RECORD NO. 10-2021

In The

United States Court Of Appeals

For The Fourth Circuit

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

v.

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

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

BRIEF OF APPELLEES

E. Bart Daniel
ATTORNEY AT LAW
Seven State Streeet
Charleston, SC 29401
(843) 722-2000

Counsel for all Appellees

John B. White, Jr.
HARRISON, WHITE, SMITH & COGGINS, P.C.
178 West Main Street
Post Office Box 3547
Spartanburg, SC 29304
(864) 585-5100

Counsel for all Appellees

Charles E. Hill
TURNER PADGET GRAHAM & LANEY, P.A.
1901 Main Street, Suite 1700
Post Office Box 1473
Columbia, SC 29202
(803) 227-4240

Counsel for Appellees Richard A. Harpootlian & Richard A. Harpootlian, P.A

Curtis W. Dowling
BARNES, ALFORD, STORK & JOHNSON, LLP
1613 Main Street
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111

Counsel for Appellees Michael Eugene Spears & Michael Spears, P.A.

M. Dawes Cooke, Jr.
Craig E. Burgess
John W. Fletcher
BARNWELL WHALEY PATTERSON & HELMS, LLC
Post Office Drawer H
Charleston, SC 29402
(843) 577-7700

Counsel for Appellees Gedney M. Howe, III & Gedney M. Howe, III, P.A.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 10-2021 Caption: Edward Maracich v. Michael Spears

Pursuant to FRAP 26.1 and Local Rule 26.1,

A. Camden Lewis (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

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I certify that on 9/21/2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Philip N. Elbert, David W. Bridgers, ElizabethTipping
Neal & Harwell
Suite 2000, 1 Nashville Place
150 4th Avenue, N.
Nashville, TN 37219

Gary L. Compton, Esquire
296 Daniel Morgan Avenue
Spartanburg, South Carolina 29306

s/ John B. White, Jr. (signature) 9/21/2010 (date)

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No. 10-2021 Caption: Edward Maracich v. Michael Spears

Pursuant to FRAP 26.1 and Local Rule 26.1,

Lewis & Babcock, LLP (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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No. 10-2021 Caption: Edward Maracich v. Michael Spears

Pursuant to FRAP 26.1 and Local Rule 26.1,

Richard A. Harpootlian, P.A. (name of party/amicus) who is appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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I certify that on Sept. 21, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Charles E. Hill (signature) Sept. 21, 2010 (date)

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Richard A. Harpootlian (name of party/amicus) who is appellee (appellant/appellee/amicus), makes the following disclosure:

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No. 10-2021 Caption: Edward Maracich et al. v. Michael Spears et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael Eugene Spears (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Gary L. Compton
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Spartanburg, SC 29306

s/Curtis W. Dowling
(signature)

9/22/2010
(date)

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No. 10-2021 Caption: Edward Maracich et al. v. Michael Spears et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael Spears, P.A. (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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No. 10-2021 Caption: Edward Maracich v. Michael Spears

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gedney M. Howe, III (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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No. 10-2021 Caption: Edward Maracich v. Michael Spears

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gedney M. Howe, III, P.A. who is Appellee, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Defendants-Appellees, Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP ("Attorneys"), disagree with the issues presented by Plaintiffs-Appellants, Edward F. Maracich, Martha L. Weeks, and John C. Tanner, individually and on behalf of all others similarly situated ("Plaintiffs"). Attorneys submit that this appeal raises the following issues:

> Did the trial court properly hold that — where the challenged conduct was proper under the litigation or state function exception — the Attorneys did not violate the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-2725, irrespective of whether the "bulk solicitation exception" was also satisfied?
>
> Suggested Answer: Yes.
>
> Did the trial court properly hold that the litigation exception applied, where the FOIA Requests and Letters reference that exception and were issued in connection with imminent or existing litigation, and where Plaintiffs proffer no contrary evidence?
>
> Suggested Answer: Yes.
>
> Did the trial court properly hold that the state function exception applied?
>
> Suggested Answer: Yes.

