the personal information relates to bring a private civil cause of action against "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted [under the DPPA]." 18 U.S.C. § 2724(a). Thus, to establish a claim under the DPPA, a plaintiff must prove: (1) that the defendant knowingly obtained, used or disclosed personal information from a motor vehicle record and (2) that it was for a purpose not permitted under the DPPA. *See Pichler*,

542 F.3d at 396-97; *Rios v. Direct Mail Express, Inc.*, 435 F.Supp.2d 1199, 1202 (S.D. Fla. 2006); *Luparello v. Inc. Vill. of Garden City*, 290 F. Supp. 2d 341, 344 (E.D.N.Y. 2003); *Cowan*, 2001 WL 856606, at *8. A court may award reasonable attorney's fees and, upon proof of "willful or reckless disregard of the law," punitive damages. 18 U.S.C. §§ 2724(b)(2), (3); *Menghi v. Hart*, 745 F. Supp. 2d 89, 110 (E.D.N.Y. 2010).

B. The DPPA Provides for Civil Liability Against Resellers

The DPPA expressly applies to resellers such as Arcanum and Softech. Specifically, section 2721(c) provides that "an authorized recipient of personal information . . . ***may resell or redisclose the information only for a use permitted under subsection (b)***." 18 U.S.C. § 2721(c) (emphasis added). Thus, a reseller cannot sell or disclose protected information to a third-party in the absence of a permissible use. *See, e.g.*, *Welch v. Jones*, 770 F. Supp. 2d 1253, 1258 (N.D. Fla. 2011) (rejecting defendant's argument that the DPPA creates an exemption for resale or redisclosure beyond the exemptions enumerated in § 2721(b)).

During the course of discovery, the Reseller Defendants conceded this very point. Softech's Chief Operating Officer testified, for example, that Softech could not have a permissible purpose in disclosing records to an end-user unless the end-user himself actually had a permissible use. (A. 572, 91:17-92:6.) Arcanum agreed. (A. 614, 94:12-18.) Thus, a reseller who "obtains" or "discloses" personal information in the absence of any ultimate permissible purpose is just as liable as someone who "uses" such information. *See* 18 U.S.C. § 2721(c); *Johnson v. West Pub. Corp.*, No.

2:10 Civ. 04027(NKL), 2011 WL 3422756, at *13 (W.D. Mo. Aug. 3, 2011); *Welch*, 770 F. Supp. 2d at 1258.[11]

III. THE DISTRICT COURT ERRED IN READING A SPECIFIC INTENT REQUIREMENT INTO THE DPPA

By holding that a reseller can never be liable so long as the end-user claims a permissible use, the District Court incorrectly inserted a *specific intent* requirement into the statute. That is, the court apparently read the DPPA to impose liability only where a defendant "*knowingly* obtain[s] or disclose[s] personal information for a use the defendant *knows* is impermissible." *See Pichler*, 542 F.3d at 396 (emphasis in original). Under this "double-knowledge" reading of the statute, a defendant would face no liability unless it actually intended to violate the DPPA. *See id.* at 396-97.

As set forth below, this reading of the DPPA has no basis in the statute itself. It has also been emphatically rejected by numerous courts – including the Third Circuit

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[11] Thus, Reseller Defendants are simply incorrect to the extent they argue, as they did before the lower court, that DPPA claims are "only maintainable against 'end users.'" (A. 663.) Nothing in the case law, or the DPPA itself, suggests that resellers are granted such immunity.

In their summary judgment briefs, the Reseller Defendants cited *Taylor v. Acxiom*, 612 F.3d 325 (5th Cir. 2010), for the proposition that resellers need not themselves have an independent permissible use in order to obtain bulk databases of DMV information. (A. 663, 665 (arguing that resellers are "not required to first themselves make an actual permissible use of records before they can lawfully resell to others").) But this argument misses the point. Unlike the defendants in *Taylor*, the Reseller Defendants specifically requested Gordon's personal information and resold it to someone who concededly had no permissible use. The DPPA clearly indicates (and the Resellers have agreed) that this constitutes a violation. 18 U.S.C. § 2721(c); *cf.* A. 572.

Court of Appeals. *Id.* at 396-97 (rejecting this interpretation as "patently without merit").

A. The District Court's Holding Has No Basis in the Text of the DPPA

The District Court's holding should be reversed because it contradicts the plain language of the DPPA.

As a purely textual matter, civil liability under the DPPA does not require knowledge that the intended use is unlawful. Rather, the use of the term "knowingly" in Section 2724(a) is intended simply to guard against accidental disclosures of information. *See, e.g.*, *Pichler v. UNITE*, 228 F.R.D. 230, 242 (E.D. Pa. 2005) (analyzing placement of "knowingly" and concluding that civil liability does not require knowledge that purpose is unlawful), *aff'd*, 542 F.3d at 397 (rejecting defendant's argument that there was "no violation of the statute absent evidence 'that a defendant appreciated the illegality of his conduct'"); *see also Rios*, 435 F. Supp. 2d at 1204-05 ("[U]nder the express language of the DPPA the term 'knowingly' only modifies the phrase 'obtains, discloses, or uses personal information.' It does not modify the phrase 'for a purpose not permitted under this Chapter.'"); *Cowan v. Codelia*, No. 98 Civ. 5548, 1999 WL 1029729(JGK), at *8 (S.D.N.Y. Nov. 10, 1999) (ruling that the DPPA "does not make an intent to harm a condition for imposing civil liability under the DPPA"). As one court has explained:

> [T]he DPPA requires only a deliberate act constituting disclosure, not knowledge that the disclosure was legally forbidden. That is the standard definition of "knowing" conduct, *cf.* Pattern Crim. Jury Instructions for the

> Seventh Circuit § 4.06 (1998) (defining "knowingly"), and there is no basis to think that Congress established a stricter standard in the DPPA.

Best, 2011 WL 5554021, at *8.

B. The District Court's Holding Renders Portions of the DPPA Meaningless

The District Court's holding should also be reversed because it adopts an interpretation of the DPPA that renders parts of the statute meaningless.

It is a fundamental tenet of statutory interpretation that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative, or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S. Ct. 2276, 159 L.Ed.2d 172 (2004) (citation omitted). Thus, as this Court has previously observed, where a statute provides for *additional* (liquidated or punitive) damages for a "willful violation," the necessary implication is that willfulness is not required to find a violation in the first place. *See Benjamin v. United Merchants & Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989) (distinguishing between a willful and non-willful violation, in context of employment discrimination statute that allows liquidated damages for "willful violations").

By its plain terms, the DPPA distinguishes between (a) ordinary civil liability and (b) enhanced liability upon proof of willful or reckless disregard of the law. That is, the DPPA provides for civil liability for anyone who "knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter." 18 U.S.C. § 2724. The DPPA ***separately*** provides for additional

liability – in the form of punitive damages – upon proof that the violation was in "willful or reckless disregard of the law." 18 U.S.C. § 2724(b)(2).[12] Thus, punitive damages are appropriate when the defendant knew or recklessly disregarded that it was acquiring, using, or disclosing DPPA-protected information for a purpose not permitted by the statute. *See Pichler*, 542 F.3d at 396-97.

"Reckless disregard of the law" is, by any definition, something less than a "specific intent" to violate the law. *See, e.g.*, *Benjamin*, 873 F.2d at 43-44 (emphasizing that willfulness or "reckless disregard" does not require a "specific intent to do something the law forbade").[13] Because a defendant who violates the DPPA is exposed to *enhanced* civil liability upon proof of "reckless disregard," it necessarily follows that *ordinary* civil liability does not require anything greater. *See id.; see also*

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[12] The DPPA also provides for criminal fines for anyone who "knowingly violates" its terms. 18 U.S.C. § 2723(a). As the Third Circuit noted, "Congress differentiated between a ***knowing acquisition, disclosure, or use*** to establish civil liability, and any ***knowing violation*** to establish liability for a criminal fine." *Pichler*, 542 F.3d at 397 (emphasis added).

It is not uncommon for Congress to distinguish between different types of violations by implementing different standards of fault. *Id.* The Third Circuit cited 18 U.S.C. § 842 (regarding explosive materials) as an example – noting that it imposes different penalties depending on whether the act was committed knowingly. *Id.* at 397.

[13] This Court has observed that "willfulness" is generally construed consistently across different civil statutes. *See Citron v. Citron*, 722 F.2d 14, 16 (2d Cir. 1983) (although "willfulness" may be interpreted differently "if required by a particular statutory scheme in which it appears," its meaning is generally consistent unless the particular statute presents some "special context"); *Benjamin*, 873 F.2d at 43 (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126, 105 S. Ct. 613, 624 (1985)).

Pichler, 542 F.3d at 397 (where additional, punitive damages are available for a willful statutory violation, ordinary civil liability is subject to a lower standard).

The distinction Congress made between Sections 2724(a) and (b)(2) would be nonsensical if ordinary civil liability required a defendant to know, or recklessly disregard, that the purported use of the information was impermissible. Indeed, the Third Circuit employed this very reasoning when it rejected the argument that DPPA liability requires knowledge that no permissible use exists. *Pichler*, 542 F.3d at 396-97. In *Pichler*, defendants argued that civil liability under the DPPA requires that a defendant "***knowingly*** obtain or disclose personal information for a use the defendant ***knows*** is impermissible." *Id.* at 396. The Third Circuit rejected this argument as "patently without merit" – noting that the proposed "double-knowledge requirement simply does not fit into the DPPA's statutory scheme." *Id.* at 397. As the Court stated:

> [Defendants'] reading of the DPPA is *incomprehensible given the statute's punitive damages provision*. Section 2724 … provides a civil cause of action against "a person who knowingly obtains, discloses or uses personal information ... for a purpose not permitted" under the statute. 18 U.S.C. § 2724(a). The DPPA continues that while the "court may award" actual damages, it may award punitive damages only "upon proof of willful or reckless disregard of the law." 18 U.S.C. § 2724(b)(2). According to [defendant], however, there is no violation of the statute absent evidence "that a defendant appreciated the illegality of his conduct," *thus making every single violation one for which punitive damages would apply.*

Id. at 397 (emphasis added); *see also Roth v. Guzman*, 650 F.3d 603, 618 (6th Cir. 2011) (Clay, J., dissenting) ("the majority's reading of the DPPA not only contradicts

the 'straightforward and commonsense meaning' of the Act . . . but if accepted also renders much of the language of the DPPA superfluous."); *cf. Benjamin*, 873 F.2d at 44 ("Were the rule otherwise, every ADEA violation would trigger liquidated damages, and Congress' purpose in creating a two-tiered structure of liability would thereby be contravened.").

By finding that the Reseller Defendants could not be held liable because they did not know that Leifer lacked a permissible use for the information (A. 883-84), the District Court read a specific intent standard into the ordinary liability section of the DPPA. Because this reading renders portions of both Sections 2724(a) and (b)(2) "inoperative, … superfluous, void [and] insignificant," the District Court should be reversed. *Hibbs*, 542 U.S. at 101, 124 S. Ct. 2276, 159 L.Ed.2d 172.

C. The District Court's Holding Undermines the Purpose of the DPPA

As discussed above, the purpose of the DPPA is to protect individual drivers and prevent "stalkers, harassers, would-be criminals, and other unauthorized individuals from obtaining and using personal information from motor vehicle records." *Margan*, 250 F. Supp. 2d at 68. Congress intended to accomplish this by "restrict[ing] the free flow of private information to prevent it from leaking out in the first place." *Johnson*, 2011 WL 3422756, at *10.

Were the Court to uphold the District Court's specific-intent interpretation of the DPPA, it would effectively immunize anyone who profits from peddling drivers' confidential records and remove any incentive for resellers to implement reasonable

measures for verifying compliance with the DPPA. As one of the Reseller Defendants himself acknowledged, most end-users seeking to use a driver's information for a criminal purpose would, like Leifer, be clever enough to try to withhold their true identity and intentions from the reseller. (A. 604, 56:21-25.) The end-user who informs the reseller of his or her intention to stalk, harass, or murder would indeed be a rarity. Thus, as a practical matter, the specific intent standard adopted by the District Court would not deter any criminal conduct and would undermine the very purpose of the DPPA.

Judge Clay expressed identical concerns in a dissenting opinion in *Roth v. Guzman*, a case heavily relied upon by the District Court.[14] 650 F.3d 603, 617 (6th Cir. 2011) (Clay, J., dissenting). *Roth* involved plaintiffs who sued Ohio state officials for disclosing motor vehicle records to a requestor (Shadowsoft), which then resold the records to another company (PublicData) who offered them for resale online. In holding that the claims against the state officials should have been dismissed, the

[14] The District Court's reliance on *Roth* was misplaced because that case involved state actors rather than private companies. Thus, the key issue in *Roth* was whether *qualified immunity* barred the claims as a matter of law. The Sixth Circuit Court of Appeals found that defendants' motion to dismiss should have been granted on the grounds that, as state officials, they enjoyed qualified immunity from civil liability if the allegedly violated right was not "clearly established" at the time of the alleged misconduct. *Roth*, 650 F.3d at 609.

Indeed, Defendants did not even cite *Roth* in their summary judgment papers (A. 860, 13:3-11), apparently because they did not view it as particularly "relevant" to their position. (*Id.* at 13:13-16.)

majority reasoned that "as long as a requestor represents . . . that it will use drivers' personal information in accordance with a DPPA exception, [defendants] do not violate the Act if they then knowingly disclose that information." *Id.* at 618. Judge Clay rejected this reasoning:

> Clearly, any interpretation of the DPPA that would require a requestor to make an affirmative statement of illegal intent or bad purpose in order for disclosure liability to attach . . . is inconsistent with both the language and purpose of the Act.

Id. at 619. The Court should thus reject the District Court's specific intent interpretation because it undermines the purpose of the DPPA.

D. The Court Should Rule That a Reseller is Liable Under the DPPA Whenever It Discloses Information Absent a Permissible Purpose

Section 2721(c) provides that a reseller may "resell or redisclose the information *only for a use permitted under subsection (b).*" 18 U.S.C. § 2721(c) (emphasis added). The most literal reading of this provision is that the existence of a permissible use is an issue of strict liability. Thus a reseller would be liable for any non-accidental disclosure of protected information to a customer without an actual permissible use. *See id.*

The Reseller Defendants incorrectly argued, and the District Court accepted, that the DPPA immunizes resellers from liability so long as their customers "certify" that a permissible use exists. (A. 664 (claiming that the DPPA "permits the release of certain personal information so long as the end-user certifies that his use of the information sought is among one of the 'permissible purposes' listed under §2721(b)"); A. 883 (no

liability where Reseller Defendants disclosed information "based on" Leifer's representation of a permissible use).) But this conclusion has literally no basis in the statute. Section 2721(c) nowhere suggests that a reseller may redisclose protected information so long as its customer *claims* to have a permissible use.[15] Nor does the statute contain a reliance exception (as the District Court implied) for resellers who "relied upon [an end-user's] assurance … that he had a permissible purpose." (*Cf.* A. 881.)

Rather, the DPPA authorizes the resale of information only if there is an actual, not just a stated, permitted use. 18 U.S.C. § 2721(c); *see Johnson*, 2011 WL 3422756, at *13. Thus, as a purely textual matter, the DPPA indicates that a reseller who sells protected information to a client without an actual permissible purpose is liable regardless what "certifications" that client has made. *Cf. Locate.Plus.Com, Inc. v. Iowa Dep't of Transp.*, 650 N.W.2d 609, 617 (Iowa 2002) ("The important task of protecting individual privacy interest recognized by Congress would be undermined by permitting a requester to determine the eligibility to receive the information."); *Pichler*, 542 F.3d at 396-97 (distinguishing between a "knowing acquisition, disclosure, or use to establish civil liability," and a "knowing violation").

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[15] Further, such a rule makes little practical sense: If a reseller's web site allows the customer to select *only* from (purportedly) permissible purposes in making its request, the reseller should not be immunized by the customer's selection of one of these purposes.

This literal reading of the DPPA also makes policy sense. Statutes designed to promote public safety or to protect individual privacy are routinely construed so as to maximize their deterrent effect – in particular, by shifting burdens to institutional actors who regularly engage in the targeted conduct or are otherwise in a position to minimize future violations. *See, e.g.*, *Margan*, 250 F. Supp. 2d at 74-75 (imposing vicarious liability on employers for DPPA violations prevents similar future violations); *see also Santoro ex rel. Santoro v. Majestic Fireplace Corp.*, 02 CIV.8796(SAS), 2004 WL 2569493, at *5 (S.D.N.Y. Nov. 12, 2004) (in context of product liability, strict liability applies to regular sellers, who are in a position to influence product safety and have "assumed a special responsibility to the public" by regularly marketing the products); *Allied Prods. Co. v. Fed. Mine Safety & Health Review Comm'n*, 666 F.2d 890, 893 (5th Cir. 1982) (in workplace safety context, strict liability creates incentive for employers to take "all practicable measures" to ensure compliance). Imposing liability for any disclosure lacking an actual permissible use would encourage resellers to implement reasonable procedures, and take reasonable steps, to verify their customers' requests. *Cf. Margan*, 250 F. Supp. 2d at 74-75 (holding principals liable for their agents' DPPA violations creates incentives for institutions to "adopt appropriate policies and procedures to prevent the misuse of motor vehicle records, *thereby furthering the DPPA's goals of protecting individuals' personal information*" (emphasis added)).

E. At a Minimum, the Court Should Rule that a Reseller is Liable Where It Has No Reasonable Procedures to Identify Customers Lacking a Permissible Purpose

Although negligence is not a requirement for civil liability under the DPPA, *see* 18 U.S.C. § 2724, there is no real dispute that DPPA liability may be based on negligence. *See supra* at 34-36 (strict liability); *cf. supra* at 29-32 (liability requires something less than reckless disregard).

Indeed, Leifer's counsel argued before the lower court (without contradiction by the Reseller Defendants) that civil liability under the DPPA could be based on negligence: "It's a reasonableness standard, negligence standard [as to] whether or not the stated purpose was permissible, both as to the end-user and as to the reseller defendants." (A. 863, 16:3-6.)

As the District Court observed, reasonableness is ordinarily a "question for the jury." (*Id.* at 16:21-22 ("I thought reasonableness was a question for the jury."). Thus, if any issues of fact exist as to whether the Reseller Defendants acted reasonably in selling Plaintiff's personal information, had reasonable grounds to believe they were complying with the DPPA, or had reasonable procedures in place to ensure that a permissible use existed, the District Court erred in dismissing Plaintiff's DPPA claims against the Resellers. *Cf. King*, 111 F.3d at 259 (reasonableness is generally a question of fact for the jury).

IV. REGARDLESS OF THE STANDARD APPLIED, THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE ARCANUM DEFENDANTS

As set forth above, the Court should apply a negligence or strict liability standard for civil liability under the DPPA. However, regardless of what standard this Court applies to its consideration of Plaintiff's DPPA claims, the record contains ample evidence establishing, at the very least, material issues of fact as to whether the Reseller Defendants violated the DPPA. *Cf. Roth*, 650 F.3d at 618 (Clay, J., dissenting) (citing numerous "material factual questions still in dispute" as to how much the defendant actually knew about the requestor at the time of disclosure, whether the requestor impermissibly used the information it received, and what representations the requestors made during contract negotiations with defendant).

Addressing first the Arcanum Defendants, substantial evidence of Arcanum's liability is found in admissions by the Arcanum Defendants themselves and documents from their own files.

A. "Insurance Other" Is Not a Permissible Purpose Under the DPPA

As an initial matter, there are serious questions as to whether the "Insurance Other" purpose selected by Leifer even constituted a "permissible use" under the DPPA. That is, *even if* an end-user's certification of a permissible use could immunize a reseller from liability, and *even if* Leifer had been truthful in selecting "Insurance Other" as his purported purpose, the fact remains that "Insurance Other" does not appear in the DPPA's list of permissible uses.

Although the DPPA does include certain insurance-related activities as "permissible uses," these insurance uses are very narrowly defined. 18 U.S.C. § 2721(b)(6). First, the user must be an "insurer or insurance support organization," or a "self-insured entity." *Id.* Second, the use must be "in connection with claims investigation activities, antifraud activities, rating or underwriting." *Id.*

Arcanum's website, however, provided no way for the user to indicate (or for Arcanum to determine) whether the user was an insurer, insurance support organization, or self-insured entity; or whether the use was in connection with one of the specified activities. Rather, Docusearch.com offered a drop-down "Permissible Purpose" menu containing three tersely described insurance-related options: "Insurance Underwriting," "Insurance Claims," and "Insurance Other." (A. 541.) Appellee Cohn testified that these options were based on information that he had provided to his programmer. He was unable, however, to testify as to what "Insurance Other" – the option selected by Leifer – actually meant. He "imagine[d]" that it would apply to insurance that did not relate to "underwriting and claims." (A. 603-04, 53:8-55:8.) But when pressed as to whether "Insurance Other" referred to "antifraud activities or rating" by an insurer, insurance support organization, or self-insured entity, Cohn said that he "honestly [did not] know." (A. 604, 54:25-55:8). He stated

that it was up to the end user to determine what "Insurance Other" meant and whether it complied with the DPPA.[16] (A. 603-04, 53:8-54:13.)

Thus, even assuming that a reseller escapes liability if its customer has claimed a DPPA permissible use, no such loophole is available here. The record reveals that even the Arcanum Defendants were unsure whether "Insurance Other" corresponded to any "permissible use" under the DPPA. (*Id.* at 53:8-55:8.) It is therefore far from clear that Leifer claimed (truthfully or not) a DPPA permissible purpose at all.[17] (A. 675-76.)

It is for this reason, among others, that *Roth v. Guzman*, so heavily relied upon by the District Court, is inapposite here.[18] As discussed above, in *Roth*, plaintiffs sued Ohio state officials for disclosing motor vehicle records to Shadowsoft, which then resold the records to PublicData, who offered them for resale online. 650 F.3d at 607-08. There was no dispute, however, that Shadowsoft (unlike Leifer or Arcanum) had certified a purpose that *actually corresponded to a DPPA permissible use*. *See id.* at 608 (defendants' disclosure was made to a requestor who certified a "permissible

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[16] As previously noted, the Docusearch website provided only an abbreviated, paraphrased summary of the DPPA for its users' review. (A. 540.)

[17] As already noted, Leifer's testimony strongly suggested that he had no permissible purpose in requesting Plaintiff's motor vehicle records. But as discussed above, substantial issues of material fact would exist as to whether the Reseller Defendants violated the DPPA *even if* Leifer's so-called certification had been truthful.

[18] As set forth above, *Roth* is also inapposite because it involved state actors and issues of qualified immunity.

purpose corresponding to the 'normal course of business' exception under § 2721(b)(3)"). Here, in contrast, the Reseller Defendants disclosed records to customers who did *not* identify a permissible purpose. Leifer certified a purpose to Arcanum that, *on its face*, did not constitute a DPPA permissible use; and Arcanum failed to certify a permissible purpose to Softech at all.

This case is therefore more analogous to *Welch v. Theodorides-Bustle*, 753 F. Supp. 2d 1223 (N.D. Fla. 2010) – a proceeding where (as in this case) the requesting party did *not* claim a DPPA permissible purpose. In *Welch* (as in *Roth*), state officials were alleged to have violated the DPPA by making bulk disclosures of personal information available to Shadowsoft, which in turn resold the information to PublicData. *Welch*, 753 F. Supp. 2d at 1226; *cf. Roth*, 650 F.3d at 611 (discussing an earlier decision in *Welch*). But here, the facts of *Welch* and *Roth* diverge. In *Welch*, as in this case, defendants made the disclosure despite the requestor's failure to specify any permissible purpose at all. *Welch*, 753 F. Supp. 2d at 1226 (noting that Shadowsoft's contract "did not articulate a permissible purpose for disclosing the information to Shadowsoft or for Shadowsoft's further disclosure of the information"). Thus, just as in this case, there were issues of fact both as to the "actual purpose" for defendants' disclosure, and as to the defendants' knowledge of (or indifference to) the

possibility of an impermissible use. *Id.* at 1227. Summary judgment was therefore inappropriate. *Id.*[19]

The same result should follow here.