Was summary judgment proper where, despite their present claim to need discovery, Plaintiffs did not move to continue summary judgment and have not specifically identified the information they need to obtain?

Suggested Answer: Yes.

Was summary judgment proper where Plaintiffs proffered no evidence that the Attorneys knew that they acted for an impermissible purpose?

Suggested Answer: Yes.

Was summary judgment proper where Plaintiffs proffered no evidence of actual injury?

Suggested Answer: Yes.

Was summary judgment proper where Plaintiffs' construction of the DPPA invites constitutional problems?
Suggested Answer: Yes.

COUNTERSTATEMENT OF THE CASE

Plaintiffs commenced this action on June 23, 2009 asserting claims pursuant to the DPPA. (J.A. 9-10, 19-89). On August 3, 2009, the Attorneys filed a comprehensive Motion to Dismiss, with a lengthy memorandum in support. (J.A. 11-12, 90-162). On September 9, 2009, the District Court denied that Motion, finding that "[a]fter consideration of the evidence that is properly before this court in deciding a Rule 12(b)(6) motion, the factual allegations in the complaint are sufficient to satisfy the low bar for pleading a claim for relief." (J.A. 12, 163-74).

On September 18, 2009, the Attorneys filed their Answer and Counterclaims. (J.A. 12-13).

On January 11, 2010, the Attorneys filed a Motion to Stay arguing, inter alia, that discovery might result in the disclosure of protected work-product or privileged information. (J.A. 13). Thus, on January 25, 2010, the District Court stayed this action for six months. (J.A. 14). On February 17, 2010, Plaintiffs moved to lift the stay to request class certification. (Id.). On March 23, 2010, after a hearing on Plaintiffs' Motion to Modify the Stay, the District Court ordered:

> At the hearing, the Defendants stated that they could file a motion for summary judgment without the need for discovery. **The Plaintiffs further stated that they believed that they would not need any discovery to respond to the Defendants' Motion for Summary Judgment.**
>
> The parties are able to proceed with motions for summary judgment without the need for discovery. . . . [T]he stay is modified solely to allow the parties to file motions for summary judgment within 60 days of this order.

(J.A. 203-04) (emphasis added).

In May 2010, the parties filed cross summary judgment motions and supporting documents. (J.A. 14-16, 205-1402). On August 4, 2010, the District Court granted the Attorneys summary judgment. (J.A. 1466-92). This appeal followed.

COUNTERSTATEMENT OF FACTS

This putative class action stems from a pending South Carolina state court consumer protection lawsuit, Herron v. CarMax Auto Superstores, Inc. ("Herron").[1] The Attorneys filed Herron on behalf of South Carolina car buyers ("Consumers") who had been charged illegal fees against car dealerships ("Dealers") charging such fees, alleging violations of, inter alia, the Manufacturers, Distributors, and Dealers Act ("MDDA"), S.C. Code §§ 56-15-10, et seq. (J.A. at 553-573). The MDDA prohibits the Dealers from "any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." See S.C. Code § 56-15-40. The MDDA creates a private right of action for damages. To protect the public, the MDDA also includes a private attorney general provision: "[w]hen such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief." See S.C. Code § 56-15-110(2).

The Attorneys set forth the following indisputable chronology of Herron relevant to this lawsuit:

---

[1] Herron is pending before The Honorable Doyet A. Early. It has been consolidated with Adams v. Action Ford Mercury, Inc., Civil Action No. 2007-CP-02-1232 and West-Cox v. Cale Yarborough Honda, Civil Action No. 2007-CP-02-1154. Adams and West-Cox have been stayed pending the resolution of Herron.

June, 2006: Individual Consumers approached the Attorneys complaining of Dealers' unfair practices. Believing that those practices violated the MDDA, the Attorneys began an investigation, which revealed that the Automobile Dealers Association may have ratified the illegal conduct.