B. Arcanum's Disclosure to Leifer Was Not "Based on" Leifer's Represented Permissible Use

In their briefs to the lower court, the Reseller Defendants sought to insert a reliance exception into the reseller provision of the DPPA. They claimed that the DPPA "permits the release of certain personal information so long as the end-user *certifies* that his use of the information sought is among one of the 'permissible purposes' listed under §2721(b)." (A. 664 (emphasis added).) They could not be liable under the DPPA, they insisted, because they "properly relied upon Leifer's stated permissible use." (A. 839.) The District Court agreed. (A. 883 (no liability where Reseller Defendants disclosed information "based on" Leifer's representation of a permissible use).)

As already noted, no such "certification" or "reliance" exception appears in the text of the DPPA. 18 U.S.C. §§ 2721(c) & 2724(a). But even assuming, *arguendo*, that resellers are immunized from DPPA liability if their redisclosure was "based on"

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[19] Following a bench trial, and the court's consideration of all the evidence, the court concluded that the requester (Shadowsoft) and the end-user (PublicData) did, in fact, have permissible uses for the bulk data. *Welch v. Jones*, 770 F. Supp. 2d 1253, 1259-61 (N.D. Fla. 2011). Given the numerous issues of fact in Plaintiff's case, he should have the same opportunity to present this case to a trier of fact.

the end-user's represented permissible use, numerous issues of fact should have precluded summary judgment dismissal on this point alone. Indeed, to the extent the issue is cast as a question of reliance, the evidence casts substantial doubt on the notion that Arcanum actually or reasonably relied on any representation by Leifer.

For example, it is undisputed both that (a) Arcanum failed to review Leifer's request, and that (b) its automated process did not flag Leifer's request as one that Arcanum was not authorized to fulfill. (A. 597, 26:13-27:8; A. 604, 54:14-18; A. 725; *see supra* at 14-15.) Thus, Arcanum apparently did not even notice that Leifer's claimed purpose ("Insurance Other") was not one of the three uses for which Arcanum was authorized to obtain information from Softech. (A. 725.) Rather, Arcanum simply passed Leifer's request on to Softech.

These facts strongly suggest that the purpose selected by Leifer (whether truthful or not) was irrelevant to Arcanum's decision to obtain and resell Plaintiff's motor vehicle records. Thus, even if a reseller may escape liability where it sold information "based on" an end-user's claimed permissible use, ample evidence suggests that this exception would not apply here.

C. Arcanum Acted Negligently, Recklessly, and With Willful Blindness in Selling Information to Leifer

Finally, whether a defendant acted negligently, recklessly, or willfully is ordinarily an issue for the jury. *See, e.g.*, *Pichler*, 542 F.3d at 389-90 (in a case involving alleged DPPA violations, emphasizing that "[t]rial issues of willfulness and

recklessness are common factual issues for juries to determine."); *Welch*, 753 F. Supp. 2d at 1227 (summary judgment inappropriate given factual disputes as to whether defendants in DPPA case were "deliberately indifferent to the possibility" of an impermissible use); *King*, 111 F.3d at 259 (unless non-moving party has failed to identify any factual disputes, "reasonableness generally is a factual question to be addressed by the jury").

Here, numerous issues of fact remain as to whether Arcanum acted without reasonable care (or recklessly, or with willful blindness) in selling Plaintiff's records to Leifer. Because even the Defendants conceded that liability under the DPPA may be premised on negligence, recklessness, or willful blindness, dismissal of Plaintiff's claims against Arcanum at the summary judgment stage was in error.

1. Arcanum Failed to Flag Discrepancies in Leifer's Identifying Information

For example, the parties dispute whether Arcanum violated the DPPA by fulfilling Leifer's search request despite discrepancies in his identifying information.

To be clear: the Court need not impose any extensive investigative duties on resellers in order to find triable issues of fact on this point. Rather, even the most minimal safeguards in a reseller's request process (whether automated or manual) would have detected red flags in Leifer's order. A reseller might, for example, cross-check its customers' identifying information against their driver's license records. *See Welch*, 770 F. Supp. 2d at 1255 (online reseller who sold motor vehicle records

verified customer information by, among other things, checking driver's license information). By the same token, a reseller could easily incorporate an automated (or manual) comparison of the customer's purported employer against the state's online database of corporations and business entities. *See supra* at 15 n.5. Such measures would pose no undue burden on Arcanum, *Welch*, 770 F. Supp. 2d . at 1260 (describing similar procedures as "reasonable steps"),[20] and would have easily identified red flags in Leifer's request.

Discrepancies in Aron Leifer's identifying information should have raised immediate red flags to Arcanum – an experienced private investigative agency – if it had exercised *any* degree of reasonable care in designing its record request process. Leifer conducted 38 separate searches for motor vehicle information using a false name, a nonexistent business, a private mailbox, and inaccurate credit card information. (A. 89-97, 29:8-23, 19:12-23, 50:9-23.) Not once in these 38 instances did the Arcanum Defendants take even basic steps to verify "Jack Loren's" identity, the authenticity of his business, or the permissibility of his purposes. Similarly, with respect to the request for Plaintiff's motor vehicle records, Leifer selected a purpose ("Insurance Other") completely at odds with his purported line of business. These

[20] Arcanum was already required by Section 2721(c) of the DPPA to maintain records "identifying each person or entity that receives information and the permitted purpose for which the information will be used." 18 U.S.C. § 2721(c).

discrepancies, by themselves, should have prompted a second look by Arcanum. (A.609, 75:4-12.)

It would have been a simple matter for Arcanum – which boasted of its keen investigative skills and rigorous customer screening process – to flag problems with Leifer's information. The home page for Docusearch.com cited its "trained and experienced investigators who apply a career's worth of instinct to ferret out information just out of the computer's reach." (A. 597, 27:9-16.) It further described the screening process Docusearch employed before fulfilling search requests for customers:

> Because not everyone is eligible to request some of the searches offered by our company, such as identifying someone's social security number, clients should expect to be screened and explain how the information will be used. Eligibility will be determined case by case.[21]

(A. 597, 26:13-27:6.) Indeed, Arcanum testified that it ultimately took very little effort to determine that "Jack Loren" was not a legitimate client and, on that basis, to cancel his account. (A. 609-10, 74:24-75:12, 81:19-21.)

But Arcanum failed to notice or flag these discrepancies in Aron Leifer's information – in part because Arcanum did not bother to review Leifer's request, and in part because its automated order process was not designed to detect such discrepancies. These failures reflect both a lack of reasonable care, and a degree of

[21] Mr. Cohn testified, however, that this screening process does not apply to clients requesting motor vehicle records – who need not "explain how the information will be used." (A. 597, 26:13-27:6.)

recklessness and willful blindness entirely improper for a private investigator in the business of selling DPPA-protected information. Thus, whether the standard for civil liability under the DPPA is strict liability, willfulness, or something in between, there are issues of material fact rendering summary judgment dismissal improper.

2. Arcanum Failed to Flag Discrepancies Suggesting an Impermissible Use

By the same token, there are questions of fact as to whether Arcanum violated the DPPA by selling protected personal information without any basis for concluding that a permissible use existed. That is, to the extent the DPPA imposes any duty of care on resellers, the evidence suggests that both resellers did essentially nothing.

Again, Plaintiff does not suggest that a reseller must aggressively investigate whether its customers' claimed permissible purposes are truthful. However, even the Reseller Defendants acknowledge that their request processes can, and should, incorporate mechanisms to detect the types of red flags that were rampant in Leifer's request. For example, Softech claimed that its automated process would reject requests where the claimed "permissible use" did not match the customer's "industry or the scope of what they do normally." (A. 567, 70:7-71:16.) By the same token, Softech's system was purportedly designed to block any request where the customer selected a purpose "not provided on [its] affidavit of intended use." (*Id.; see also* A. 597, 26:13-27:6 (Arcanum claimed to screen customers and to require explanations of "how the [requested] information will be used").)

But the Reseller Defendants followed none of these procedures in processing Leifer's request. As an initial matter, Arcanum did not notice that Leifer's so-called "Permissible Purpose" (Insurance Other) was clearly at odds with his purported line of work. Even more egregiously, Arcanum disregarded the fact that it was not authorized by its contract with Softech to obtain information for insurance purposes. Indeed, Cohn had previously affirmed under penalty of perjury that he would obtain motor vehicle information only for other purposes. (A. 725.) These facts alone demonstrate the Arcanum Defendants' reckless disregard for their legal obligations.

Further, Arcanum purported to place the onus on customers to determine whether they complied with the DPPA, by separately providing a link to an abbreviated, paraphrased summary of nine of the DPPA's permissible uses. (A. 532, ¶ 10, A. 539; A.603-04, 53:8-54:13.) However, there is plainly an issue of fact as to whether the inclusion of "Insurance Other" (and other uses that did not clearly correspond to a DPPA use) realistically allowed the user to make this determination. That is, Arcanum designed the Docusearch.com web site so that the only options available to customers were purposes that were purportedly permissible. (A. 541, A., 604, 54:14-24 (list of purported "Permissible Purposes" was supposed to summarize DPPA permissible uses).) But customers could select a purpose that *did not actually correspond to a DPPA permissible use*. (*See supra* at 12.) Indeed, even the web site's

creator was uncertain as to what activities "Insurance Other" actually referred to. (A. 603-04, 53:8-55:8.)

By designing an automated order process that compelled users to select from a list of purported "Permissible Purposes," and including several impermissible uses within that list, Arcanum opened the door to customer requests lacking any DPPA permissible use. At a minimum, this raises an issue of fact as to whether Arcanum acted negligently, recklessly, or with willful blindness as to the existence of a DPPA permissible use.

The same would be true even if all of these so-called "Permissible Purposes" actually corresponded to permissible uses under the DPPA. By inviting customers to select *only* DPPA permissible uses, the website would offer no way to screen out impermissible uses – thus turning a blind eye to users with impermissible purposes.

Indeed, this court has previously emphasized that a *willful* statutory violation can be found where – as here – the defendant knew that it was subject to a statute, knew that the statute made certain conduct illegal, but took no meaningful steps to determine whether its conduct "was carried out on an impermissible basis." *Benjamin*, 873 F.2d at 44 (finding willful violation based on proof of "indifference to the requirements of the governing statutes"). The court held that, on these facts, a jury can "properly find that [defendant's] actions are willful," therefore entitling the plaintiff to

punitive damages. *Id.* at 45; *see also id.* at 43 (noting that liquidated damages provision was punitive in nature). The same result should follow here.

V. REGARDLESS OF THE STANDARD APPLIED, THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE SOFTECH DEFENDANTS

The record similarly reflects questions of fact as to whether Softech violated the DPPA in selling Plaintiff's motor vehicle records to Arcanum.

First, the District Court clearly erred in dismissing Softech from the case on the grounds that its disclosure of Plaintiff's information was "based upon Leifer's written presentation and certification that his use was permissible." (A. 883.) That is, even if a reseller may escape liability where it relies on a customer's claimed permissible use (a rule without basis in the DPPA), the record is clear that nothing of the sort happened here. Softech neither requested nor received any indication as to the ultimate end-user's purported permissible use. (*Supra* at 16, 19.) Thus, whatever use was "certified" by Leifer was irrelevant to Softech's decision to release the information. Nor, for that matter, did Softech's own customer – Arcanum – specify its own purported permissible use for the requested records. (*Supra* at 15.) Thus, *even assuming* that a reseller is not liable for a disclosure that is "based on" its customer's certified permissible purpose, Softech cannot avail itself of this exception.

Further, the record establishes, at a minimum, questions of fact as to whether a permissible use actually existed. Leifer's testimony strongly suggested that he never

had a permissible use. (*Supra* at 13 n.4.) The evidence separately suggests that "Insurance Other" does not constitute a DPPA permissible use. Thus, there are substantial issues of fact as to whether the Softech Defendants obtained and disclosed Gordon's information in the absence of a permissible use.

Indeed, the Softech Defendants admitted that they could not have a permissible purpose in obtaining and disclosing motor vehicle records if the end-user did not have a permissible use. (A. 572, 91:17-24.) They further acknowledged their obligation to verify the identity of the person requesting motor vehicle information and to confirm that the end-user possesses a permissible use. (A. 738, 32:13-21; A. 564, 59:16-22.) But Softech did not even inquire about the end-user's name or purposes. Instead, the Softech Defendants obtained and disclosed Gordon's information based on the Arcanum Defendants' representation that the information would be used by Arcanum, a private investigative agency, for an unspecified permitted purpose. (A. 559, 39:3-15.) Softech's own agreement with the DMV *did not allow Softech to do this*. (*Id.* at 39:16-41:24; A. 725.) Moreover, if the Softech Defendants had bothered to inquire about the permitted use selected by Leifer, Softech would have discovered that Leifer had selected "Insurance other." Because this was not one of the purposes permitted under the agreement between Arcanum and Softech, a simple investigation should have caused the Softech Defendants to reject the order. (A. 725.)

In addition, considerable issues of fact exist as to whether Softech otherwise violated the DPPA in processing the request. As a reseller, Softech was obligated to collect and maintain records "identifying each person or entity that receives information and the permitted purpose for which the information will be used." 18 U.S.C. § 2721(c). Purportedly in keeping with this obligation, Softech's contract with Arcanum required Arcanum to specify the end-user's identity and purpose at the time any request was made. However, Softech's automated process provided no way for Arcanum to enter this information, and Arcanum did not provide it. (In fact, Softech took the position that it was not required to collect this information unless and until it was required by audit.) By disclosing Plaintiff's personal information without so much as providing a mechanism for the Arcanum Defendants to specify a DPPA permissible use, Softech acted negligently, and in willful or reckless disregard of the law. The District Court should have permitted Plaintiff to present this evidence to a jury.

Finally, the Softech Defendants' false representation to Gordon that Softech did not release his information (along with their refusal to respond to communications on this matter) is further evidence of Softech's willful or reckless disregard for their legal obligations and for Gordon's rights. Numerous courts, including this one, have held that a defendant's subsequent efforts to "***cover up***" its alleged misconduct may be evidence of willfulness. *See, e.g.*, *Benjamin*, 873 F.2d at 44-45 (*post hoc* efforts to conceal age discrimination could support an inference of willfulness); *Russo v. Trifari*,

Krussman & Fishel, Inc., 837 F.2d 40, 45 (2d Cir. 1988) (internal memo discrediting sincerity of company's explanation could support finding of willfulness by demonstrating "an appreciation of its illegality and a resultant attempt to conceal it"). Indeed, the Seventh Circuit has specifically stated that such evidence is relevant to whether a DPPA violation was willful – and thus whether punitive damages are appropriate. *See Deicher v. City of Evansville, Wis.*, 545 F.3d 537, 539-40, 542-45 (7th Cir. 2008) (finding that lower court erred in excluding evidence that defendants had sought to cover up their DPPA violation, and that such evidence was "relevant to whether there was a willful violation of the DPPA" for punitive damages purposes).

In short, whether the precise standard for civil liability is strict liability, specific intent, or something in between, dismissal of Plaintiff's DPPA claims at the summary judgment stage was in error. The record contains considerable evidence supporting a finding of liability on any of these standards. At a minimum, the evidence is more than sufficient to create issues of fact rendering dismissal before trial improper.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the District Court's decisions granting summary judgment for the Reseller Defendants and denying Plaintiff's motion for reconsideration.

Dated: New York, New York
June 8, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the form requirements of Fed. R. App. P. 32(c)(2), because the brief has been prepared using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: New York, New York
June 8, 2012

By: /s/ Justin M. Sher
Justin M. Sher

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIK H. GORDON, Plaintiff, -against- SOFTECH INTERNATIONAL, INC., et al., Defendants.	10 Civ. 5162 (RMB) **DECISION & ORDER**

I. Introduction

On January 19, 2011, Erik H. Gordon ("Gordon" or "Plaintiff") filed an amended complaint ("Amended Complaint") against Softech International, Inc. ("Softech"), Softech's Chief Operating Officer Reid Rodriguez ("Rodriguez"), Arcanum Investigations, Inc. ("Arcanum"), Arcanum's President Dan Cohn ("Cohn" and, together with Softech, Rodriguez, and Arcanum, the "Reseller Defendants"), and Aron Leifer ("Leifer" and, together with the Reseller Defendants, "Defendants") pursuant to the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725 ("DPPA").[1] Gordon alleges that Leifer obtained Gordon's personal information (through the Reseller Defendants' services) from the New York Department of Motor Vehicles ("DMV") for the impermissible use of (Leifer) placing "a series of phone calls designed to harass, threaten and annoy" Gordon in violation of the DPPA. (Am. Compl. ¶¶ 72–86, 94.) Gordon alleges that the Reseller Defendants also violated the DPPA, notwithstanding that Leifer represented and certified to the Reseller Defendants that he was "requesting the information pursuant to a [DPPA] permissible use." (Am. Compl. ¶¶ 34–35, 81.) At oral

[1] The Complaint also named John Does 1-5 and ABC Corporations 1-5 as defendants, none of whom has appeared in this action. (See Am. Compl., dated Jan. 5, 2011, ¶¶ 16–17.)

argument held on November 22, 2011, Gordon's counsel stated, "I think [the Reseller Defendants] are strictly liable" under the DPPA. (Hearing Transcript, dated Nov. 22, 2011 ("Oral Arg. Tr."), at 5:11–14; 7:8–12 (THE COURT: "You are saying it's a strict liability statute[?]" PL. COUNSEL: "I think that's how the statute reads, that's correct.").)

Gordon also asserts state law claims of prima facie tort and intentional infliction of emotional distress against Leifer, alleging that Leifer's "series of threatening phones calls" caused Gordon to experience "emotional distress" and "fear for his safety as well as the safety of his family and employees." (Am. Compl. ¶¶ 88, 90, 94, 96.)[2]

On June 8, 2011, Arcanum and Cohn filed cross-claims against Leifer for common law indemnification, contractual indemnification, and contribution, alleging that Leifer's "primary carelessness, recklessness or affirmative acts of omission or commission" caused Plaintiff's damages, if any, and that Leifer had signed a written indemnity agreement. (Arcanum & Cohn's Answer, dated June 8, 2011, ¶¶ 39–40.) On June 9, 2011, Softech and Rodriguez also filed cross-claims against Leifer for common law indemnification, contractual indemnification, and contribution, alleging that Leifer's "negligent, reckless, wanton, willful and/or intentional acts"

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[2] As described infra Section II, Gordon's claims arise out of an unusual and unfortunate incident that occurred on October 10, 2009 on East 61st Street in Manhattan, New York (between the hours of 11:00 p.m. and 1:30 a.m.). The incident seems to have involved Leifer, who is "involved" in the operation of a business called "Hot Local Escorts," Gordon's driver, Tom Harris ("Harris"), and a female friend of Leifer. Harris contends that while Gordon was in a nearby restaurant, Leifer's female friend approached Gordon's (London-style) taxicab. Leifer's friend allegedly "asked [Harris] about the car," and Harris allegedly declined to answer her questions. Harris contends that Leifer thereafter threatened Harris for being "mean" to Leifer's friend, that Harris drove away, and that Leifer gave chase in his white SUV. Leifer contends that he drove away in order to drop his friend off at a hotel, and that Gordon's cab (driven by Harris) hit Leifer's white SUV.

Leifer also contends that after the October 10, 2009 incident, he was trying to reach Gordon by phone (using Gordon's license plate number) to resolve insurance matters regarding the alleged car accident. Harris contends that there was no car accident.

caused Plaintiff's damages, if any. (Softech and Rodriguez's Answer, dated June 9, 2011, ¶¶ 11–12.)[3]

On August 12, 2011, Defendants filed a joint motion for summary judgment against Gordon pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing, among other things, that (1) Leifer represented and certified that his permissible use of Gordon's DMV information was "to obtain Plaintiff's insurance information" and "to perform [an] investigation in anticipation of litigation"; (2) the Reseller Defendants disseminated DMV information for a permissible use under the DPPA based upon, among other things, Leifer's written certification; (3) Plaintiff's prima facie tort claim against Leifer fails because Plaintiff has failed to show that Leifer's "sole motivation was 'disinterested malevolence'" as required under New York law; and (4) Plaintiff's intentional infliction of emotional distress claim against Leifer fails because Leifer's conduct does not "rise to the level of 'outrageous conduct,'" and because Plaintiff's "few sleepless nights" do not constitute severe emotional distress. (Defs.' Mem. of Law in Supp. of Joint Mot. for Summ. J. by Defs., dated Aug. 12, 2011 ("Defs. Mem."), at 1, 16, 19–20.)[4]

On September 5, 2011, Plaintiff filed an opposition to Defendants' motion and also cross-moved for summary judgment (on his DPPA claims only), arguing that (1) Leifer "cannot credibly claim" that his permissible use under the DPPA was to obtain Gordon's insurance information or to conduct an investigation in anticipation of litigation because "[n]o . . . collision

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[3] On July 13, 2011, Leifer filed cross-claims against the Reseller Defendants for common law indemnification and contribution, alleging that their wrongful conduct was "primary and/or active," while any wrongdoing by Leifer was "secondary and/or passive." (Leifer's Answer, dated July 13, 2011, ¶¶ 1–2.)

[4] At oral argument on November 22, 2011, Leifer's counsel argued that "Mr. Leifer indicated his purpose in contacting plaintiff was to get insurance information so that he could either resolve a claim or commence a claim. There is no other evidence that [Leifer] had any other basis whatsoever." (Oral Arg. Tr. at 15:10–14.)

took place" between Gordon's taxicab and Leifer's SUV on October 10, 2009; (2) the DPPA "does not contain an intent requirement" and, therefore, the Reseller Defendants are strictly liable, i.e., according to Gordon, they could not have had a permissible use because Leifer did not (ultimately) have a permissible use, notwithstanding that Leifer "communicated [and certified] a permissible purpose" in seeking to obtain DMV information; (3) "there is ample evidence to demonstrate that [Leifer] intended to cause Gordon emotional harm"; and (4) Leifer's phone calls, "in particular, his call to Gordon's ill mother in which he alleged that Gordon had been involved in a sexual assault," constituted extreme and outrageous conduct that caused Gordon "pain and suffering." (Pl.'s Mem of Law in Opp'n to Defs.' Joint Mot. for Summ. J. and in Supp. of Pl.'s Cross-Mot. for Summ. J., dated Sept. 5, 2011 ("Pl. Opp'n"), at 4, 14, 16–17, 21, 24–25.)

On September 12, 2011, Defendants filed a reply and opposition to Plaintiff's cross-motion, arguing, among other things, that the Reseller Defendants "properly relied upon Leifer's stated permissible use" and that, under Gordon's interpretation of the DPPA, a reseller would be (strictly) liable for any "misinformation by the end user," which is not what the DPPA provides. (See Reply Mem. of Law in Further Supp. of Defs.' Joint Mot. for Summ. J. and in Opp'n to Pl.'s Cross Mot. for Summ. J., dated Sept. 12, 2011 ("Defs. Reply"), at 3, 7.) As noted, oral argument was held on November 22, 2011. (See Oral Arg. Tr.)

For the reasons set forth below, Defendants' motion for summary judgment is granted in part and denied in part, and Plaintiff's cross-motion for summary judgment on his DPPA claims is denied.

II. Background

The following summary reflects facts which are undisputed and some that are disputed (as noted).