6/23/2006: As part of this investigation, a Freedom of Information Act ("FOIA") request[2] was submitted to the South Carolina DMV — copied to the DMV's Chief Legal Counsel — stating: "I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request." (J.A. at 39). This request sought information about sales in Spartanburg County from May 1-7, 2006. (Id.). The South Carolina DMV provided information responsive to this FOIA Request; in fact, the DMV provided information responsive to all of the FOIA Requests implicated in this case.

8/24/2006: A second FOIA Request was sent "in anticipation of litigation … pursuant to the exception in 18 U.S.C. § 2721(b)(4)" (J.A. at 44). This FOIA Request sought information about automobile sales in five South Carolina Counties from May 1-7, 2006. (Id.).

---

[2] The Attorneys shall collectively call the FOIA requests at issue the "FOIA Requests."

8/29/2006: The Attorneys commenced Herron with four individual Consumers as named Plaintiffs. Because their investigation supported that the deceptive practices were widespread, the Attorneys also asserted claims "for the benefit of all car buyers who[] paid 'administrative fees'" against 51 named Dealers. (J.A. 219). The Attorneys did so under the MDDA's authorization of a representative action "[w]hen such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court." See S.C. Code § 56-15-110(2).

September, 2006 through February 27, 2007: Dealers filed over 180 motions to dismiss in Herron arguing, in part, that the Consumers' claims should be dismissed for lack of standing. (See e.g., J.A. 574-76). One representative motion alleged that "Plaintiffs, none of whom allege that they purchased vehicles from Dick Dyer or Dick Smith, lack standing to bring this action against Dick Dyer and Dick Smith." (J.A. 575-76). With these motions, beginning in September 2006, the Dealers began a campaign of arguing that standing rules prohibited the four named Consumers from suing, as representatives, dealers with whom they did not personally deal.

10/26/2006: Another FOIA Request was sent seeking information concerning vehicle sales from May 1-14, 2006 by numerous specified Dealers (including Dick

Smith and Dick Dyer dealerships). (J.A. 47-57). This FOIA Request stated it was made " pursuant to . . . the exception in 18 U.S.C. § 2721(b)(4)" (J.A. at 47).

10/31/2006: The Attorneys amended the Herron Complaint to add four more Consumers as plaintiffs and over 250 Dealers as Defendants. (J.A. 247-320). The Attorneys could not have discovered the additional named plaintiff Consumers through the FOIA Requests, since they did not send the Letters at issue until well after this time. (J.A. at 66-67).

1/3/2007: More than five months after Herron was filed and after the filing of numerous Dealers' motions to dismiss for lack of standing — letters were sent to unnamed Consumers identified as a result of the FOIA Requests:

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

(J.A. 67 (emphasis omitted)).[3] In an effort to be prudently cautious, the words "ADVERTISING MATERIAL" and statements required by South Carolina Rule of Professional Conduct 7.3(d)(1)-(3) & (g) were included in the Letters. (Id.).

1/9/2007: The Letters were filed with the Office of Disciplinary Counsel, pursuant to Rule 7.3 of the Rules of Professional Conduct. (J.A. 66).

1/19/2007: Another FOIA Request was sent seeking information about sales by specified Dealers between June 1 and September 2, 2006. (J.A. 59-60).

1/22/2007: Another FOIA Request was sent seeking information about sales by seven Dealers between June 1 and September 2, 2006. (J.A. 62).

1/23/2007: Another FOIA Request was sent seeking information about sales by specified Dealers between September 1-14, 2005 and December 10-24, 2005. (J.A. 64).

1/23/2007: More nearly identical Letters were sent to Consumers. (J.A. 72).

2/12/2007: The Dealers filed a Joint Memorandum in Support of Motion to Dismiss, arguing that the named individual Consumers could not assert representative claims against Dealers with whom those individuals did not transact business. The Dealers argued that, for every named Dealer, there had to be a corresponding named Consumer who was a customer.