Gordon owned a "London-style taxi cab" that carried a New York State license plate registered in his name. (Defs.' Joint Response to Pl.'s Statement of Material Facts in Supp. of the Cross Mot. for Summ. J. Pursuant to Local Civ. R. 56.1, dated Sept. 12, 2011 ("Defs. 56.1 Response"), ¶¶ 1, 3.) On October 10, 2009, Gordon's cab was parked on East 61st Street in Manhattan, New York. (See Pl.'s Response to Defs.' Local Civ. R. 56.1 Statement of Material Facts, dated Sept. 5, 2011 ("Pl. 56.1 Response"), ¶¶ 9–10, 25.) Gordon's driver, Harris, was waiting in the cab while Gordon was in a nearby restaurant. (See Pl. 56.1 Response ¶¶ 9–10, 25.) Leifer, who is involved in the operation of a business called "Hot Local Escorts," was parked nearby in a white SUV with an unnamed female friend. (Pl. 56.1 Response ¶¶ 9–10; Deposition Transcript of Aron Leifer, dated July 12, 2011 ("Leifer Tr."), at 30:12–40:25.) Between approximately 11:00 p.m. and 1:30 a.m., Leifer's friend approached Gordon's cab and allegedly "asked [Harris] about the car." (Pl. 56.1 Response ¶ 25; Deposition Transcript of Thomas Harris, dated Mar. 15, 2011 ("Harris Tr."), at 24:23–25:7; 30:17–22.) The actual content of the conversation between Harris and Leifer's friend is in dispute. Leifer contends that Harris was "mean" to Leifer's friend, while Harris contends that it was Leifer's friend who was "mean." (Pl. 56.1 Response ¶ 26.)[5]

[5] At his deposition, Harris testified as follows: "**A.** A woman came up to the car. It's a right-hand drive car. She came to the right-hand side and she asked me about the car. And I said -- I had some words with her about the car. **Q.** And what do you recall the words were? **A.** Something to the effect that, I get spoken to a lot about the car, and I really don't like talking about the car. . . . And she said, well, you're mean. Or you're really mean or something like that. And I said something like, if anybody's mean here, Ms., Madame, whatever, you are. And

Leifer then approached Gordon's cab—and what happened next is also very much in dispute. (Pl. 56.1 Response ¶ 27.) Harris says: "And the next thing I know, this – the man [presumably Leifer] that she emerged from one of the restaurants with came barging across the street, and I drove away. And as I was driving away, he said to me, and I quote, 'I am going to fuck you up.' And he got in his car and followed me." (Harris Tr. at 25:8–26:5.) Leifer contends that he wanted "to ascertain why [Harris] acted in that fashion." (Pl. 56.1 Response ¶ 13.) Harris and Leifer each appear to have begun to drive down East 61st Street. (Pl. 56.1 Response ¶¶ 13–14.) Leifer contends that he started driving "to drop [his] friend off at a hotel," and that Harris "engaged in a game of starting and stopping." (Pl. 56.1 Response ¶¶ 14, 16.) Harris contends that he started driving "to get away from Leifer," and that "Leifer gave chase." (Pl. 56.1 Response ¶¶ 15–16.) Leifer contends that, as they were driving, "contact occurred between some portion of the London Cab and Leifer's vehicle[]," while Harris contends that he "never got into an accident or collision." (Pl. 56.1 Response ¶ 17.)

Leifer "wrote down the license plate number" of Gordon's cab. (Defs. 56.1 Response ¶ 1.) And, on October 11, 2009, Leifer submitted Gordon's license plate number to Docusearch.com in order to obtain information associated with the license plate number. (See Defs. 56.1 Response ¶ 4.) Docusearch.com is Arcanum's online website, and Arcanum is a licensed "private investigation firm," which is wholly owned and operated by Cohn.[6] (Pl. 56.1 Response ¶¶ 6–8; Defs. 56.1 Response ¶¶ 4, 19–20; Affidavit of Dan Cohn, dated Feb. 9, 2010, ¶¶ 4–5.) The Docusearch.com website advises users that "[t]here are restrictions to requesting

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she walked away. She went across the street. And [went to] a white SUV, I would call it." (Harris Tr. at 25:8–26:5.)

[6] Under the DPPA, "use by any licensed private investigative agency or licensed security service for any purpose permitted under [§ 2721(b)]" is a permissible use for obtaining or disclosing information from a motor vehicle record. 18 U.S.C. § 2721(b)(8).

license plate information." (Joint Declaration of Jura C. Zibas, Gregory R. Saracino & Vincent Chirico, dated Aug. 12, 2011 ("Zibas Decl."), Ex. O.) Next to that statement is a link labeled "DPPA Permissible Purpose," which brings users to another webpage that states in relevant part, "[p]ursuant to the Driver's Privacy Protection Act of 1994 (DPPA), you may only access vehicle registration information for one of the following permitted uses." (Zibas Decl., Ex. P.) The webpage lists a number of permissible uses of DMV information under the DPPA and also states in relevant part:

> You will be required to select a DPPA Permissible Purpose when placing your order. By inputting your response, you hereby certify to Docusearch.com that you are in, and assume full responsibility for, compliance with the DPPA and you agree to indemnify, defend and hold Docusearch harmless from any breach of the DPPA by you . . . .

(Id.) The Docusearch.com website required Leifer to select from a list of "permissible use[s]" using a drop-down menu. (Pl. 56.1 Response ¶¶ 82–83; see Declaration of Justin M. Sher, dated Sept. 5, 2011 ("Sher Decl."), Ex. Q.) The website also required Leifer to enter into an online agreement, which states in relevant part:

> **Client represents and warrants that it will provide Docusearch with accurate and complete information regarding the searches requested, and that search results will not be used for any purpose other than the purpose stated to Docusearch.**

(Pl. 56.1 Response ¶¶ 83, 86 (emphasis added).) Leifer selected "Insurance Other" as the permissible use from the drop-down menu; he also checked the box signifying his agreement to the online contract. (Pl. 56.1 Response ¶¶ 84, 87–88; Zibas Decl. Ex. S.) He thereafter paid the required $39.00 fee by credit card and submitted his request for information. (Pl. 56.1 Response ¶¶ 38, 84, 87–89.)

Arcanum, in turn, submitted Leifer's search request to Softech. (Pl. 56.1 Response ¶ 90; Defs. 56.1 Response ¶ 21.) Softech "is in the business of information gathering and obtaining information from the department of motor vehicles." (Pl. 56.1 Response ¶ 2.) Arcanum and Softech have a Vendor Agreement, dated July 5, 2005 ("Vendor Agreement"), which provides in relevant part that Arcanum

> hereby certifies that it will request the Records and the information therein from Softech and resell such to the End Users solely for said End Users' use in connection with a permissible purpose under the . . . DPPA. . . . [Arcanum] further warrants that it will require by written contract that its End Users comply with the same obligations of compliance with laws.

(Sher Decl., Ex. D at 6.) The Vendor Agreement contains an indemnification provision that states in relevant part that Arcanum "will indemnify, defend, and hold Softech harmless from and against any and all liabilities . . . arising out of or resulting from the use, disclosure, sale or transfer of the Records (or information therein) by [Arcanum] or its End Users." (Sher Decl., Ex. D at 8.)

On October 12, 2009, Softech's automated computer system processed Arcanum's search request, among other things, verifying Arcanum's status as a licensed private investigation firm, and submitted the request to the DMV. (Defs. 56.1 Response ¶ 26; Deposition Transcript of Reid Rodriguez, dated Feb. 16, 2011 ("Reid Tr."), at 71:5–16, 81:12–86:2.) Thereafter on that same day, the DMV disclosed Gordon's name, address, driver's license number, driver's license expiration date, and vehicle make and model to Softech, which disclosed the information to Arcanum, which in turn disclosed the information to Leifer. (Defs. 56.1 Response ¶¶ 26, 33, 35; Sher Decl. Ex. A.) Leifer used Gordon's name and address to conduct internet searches and to obtain "phone numbers associated with [Gordon]." (Pl. 56.1 Response ¶ 39; Defs. 56.1 Response ¶ 36.)

On October 12 and 13, 2009, Leifer placed five or more phone calls to various numbers associated with Gordon, including to Gordon's mother, Gordon's assistant, and Gordon's father's assistant. (See Pl. 56.1 Response ¶¶ 51–54, 67–68; Defs. 56.1 Response ¶ 37.) Gordon stated at his deposition that during a phone call to Gordon's mother, Leifer stated that he wanted "to get in touch with [Gordon] and said that there had been a sexual assault in the back of [Gordon's] car, [and] that if [Gordon] didn't get in touch with [Leifer] immediately [Gordon] would be in big trouble." (Deposition Transcript of Erik H. Gordon, dated Feb. 9, 2011 ("Gordon Tr."), at 62:5–13; see Pl. 56.1 Response ¶ 67.) Gordon's assistant testified at his deposition that during a call to him, Leifer stated that "he had just gotten off the phone with [Gordon's] mother . . . and he would go to the media. And when stupid people hire stupid people, that's when people get hurt." (Deposition Transcript of Travis Braha, dated Mar. 30, 2011 ("Braha Tr."), at 32:12–33:23; see Pl. 56.1 Response ¶ 53.)

Leifer contends that he "tried to contact Plaintiff to discuss the automobile accident" and "tried different ways to coax him into coming to the phone without mentioning the automobile accident." (Pl. 56.1 Response ¶¶ 40, 45.) Gordon contends that the calls were "threatening" and that he "feared for his safety." (Defs. 56.1 Response ¶ 40.)

III. Standard of Review

Rule 56(a) of the Federal Rules of Civil Procedure provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] court must resolve all ambiguities and draw all reasonable inferences against the moving party." Cowan v. Ernest Codelia, P.C., 149 F. Supp. 2d 67, 71 (S.D.N.Y. 2001) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

"'The trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.'" Id. at 70–71 (quoting Gallo v. Prudential Residential Servs. Ltd. P'Ship, 22 F.3d 1219, 1224 (2d Cir. 1994)). "[I]f there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Id. at 71.

The DPPA "carves out both mandatory and permissive exceptions to the general prohibition[]" against obtaining and disclosing personal information from motor vehicle records. Roth v. Guzman, 650 F.3d 603, 606 (6th Cir. 2011). Personal information shall be disclosed for, among other things, "use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, [and] motor vehicle product alterations, recalls, or advisories" to carry out the purposes of the Automobile Information Disclosure Act, 15 U.S.C. §§ 1231 et seq., and the Clean Air Act, 42 U.S.C. §§ 7401 et seq. See 18 U.S.C. § 2721(a). Further, persons may obtain or disclose such information "for any of the permissible uses or purposes listed in § 2721(b)(1)–(14)." Roth, 650 F.3d at 606.[7]

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[7] The fourteen permissible uses under the DPPA are:

> (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
>
> (2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.
>
> (3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

IV. Analysis

(1) DPPA Claim against Leifer

Leifer argues that he used Gordon's information for the permissible purpose of "obtain[ing] Plaintiff's insurance information" and/or "perform[ing] [an] investigation in

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

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

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

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

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

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

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

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

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

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

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

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

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

18 U.S.C. § 2721(b).

anticipation of litigation" presumably in relation to the alleged October 10, 2009 car accident. (Defs. Mem. at 1.) Gordon responds that Leifer "cannot credibly claim" that his permissible purpose was to obtain Gordon's insurance information or to conduct an investigation in anticipation of litigation because, among other reasons, "[n]o such collision took place." (Pl. Mem. at 4, 21.)

The DPPA provides in relevant part:

> 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).[8] As noted at supra Section III, Section 2721(b) enumerates fourteen permissible uses for obtaining or disclosing personal information. See 18 U.S.C. §§ 2721(b)(1)–(14); Reno v. Condon, 528 U.S. 141, 145 & n.1 (2000). The permissible uses relevant here are:

> (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.
> . . .
> (6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

18 U.S.C. §§ 2721(b)(4), (6).[9]

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[8] The DPPA also provides for criminal enforcement: "It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under [§] 2721(b)." 18 U.S.C. § 2722.

[9] One court has held that, under § 2721(b)(4), an "investigation in anticipation of litigation" occurs where "(1) [the user] undertook an actual investigation; (2) at the time of the investigation, litigation appeared likely; and (3) the protected information obtained during the

Summary judgment is not available (to either Leifer or Gordon) on Gordon's DPPA claims against Leifer. Material questions of fact appear to exist regarding Leifer's obtainment and use of Gordon's DMV information because Gordon and Leifer sharply dispute, among other things, whether any car accident ever occurred on October 10, 2009.[10] These questions must be resolved by a jury. See Cowan, 149 F. Supp. 2d at 79–80.

Leifer contends that "contact occurred between some portion of [Gordon's] London Cab and Leifer's vehicle[]" on the night of October 10, 2009, which justified his efforts to obtain information "to submit an insurance claim" and "to perform [an] investigation in anticipation of litigation." (Pl. 56.1 Response ¶¶ 17, 21; Defs. Reply at 5.) Gordon asserts that Harris "never got into an accident or a collision" with Leifer, which is allegedly corroborated by Leifer's acknowledgement "that his SUV was not damaged" and by the alleged facts that Leifer never filed an insurance claim or a police report. (Pl. 56.1 Response ¶ 17; Pl. Mem. at 19; Defs. 56.1 Response ¶¶ 14, 16.). Leifer contends that, after placing the October 12 and October 13, 2009 phone calls, his friend observed the damage to Leifer's vehicle and repaired it, obviating the "need for an insurance claim." (Pl. 56.1 Response ¶¶ 47, 48.)

(2) DPPA Claim against the Reseller Defendants

The Reseller Defendants argue that they cannot be held liable under the DPPA because they disclosed DMV information (only) for a permissible use, namely, for use in insurance

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investigation would be of 'use' in the litigation." Pichler v. UNITE, 339 F. Supp. 2d 665, 668 (E.D. Pa. 2004). The parties contest whether Leifer could qualify as "a self-insured entity" under § 2721(b)(6). (See Pl. Mem. at 19–20; Defs. Mem. at 5.) Summary judgment as to that legal question is denied without prejudice, and the parties may raise the issue in a (subsequent) motion in limine just before trial.

[10] As noted supra n.4, Leifer's counsel stated at oral argument, "Mr. Leifer indicated his purpose in contacting plaintiff was to get insurance information so that he could either resolve a claim or commence a claim. There is no other evidence that [Leifer] had any other basis whatsoever." (Oral Arg. Tr. at 15:10–14.)

claims investigation and private investigation. They argue that they relied upon Leifer's assurance (i.e., his written certification) that he had a "permissible purpose" (and only a permissible purpose) in seeking DMV information from them. (Defs. Mem. at 7.)[11] **Indeed, no party contends that the Reseller Defendants had an impermissible use when they provided DMV information to Leifer.** (See Oral Arg. Tr. at 10:7–12 (THE COURT: "You can't possibly imagine that these resellers had the same impermissible purpose that Leifer [allegedly] had." PL. COUNSEL: "Did they know Mr. Leifer was going to pick up the phone and use this information to contact Mr. Gordon's family and associates and harass them, no, I don't think they did.").)

Gordon contends that Leifer's stated and certified permissible use was contrary to his presumably intended impermissible use but also that the Reseller Defendants should be "strictly liable" for Leifer's impermissible use, if any. (See Oral Arg. Tr. at 5:11–14 (THE COURT: "You are saying it's a strict liability statute." PL. COUNSEL: "I think that's how the statute reads, that's correct.").) The Reseller Defendants contend persuasively that, under Gordon's interpretation of the DPPA, a reseller would be (strictly) liable for any "alleged misinformation by the end user," or even for an end user's subsequent change of mind from a permissible use to an impermissible use. (Defs. Reply at 7; see Oral Arg. Tr. at 15:21–16:1.) Gordon argues that the "[t]he DPPA authorizes the resale of information only if there is an actual, not just a stated, permitted use," and that the DPPA does not contain "an intent or knowledge requirement." (Pl. Mem. at 14, 16–18.) Gordon argues further that, if "Leifer lacked a permissible use," the Reseller Defendants also lacked a permissible use, notwithstanding Leifer's certification of a

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[11] That is, Arcanum and Cohn relied on Leifer's representation and certification that he sought the information for a permissible use, and Softech and Rodriguez relied on Arcanum and Cohn's representation and certification that Leifer had represented and certified a permissible use. See supra Section II.

permissible use. (Pl. Mem. at 21; see Oral Arg. Tr. at 9:25–10:2 (THE COURT: "You are saying that the purpose of Leifer is the purpose of the reseller." PL. COUNSEL: "True.").)

Whether a reseller may be liable under the DPPA for an alleged but undisclosed impermissible use of driver information by an end user where a permissible use has been asserted and certified by the end user appears to be a question of first impression in this Circuit. The United States Court of Appeals for the Sixth Circuit, however, addressed a similar issue in Roth v. Guzman, 650 F.3d 603 (6th Cir. 2011), and ruled in favor of the defendants by finding them not liable for the undisclosed impermissible use of the requester.[12] In Roth, a class of licensed drivers sued state officials of the Ohio Department of Public Safety and the Ohio Bureau of Motor Vehicles, alleging that the defendants made "bulk disclosures of personal information from motor vehicle records" to a reseller who had made express written representations that it had a permissible use (but presumably had a hidden or undisclosed impermissible use). Id. at 608–10 (internal quotation marks omitted). The Roth court reversed the lower court's denial of the defendant's motion to dismiss and held that the defendant state officials could not be held liable "for a knowing disclosure made for a permissible purpose any time the purpose was misrepresented or the information was later misused or improperly redisclosed by the requester or any other entity." Id. at 611.

Although Roth also addressed the issue of qualified immunity of state officials, its conclusion that the DPPA is not "essentially a strict liability statute" is relevant and persuasive here. Id. The Sixth Circuit reasoned that "[i]f no distinction is made between the [permissible] use for which the defendants disclosed the information, and the undisclosed use for which it was

[12] Neither party cited Roth in its briefs. (See Oral Arg. Tr. at 2:9–12 (THE COURT: "[D]id you mention the Roth case." PL. COUNSEL: "I don't believe we mentioned it."); 13:2–4 (THE COURT: "Did you cite the Roth case yourselves." DEFS. COUNSEL: "I don't think we did.").)

obtained, subsequently misused or impermissibly redisclosed by the recipient, the DPPA becomes essentially a strict liability statute." Id. In reaching its conclusion, the Sixth Circuit distinguished Pichler v. UNITE, 542 F.3d 380 (3d Cir. 2008), and Rios v. Direct Mail Express, Inc., 435 F. Supp. 2d 1199 (S.D. Fla. 2006), where the courts held that the DPPA "does not require proof that a defendant had any appreciation that its conduct was impermissible." Pichler, 542 F.3d at 396; see Rios, 435 F. Supp. 2d at 1204–05. The Sixth Circuit found that Pichler and Rios did not address the question presented because

> [i]t is one thing to say that a defendant's ignorance that his own conduct violates the law is not a defense, but it is another, we think, to conclude that a defendant is liable for a knowing disclosure made for a permissible purpose any time the purpose was misrepresented or the information was later misused or improperly redisclosed by the requester or any other entity.

Roth, 650 F.3d at 611.[13]

This Court agrees with the Sixth Circuit's reasoning and finds that because the Reseller Defendants knowingly disclosed personal information from a motor vehicle record for a (certified) permissible use (i.e., based upon the representation and certification that the information was requested for a permissible use), such Defendants are not strictly liable if the use turns out to have been misrepresented or the information was later misused or improperly redisclosed by the end user, i.e., in this case, Leifer. See id.; 18 U.S.C. § 2724(a). Here, the Reseller Defendants had a permissible use under the DPPA for obtaining and disclosing Gordon's DMV information based upon Leifer's written representation and certification that his use was permissible (i.e., his selection of "Insurance Other" as his permissible use on the

[13] This Court also believes that Pichler and Rios are inapposite because they were not suits seeking to impose liability against resellers for the impermissible use of an end user but, instead, were suits against end users who claimed that they did not know that their use was impermissible. See Pichler, 542 F.3d at 383–84; Rios, 435 F. Supp. 2d at 1201.

Docusearch.com website) after Leifer was warned about the DPPA's permissible use restrictions. (Pl. 56.1 Response ¶¶ 84, 87–88; Zibas Decl. Ex. S); see Roth, 650 F.3d at 611. Where Congress sought to strike "a critical balance between the legitimate governmental and business needs for this information, and the fundamental right of our people to privacy and safety," 139 Cong. Rec. S15763 (1993), the DPPA cannot, on the facts presented here, be considered "essentially a strict liability statute," Roth, 650 F.3d at 611.

Accordingly, the Reseller Defendants' motion for summary judgment against Gordon is granted.

(3) Prima Facie Tort

Leifer argues that "Plaintiff has failed to allege or prove that any phone calls by defendant Leifer were made with malevolent intent." (Defs. Mem. at 17.) Gordon responds that "there is ample evidence to demonstrate that [Leifer] intended to cause Gordon emotional harm." (Pl. Mem. at 25.)

In New York, the elements of a prima facie tort claim are "(1) intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; (4) by an act that would otherwise be lawful." Mugavero v. Arms Acres, Inc., No. 03 Civ. 5724, 2009 WL 890063, at *25 (S.D.N.Y. Mar. 31, 2009) (quoting Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 571 (2d Cir. 1990)). The defendant's intent must be "disinterested malevolence." Twin Labs., 900 F.2d at 571. "[S]pecial damages must be alleged with sufficient particularity to identify actual losses . . . . [R]ound sums without any attempt at itemization are insufficient." Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc., 361 F. Supp. 2d 283, 306 (S.D.N.Y. 2005).

Leifer is not entitled to summary judgment against Gordon. Material questions of fact exist as to, among other things, whether Leifer's motivation in calling Gordon's family and associates on October 12 and 13, 2009 was disinterested malevolence (elements one and three). See Mugavero, 2009 WL 890063, at *26. Leifer asserts that he called Gordon's phone numbers to "obtain information to submit an insurance claim." (Pl. 56.1 Response ¶ 21.) Gordon counters that there was never "an accident or collision," pointing out, as noted, that "Leifer never filed an insurance claim" and "never filed a police report." (Pl. 56.1 Response ¶¶ 16–17; Defs. 56.1 Response ¶¶ 14, 16.) Whether Leifer's motivation was intentionally to inflict harm through allegedly threatening statements over the phone, such as "Gordon [was] involved in a sexual assault" and "when stupid people hire stupid people, that's when people get hurt," should be determined by a jury. (Braha Tr. at 32:12–33:23; Gordon Tr. at 62:5–13); see Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490, 497 (2d Cir. 1995); Sadowy v. Sony Corp. of Am., 496 F. Supp. 1071, 1075 (S.D.N.Y. 1980).

As to the second element, Leifer argues that "Plaintiff has failed to sufficiently plead" special damages. (Defs. Mem. at 16.) Gordon counters by submitting an (unrebutted) accounting, dated April 19, 2009, indicating that Gordon's "economic damages are $2,214,627." (See Sher Decl., Ex. L.) The accounting contains schedules itemizing Gordon's past and projected security costs. (See id. at 1.) While the ultimate amount of damages, if any, will be an issue for trial, Gordon has offered sufficiently particularized evidence of special damages to survive summary judgment. See Mugavero, 2009 WL 890063, at *26; Gay v. Affourtit, 76 F. Supp. 2d 517, 519 (S.D.N.Y. 1999).

As to the fourth element, Leifer's act of making phone calls may otherwise have been lawful. See Mugavero, 2009 WL 890063, at *26 & n.24.

(4) Intentional Infliction of Emotional Distress

Leifer argues that Gordon "has not disclosed any objective evidence from any medical provider to substantiate his unfounded allegations of emotional distress." (Defs. Reply at 10.) Gordon contends that he has suffered "significant mental anguish," which "has manifested itself physically by causing [him] to suffer from severe bouts of insomnia." (Declaration of Erik H. Gordon, dated Apr. 19, 2011 ("Gordon Decl."), ¶¶ 7–8.)