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[3] The letters at issue in this lawsuit allegedly sent by or on behalf of the Attorneys are collectively referred to as the "Letters."

3/1/2007: More nearly identical Letters were sent to Consumers. (J.A. 77).

3/5/2007: More nearly identical Letters were sent to Consumers. (J.A. 79).

3/7/2007: Gregory J. Studemeyer ("Studemeyer"), counsel for several Dealers (and one of the attorneys who filed this lawsuit for Plaintiffs), wrote to Defendant Lewis complaining about the FOIA Requests and Letters, citing the DPPA and S.C. Code § 30-2-50. (J.A. 86-87).

3/9/2007: The Consumers filed a Memorandum in Opposition to Motions to Dismiss. (J.A., 739-899). The Consumers argued, inter alia, that the MDDA's authorization of suit "for the benefit of the whole," conferred standing on the named plaintiff Consumers to sue **all** defendant Dealers on behalf of all Consumers. The Consumers argued that they were not required to name an individual customer corresponding to each named Dealer.

3/16/2007: Defendant Lewis responded to Studemeyer's 3/7/2007 letter stating, in part:

> [T]he Freedom of Information Action requests were made under the exception of 18 U.S.C. § 2721(b)(4). They were for the purpose of obtaining information in litigation and making sure the car buyers had been illegally charged as set forth in our Complaint. It is a lawyer's duty to make sure injured citizens understand their rights, and when they have been secretly cheated to bring that to their attention if at all possible.

(Id.).

4/4/2007: Judge Early held oral argument on the Dealers' motions to dismiss, wherein the Dealers and Consumers maintained their standing arguments. (J.A. 900-73).

5/8/2007: More nearly identical Letters were sent to Consumers. (J.A. 84).

6/1/2007: When a ruling did not immediately follow oral argument, the Attorneys deemed it prudent to take affirmative steps to protect the Consumers' rights. They determined to amend the Herron complaint to name an individual plaintiff Consumer corresponding to each defendant Dealer. This would effectively eliminate the standing issue. Thus, the Consumers moved to amend their Complaint to add 247 named plaintiffs, who purchased cars from each named Dealer and came forward because of the Letters. (J.A. 976-1029). Plaintiffs proffer no evidence contradicting the Attorneys' intentions in this regard.

7/25/2007: Several Dealers filed a memorandum opposing this Motion to Amend Complaint arguing, inter alia, that the Attorneys had violated the DPPA in contacting the newly-named plaintiff Consumers, (J.A. 1080-1244), even though the proposed amendment would eliminate the standing issues the Dealers raised.

7/27/2007: Studemeyer filed an opposition to the Consumers' motion to amend (although he previously argued that there should be a named Consumer for each named Dealer), raising allegations of DPPA violations. (J.A. 1245-91). He cited Wemhoff v. District of Columbia, 887 A.2d 1004 (D.C. Cir. 2005), which

Plaintiffs cite in this lawsuit, and attached copies of FOIA Requests and Letters. (J.A. 1252).

Between 4/4/2007 and 7/31/2007: In a telephone conference, Judge Early expressed ongoing standing concerns. (J.A. 1320).

7/31/2007: Judge Early denied the Dealers' Motions to Dismiss, ruling that the Consumers had standing and that the DPPA's private attorney general provision "creates a substantive right" so that a complaint thereunder did not need "to plead and prove the class certification requirements of S.C.R.C.P. Rule 23." (J.A. 1311). Judge Early endorsed the statutory right of the named Consumers to proceed "for the benefit of the whole" and held that the eight named Consumers could sue all of the named Dealers.