Under New York law, "a claim of intentional infliction of emotional distress requires: (1) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." Conboy v. AT&T Corp., 241 F.3d 242, 258 (2d Cir. 2001) (internal quotation marks omitted). "Courts routinely grant summary judgment against plaintiffs where they have failed to present medical evidence demonstrating severe emotional injury." Biggs v. N.Y.C., No. 08 Civ. 8123, 2010 WL 4628360, at *9 (S.D.N.Y. Nov. 16, 2010).

Gordon fails to offer objective medical evidence demonstrating severe emotional distress. See Romano v. SLS Residential, Inc., --- F.Supp.2d ---, 2011 WL 2671526, at *11 (S.D.N.Y. June 22, 2011). While Gordon claims that he "visited a physician" who "prescribed Xanax, Temezapam and Sonata," and that he "contracted an upper respiratory infection for which [he] was prescribed Augmentin and a steroid" (Gordon Decl. ¶ 8.), he offers no medical reports, doctors' affidavit(s), or any other medical evidence to support his claim. See, e.g., Lenhoff v. Getty, No. 97 Civ. 9458, 2000 WL 977900, at *9 (S.D.N.Y. July 17, 2000) (granting summary judgment where plaintiff's emotional distress claim was not substantiated by a medical expert); Dankner v. Steefel, 47 A.D.3d 867, 868 (N.Y. App. Div. 2008). Gordon's "mere recitation of

speculative claims" is insufficient to show severe emotional distress. Walentas v. Johnes, 257 A.D.2d 352, 353 (N.Y. App. Div. 1999). The Court need not address the remaining elements of this claim. See Biggs, 2010 WL 4628360, at *9.

(5) Defendants' Cross-Claims

Because the Reseller Defendants are not liable under the DPPA, the Reseller Defendants' cross-claims against Leifer for common law indemnification, contractual indemnification, and contribution are dismissed sua sponte as moot. See Foremost Guar. Corp. v. Public Equities Corp., No. 86 Civ. 6421, 1989 WL 82412, at *1 (S.D.N.Y. July 21, 1989).

Leifer's cross-claims against the Reseller Defendants for common law indemnification and contribution are also dismissed sua sponte. In New York, a claim for common law indemnification requires that "(1) the party seeking indemnity and the party from whom indemnity is sought have breached a duty to a third person, and (2) some duty to indemnify exists between them." Perkins Eastman Architects, P.C. v. Thor Engineers, P.A., 769 F. Supp. 2d 322, 329 (S.D.N.Y. 2011). "[T]he critical requirement for a contribution claim under New York law is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." Id. at 327.

Leifer does not allege a single fact in support of his cross-claims against the Reseller Defendants in the two paragraphs that constitute the entirety of his cross-claims. (See Leifer's Answer ¶¶ 1–2.) Accordingly, Leifer fails to show the breach of any duty by the Reseller Defendants necessary to sustain a claim for either common law indemnification or contribution under New York law. See Perkins, 769 F. Supp. 2d at 329.

V. Conclusion & Order

For the foregoing reasons, Defendants' motion for summary judgment [#77] is granted in part and denied in part as follows:

(i) Summary judgment as to Leifer's liability to Gordon under the DPPA is denied;

(ii) Summary judgment as to the Reseller Defendants' liability under the DPPA is granted in favor of the Reseller Defendants;

(iii) Summary judgment as to Gordon's prima facie tort claim against Leifer is denied; and

(iv) Summary judgment as to Gordon's intentional infliction of emotional distress claim against Leifer is granted in favor of Leifer;

Plaintiff's cross-motion for summary judgment on his DPPA claims against Leifer and the Reseller Defendants [#83] is denied; the Reseller Defendants' cross-claims against Leifer [#63, #64] are dismissed; and Leifer's cross-claims against the Reseller Defendants [#66] are dismissed.

The parties are directed to appear for a pre-trial conference before the Court on December 14, 2011 at 9:00 a.m. The parties are directed to engage in good-faith settlement discussions prior to the conference.

Dated: New York, New York
November 30, 2011

RMB

RICHARD M. BERMAN, U.S.D.J.

SHER LLP
ATTORNEYS & COUNSELORS AT LAW

MEMO ENDORSED

December 8, 2011

BY HAND DELIVERY

Hon. Richard M. Berman
United States District Judge
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: ***Gordon v. Softech International, Inc., et al.***
(Case No. 10 Civ. 5162 (RMB))

Dear Judge Berman:

We respectfully submit this letter on behalf of Plaintiff Erik Gordon, pursuant to Rule 2(A) of the Court's Individual Practices to request a pre-motion conference. We seek permission to move for reconsideration of the Court's November 30, 2011 Decision and Order (the "Decision and Order"), which, in pertinent part, granted summary judgment in favor of Defendants Softech International, Inc. ("Softech"), Reid Rodriguez, Arcanum Investigations, Inc. ("Arcanum") and Dan Cohn (collectively the "Reseller Defendants"). In the event the Court upholds this portion of the Decision and Order, we also seek an order pursuant to Fed. R. Civ. P. 54(b) directing entry of final judgment as to the Reseller Defendants so that Plaintiff may appeal to the Second Circuit.

1. Motion for Reconsideration

Plaintiff seeks permission to move for reconsideration because, even assuming the DPPA does not impose strict liability, a genuine issue of material fact exists as to whether the Reseller Defendants' conduct in relying on the end-user's representations that he sought disclosure of Plaintiff's personal information for a permissible use constitutes a willful or reckless violation of the Driver's Privacy Protection Act of 1994 ("DPPA").

In its Decision and Order, the Court held that the Reseller Defendants "had a permissible use under the DPPA . . . based on [the end-user's] written representation and certification that his use was permissible . . . after [the end-user] was warned about the DPPA's permissible use restrictions." (Decision and Order at 12.) The Court further

held that, "the DPPA cannot, on the facts presented here, be considered essentially a strict liability statute." *Id.*

The Court did not, however, address the question of whether a genuine issue of material fact exists applying the DPPA's recklessness standard. *See* 18 U.S.C. § 2724(b)(2) (specifying the availability of punitive damages "upon proof of willful or reckless disregard of the law"); *Cowan v. Codelia, P.C.*, No. 98 Civ. 5548 (JGK), 1999 WL 1029729, at *1 (S.D.N.Y. Nov. 10, 1999) ("The DPPA . . . permits the recovery of actual damages and, upon proof of willful or reckless disregard of the law, the awarding of punitive damages.").

Drawing all inferences in Plaintiff's favor, a genuine issue of material fact exists as to whether the Reseller Defendants' recklessly disregarded the DPPA by failing to conduct a meaningful inquiry into the end-user's purpose for obtaining Plaintiff's personal information. It is undisputed that Arcanum's website specifically instructed the end-user that he could only access vehicle registration information for a permitted purpose, stated that the end-user was "required to select a DPPA Permissible Purpose," and provided a pull down menu of options that included only permissible purposes. (*See* Decision and Order at 7.) Inasmuch as the Arcanum website provided only conforming explanations for seeking drivers' information and precluded the end-user from providing information that could indicate an impermissible use, a rational trier of fact could infer either: (1) that the website was specifically designed to ensure that all end-users indicate a permissible use, regardless of their true intent, which would constitute willful disregard of the law; or (2) that the website's design was obviously inadequate to ensure against the disclosure of personal information for impermissible uses, in reckless disregard of the DPPA. *See Cowan*, 1999 WL 1029729, at *7-8 (noting that "recklessness can . . . be understood as a variant of negligence"[1] and emphasizing that liability may be imposed under the DPPA "even though [the defendants] neither intend to harm [the plaintiff] nor intended to violate the DPPA").

It is also undisputed that the end-user obtained the Plaintiff's personal information using a false name that did not match the credit card number that he provided. Indeed, it is undisputed that Arcanum failed to detect that the end-user provided a false name on 38 prior occasions and that the end-user's purported employer, "Bodyguards.com," did not exist. And there is no evidence in the record of any effort by the Reseller Defendants to ensure that they possessed the true name of the reseller, despite their obligation under the DPPA to "keep for a period of 5 years records identifying each person or entity that receives information." 18 U.S.C. § 2721(c). An inference of recklessness based on these facts would be entirely consistent with the principle that a reseller may "disclose[] information *only* to a user who provides an identity that [the reseller] takes *reasonable*

[1] Such an inference would also be consistent with the negligence standard advocated by counsel for Defendant Leifer at oral argument. We note that counsel for the Reseller Defendants did not express any disagreement with this position.

steps to verify." *Welch v. Jones*, 770 F. Supp. 2d 1253, 1260 (N.D. Fl. 2011) (emphasis added).

Applying the DPPA's "willful or reckless disregard of the law" standard, the Reseller Defendants would not automatically escape liability based on the end-user's certification of compliance with the DPPA. Nor would Softech escape liability based on Arcanum's contractual agreement to require end-users to agree only to use information for a permissible purpose. To the contrary, applying the "willful or reckless disregard of the law" standard, a rational trier of fact could infer that these agreements reflect either an improper attempt by the Reseller Defendants to contractually relieve themselves of their obligation to comply with the DPPA or a reckless failure to do so.

In addition to the foregoing reasons, we urge the Court to reconsider its grant of summary judgment in favor of the Reseller Defendants because relieving the Reseller Defendants of liability on these facts would effectively read into the DPPA a "safe harbor" for resellers who frustrate the purpose of the statute, whether willfully or recklessly, by setting up websites that prevent the end-user from submitting accurate information about the purpose for which disclosure of personal information is sought.

2. Motion for Entry of Final Judgment Pursuant to Rule 54(b)

In the event the Court declines to reconsider the Decision and Order or, upon reconsideration, upholds its decision to grant summary judgment to the Reseller Defendants, Plaintiff respectfully requests an order pursuant to Fed. R. Civ. P. 54(b) directing entry of final judgment as to the Reseller Defendants so that Plaintiff may appeal this issue of first impression to the Second Circuit. When an action involves multiple parties, Rule 54(b) allows a court to direct entry of a final judgment as to one or more parties if the court "expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b); *see also Backus Plywood Corp. v. Commercial Decal, Inc.*, 317 F.2d 339, 341 (2d Cir. 1963) ("As multiple parties were here involved, and the judgment appealed from wholly terminated appellant's action against one of them . . . that much of the judgment is properly before us."). In this case, the Decision and Order wholly terminated Plaintiff's claims against the Reseller Defendants, and there is no just reason to delay a final judgment against them.

Respectfully submitted,

Justin M. Sher

cc: Jura Zibas, Esq.
Greg Saracino, Esq.
Vincent Chirico, Esq.

Defs are required to respond with a brief letter by 12/15/11 @ NOON.

SO ORDERED:
Date: 12/8/11
Richard M. Berman

3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIK H. GORDON,

Plaintiff,

-against-

SOFTECH INTERNATIONAL, INC., et al.,

Defendants.

10 Civ. 5162 (RMB)

ADMINISTRATIVE ORDER

As indicated at today's conference, the trial between Plaintiff Erik H. Gordon ("Gordon") and Defendant Aron Leifer ("Leifer") will be held on January 30, 2012 at 9:00 a.m. Pretrial submissions are due January 6, 2012, and any replies are due January 13, 2012. A final pretrial conference is scheduled for January 17, 2012 at 2:30 p.m.

As to Gordon's motion for reconsideration, the Court will take it under advisement (and may solicit more complete memoranda of law from the parties). In any event, it is appropriate to conduct the trial against Lefier first, as Gordon's claim against the other defendants is derivative and dependent upon the outcome of that trial.

Dated: New York, New York
December 14, 2011

RMB

RICHARD M. BERMAN, U.S.D.J.

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Jura C. Zibas
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December 14, 2011

VIA HAND DELIVERY
Hon. Richard M. Berman, U.S.D.J.
United States District Court
Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street, Courtroom 21B
New York, NY 10007

MEMO ENDORSED

RE: Gordon v. Softech International, Inc., et al.
Case No.: 10 Civ. 5162 (RMB)

Dear Judge Berman:

Pursuant to Your Honor's Order dated December 8, 2011, this letter is submitted on behalf of Softech International, Inc., Reid Rodriguez, Arcanum Investigations, Inc. and Dan Cohn (collectively referred to as "Reseller Defendants"), in response to Plaintiff's letter dated December 8, 2011.

Reseller Defendants respectfully request that Plaintiff's request to file a Motion for Reconsideration be denied. The Court clearly decided the motion based upon a review of all materials facts contained in the record submitted to the Court. Plaintiff now claims that the Court failed to address the question of whether a material fact exists in applying the Driver's Privacy Protection Act ("DPPA") recklessness standard which is not true. Plaintiff also attempts to embellish the record with additional facts raised in his letter as to Arcanum Investigations, Inc.

Based on a review of the record, the Court decided that there was a permissible use as to the Reseller Defendants (Decision and Order at 16) and there was no violation or disregard of the DPPA as to the Reseller Defendants. Since the Court decided that there was no violation or disregard of the DPPA, there can be no further determination of willful or reckless conduct on the part of the Reseller Defendants. The "willful or reckless disregard of the law" standard referenced by Plaintiff in his letter cannot be applied separately from the disregard of the law standard. The Reseller Defendants did not "disregard" the DPPA, so it is not logical to further apply a higher standard of "willful or reckless" conduct so the Plaintiff can attempt to re-coup punitive damages from parties who should not be in this lawsuit. All arguments raised in Plaintiff's letter were previously argued in the brief, oral argument and decided. Thus, based on

the record, the Court has considered all issues raised in Plaintiff's letter and the request for a motion for reconsideration should be denied.

Pursuant to Rule 54(b), the Court may direct entry of a final judgment as to the Reseller Defendants dismissing the action.

Very truly yours,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Jura C. Zibas

cc: Greg Saracino, Esq.
Justin Sher, Esq.
Vincent Chirico, Esq.

Docket + File.

SO ORDERED:
Date: 12/14/2011 Richard M. Berman
Richard M. Berman, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
40 CENTRE STREET
NEW YORK, NEW YORK 10007
(212) 805-6715

Chambers of
RICHARD M. BERMAN
UNITED STATES DISTRICT JUDGE

FAX COVER PAGE

Date: 1/17/2012

TO: Justin M. Sher

FAX: (212) 202-4156

FROM: Honorable Richard M. Berman

PAGES (incl. cover): 2

COMMENTS:

Counsel receiving this documentation is directed to transmit a copy to all other parties in these proceedings and to retain proof of such transmittal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIK H. GORDON,

Plaintiff,

-against-

SOFTECH INTERNATIONAL, INC., et al.,

Defendants.

10 Civ. 5162 (RMB)

ORDER OF DISCONTINUANCE

Based upon the parties' letter, dated January 17, 2012, stating that "Plaintiff and Defendant Aron Leifer have reached a settlement agreement," it is hereby

ORDERED that the above-entitled action be, and the same hereby is, discontinued.

Dated: New York, New York
January 17, 2012

RICHARD M. BERMAN, U.S.D.J.

SHER TREMONTE LLP

January 17, 2012

BY FAX (212.805.6717)

Hon. Richard M. Berman
United States District Judge
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: ***Gordon v. Softech International, Inc., et al.***
(Case No. 10 Civ. 5162 (RMB))

Dear Judge Berman:

I write to respectfully advise the Court that Plaintiff and Defendant Aron Leifer have reached a settlement agreement in the above-referenced matter. We respectfully request that the pretrial conference scheduled for this afternoon at 2:30 p.m. be adjourned *sine die*.

We expect to submit a stipulation and proposed order of dismissal by the end of the week.

Respectfully submitted,

Justin M. Sher

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIK H. GORDON, Plaintiff, -against- SOFTECH INTERNATIONAL, INC., et al., Defendants.	10 Civ. 5162 (RMB) **DECISION & ORDER**

Having reviewed the record herein, including Plaintiff counsel's letter, dated February 14, 2012, asking the Court to endorse a "stipulation and proposed order" which incorporates the parties' Settlement Agreement and General Release and seeking clarification as to "whether or not [Plaintiff's] motion for reconsideration[, filed December 8, 2011,] is still under advisement," the Court directs as follows:

1) The stipulation and proposed order enclosed with Plaintiff's February 14, 2012 letter are not being "so ordered" by the Court—and need not be. This entire matter was discontinued by the Court by order, dated January 17, 2012, based upon the parties' notification to the Court that the matter had been settled. See Order of Discontinuance, dated Jan. 17, 2012.

2) Plaintiff's motion for reconsideration has similarly been discontinued by the Court as it was rendered moot when the parties settled and the Court discontinued the case on January 17, 2012. See id. Assuming arguendo that the motion for reconsideration had not been rendered moot, the motion would have been denied for substantially the same reasons set forth in the Court's Decision & Order, dated November 30, 2011. See Decision & Order, dated Nov. 30, 2011. Moreover, it would be highly unusual and irregular for the Court to review a stipulated set of facts—well after the fact—as is requested in Plaintiff's February 14, 2012 letter and as set

forth in the affidavit of Aron Leifer, dated February 14, 2012, in relation to a motion filed over two months earlier. See Andresakis v. Capital One Bank (USA) N.A., No. 09 Civ. 8411, 2011 WL 1097413, at *2 n.2 (S.D.N.Y. Mar. 23, 2011).

Dated: New York, New York
February 15, 2012

RICHARD M. BERMAN, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIK H. GORDON,

Plaintiff,

-against-

SOFTECH INTERNATIONAL, INC., et al.,

Defendants.

Case No. 10 Civ. 5162 (RMB)

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Erik H. Gordon hereby appeals to the United States Court of Appeals for the Second Circuit from (1) the Decision and Order dated November 30, 2011 granting summary judgment in favor of Defendants Softech International, Inc., Reid Rodriguez, Arcanum Investigations, Inc., d/b/a Docusearch.com, and Dan Cohn, (2) the Order of Discontinuance dated January 17, 2012, which purported to discontinue the action as to all parties, and (3) the final Decision and Order dated February 15, 2012, through which the Court denied Plaintiff's Motion for Reconsideration.

Dated: New York, New York
February 16, 2012

SHER TREMONTE LLP

By: /s/ Justin M. Sher
Justin M. Sher
Michael Tremonte
Valerie A. Gotlib
41 Madison Avenue, 41st Floor
New York, New York 10010
Tel: 212.202.2600
E-mail: jsher@shertremonte.com

Attorneys for Plaintiff Erik H. Gordon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIK H. GORDON,

Plaintiff,

-against-

SOFTECH INTERNATIONAL, INC., et al.,

Defendants.

10 Civ. 5162 (RMB)

DECISION & ORDER

Having reviewed the record herein, including, among other things, the Court's Decision & Order, dated November 30, 2011 ("2011 Decision & Order"), finding, among other things, that "because the Reseller Defendants knowingly disclosed personal information from a motor vehicle record for a (certified) permissible use . . . , such Defendants are not strictly liable if the use turns out to have been misrepresented or the information was later misused or improperly redisclosed by the end user, i.e., in this case, Leifer";[1] the parties' letter, dated January 17, 2012, stating that Plaintiff and Defendant Aron Leifer have reached a settlement; the Court's Order of Discontinuance, dated January 17, 2012, stating that it is "ordered that the above-entitled action be, and the same hereby is, discontinued"; Plaintiff's letter to the Court, dated February 14, 2012, asking the Court to "consider" the affidavit of Aron Leifer, dated February 14, 2012, if Plaintiff's motion for reconsideration of the 2011 Decision & Order, filed on December 8, 2011, was still pending; the Court's Decision & Order, dated February 15, 2012, holding that the parties'

[1] Plaintiff had argued on summary judgment that the Reseller Defendants should be held strictly liable for Leifer's actions. (See Hr'g Tr., dated Nov. 22, 2011, at 5:11–16 (THE COURT: "You are saying it's a strict liability statute[?]" PL. COUNSEL: "I think that's how the statute reads, that's correct." THE COURT: "I am trying to clarify that." PL. COUNSEL: "That's correct, judge."), 8:18–23 (PL. COUNSEL: "Let me try to explain our position. We do think strict liability applies." PL. COUNSEL: "What I am trying to say is Congress intended for strict liability to apply."), 11:8–10 (THE COURT: "What is it in your opinion[?]" PL. COUNSEL: "Our view is the most literal reading of the statute indicates it's strict liability.").)

"stipulation and proposed order" of settlement need not be "so ordered" by the Court because "[t]his entire matter was discontinued by the Court by order, dated January 17, 2012, based upon the parties' notification to the Court that the matter had been settled," and also stating that Plaintiff's motion for reconsideration had been "rendered moot when the parties settled and the Court discontinued the case on January 17, 2012," and that even "[a]ssuming arguendo that the motion for reconsideration had not been rendered moot . . . it would be highly unusual and irregular for the Court to review a stipulated set of facts—well after the fact—as is requested in Plaintiff's February 14, 2012 letter and as set forth in the affidavit of Aron Leifer, dated February 14, 2012, in relation to a motion filed [and decided] over two months earlier"; Plaintiff's notice of appeal, dated February 16, 2012; Defendants' letter, dated April 17, 2012, requesting the Court to "correct or amend the record" pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure to not include "a new set of facts set forth in the [February 14, 2012] affidavit of Aron Leifer"; Plaintiff's opposition letter, dated April 24, 2012, arguing that "the Court should supplement the record on appeal" to include Plaintiff's counsel's February 14 letter and the affidavit of Aron Leifer, dated February 14, 2012; and applicable legal authorities, the Court directs as follows:

1) The record need not be corrected or amended. See Robinson v. Sanctuary Record Grps., Ltd., 589 F. Supp. 2d 273, 275 (S.D.N.Y. 2008); Miro v. Plumbers & Pipefitters Nat'l Pension Fund, No. 01 Civ. 5196, 2002 WL 31357702, at *1–2 (S.D.N.Y. Oct. 17, 2002).

2) The record is clear that the 2011 Decision & Order was rendered on November 30, 2011 and that the case was discontinued on January 17, 2012. The subsequent affidavit of Aron Leifer, dated February 14, 2012, would alter and contradict the record which was before the Court at the time of the 2011 Decision & Order and did not (and could not) inform the

Court's decisions in this matter. (See Decision & Order, dated Nov. 30, 2011, at 11–12 ("Leifer argues that he used Gordon's information for the permissible purpose of 'obtain[ing] Plaintiff's insurance information' and/or 'perform[ing] [an] investigation in anticipation of litigation.'").) It is not and should not be part of the record on appeal. See Robinson, 589 F. Supp. 2d at 275 (where declarations "played no role in any consideration or ruling by this Court in this action").

3) Plaintiff's proposal that the Court consider information developed after the case had been decided and discontinued (see supra at p 1–2) was rejected by the Court in its ruling on February 15, 2012. It would have been "highly unusual and irregular for the Court to review a stipulated set of facts—well after the fact—as is requested in Plaintiff's February 14, 2012 letter and as set forth in the affidavit of Aron Leifer, dated February 14, 2012." (Decision & Order, dated Feb. 15, 2012, at 1–2); see also Miro, 2002 WL 31357702, at *1–2 (finding affidavit submitted "informal[ly]" after deadline by which any motion shall be fully briefed was not part of record on appeal).

Dated: New York, New York
April 26, 2012

RMB

RICHARD M. BERMAN, U.S.D.J.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 123. Prohibition on Release and Use of Certain Personal Information from State Motor Vehicle Records

18 U.S.C.A. § 2721

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

Effective: October 23, 2000
Currentness

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

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

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): *Provided,* That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

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

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

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

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

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

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

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

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

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

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

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

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

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

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

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

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

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

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

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

(e) Prohibition on conditions.--No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in 18 U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

Credits

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

Notes of Decisions (47)

18 U.S.C.A. § 2721, 18 USCA § 2721
Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 123. Prohibition on Release and Use of Certain Personal Information from State Motor Vehicle Records

18 U.S.C.A. § 2724

§ 2724. Civil action

Effective: September 13, 1997
Currentness

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

(b) **Remedies.**--The court may award--

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

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

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

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

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

Notes of Decisions (36)

18 U.S.C.A. § 2724, 18 USCA § 2724
Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

End of Document