7/31/2007: Later that day, Judge Early heard arguments on the Consumers ' motion to amend. (J.A. 1314-26). Judge Early notified the parties of his denial of the Dealers' motions to dismiss, explaining that he "made a ruling on the relationship between the South Carolina Rules of Civil Procedure 23 and the Code § 56-15-110(2) and in that I found [Title] 56 created a substantive right and Rule 23 was not required to move forward in this case." (J.A. 1316). Judge Early noted that he had "raised consistently" concerns about standing and that those concerns were not a "secret." (J.A. 1320).

Despite the implications of their motions to dismiss, the Dealers opposed the Consumers' motion to amend arguing that the Attorneys improperly used FOIA Requests to "solicit" clients. (J.A. 1319-23). Judge Early summarily rejected those arguments as irrelevant and stated that his denial of the motions to dismiss foreclosed any DPPA issues. (Id.). At several points during Studemeyer's oral argument, Judge Early questioned why he was "continuing to talk about that" because "I have already ruled on that" and commenting "Mr. Studemeyer, you're losing me… I don't know where you're coming from on a motion to amend." (Id.).

Judge Early indicated he would deny the motion to amend and allow Herron to proceed with eight named Consumers against all defendant Dealers; in the interest of efficiency, he encouraged the Dealers to select a group of Dealers to conduct discovery. (J.A. 1326). In suggesting this, he indicated that Herron was "like a little class action … like it's a mass lawsuit." (Id).

8/21/2007: Judge Early denied the Consumers' motion to amend the complaint, concluding that S.C.R.C.P. Rule 15 "does not allow the existing plaintiffs to add new plaintiffs to the case in order to assert a claim against the defendant." (J.A. 1327).

1/31/2008: Judge Early reconsidered his denial of the Dealers' motions to dismiss. (J.A. 1329-42). He then held that each named Consumer had representative standing only to sue Dealers with whom he transacted business. He stated that a

Consumer could acquire standing to sue Dealers with which he did not transact any business "if that [Consumer], during discovery, obtains evidence sufficient to raise a genuine issue of material fact on whether certain [Dealers] engaged in a civil conspiracy with regard to charging a closing fee." Judge Early's decision reconfirmed that the named Consumers acted as representatives for unnamed Consumers; he specifically ruled that he did not change his prior ruling that § 56-15-110(2) created a substantive right to proceed in a representative capacity without the need for Rule 23 class certification. (J.A. 1332).

3/10/2008: Judge Early denied a Dealer's motion to compel arbitration, writing: "S.C. Code Ann. § 56-15-110(2) is designed so that one person can stop a car dealer[] from perpetrating wrongdoing against many car purchasers. This right to group injunctive relief was given by the General Assembly to prevent car dealerships from perpetrating mass wrongdoing on the public. This is a significant right … ." (J.A.1362-75).

10/12/2009: Judge Early reaffirmed that Herron is a "group representative action" in which unnamed Consumers have significant interests requiring protection. (J.A. 1352-61). Judge Early underscored that the Attorneys owed duties to unnamed Consumers:

> [T]his case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act. A "private attorneys general suit" is a term used by courts when statutes authorize both the Attorney General's office and private citizens, through civil actions, to

> enforce regulations. [Citations omitted.] . . . Plaintiffs' counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices. Class certification is not a prerequisite to action to a private attorneys general suit.

(J.A. at 1357).

1/11/2010: Judge Early ruled in part on the Consumers' declaratory judgment claims against Taylor Toyota, interpreting two terms in the Closing Fee statute (S.C. Code § 37-2-307). (J.A. 1388-1402). Judge Early's construction of these terms favored the Consumers' claims. The Dealers' appeal from this order was ultimately dismissed as interlocutory.

4/19/2010: The South Carolina Supreme Court affirmed Judge Early's denial of a motion to compel arbitration, holding that an arbitration provision banning representative actions violates public policy:

> Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our state's public policy and is void and unenforceable.

(J.A. 1376-87).

SUMMARY OF ARGUMENT

The crux of Plaintiffs' argument is that the conduct at issue was improper because it could be characterized as "solicitation." Plaintiffs argue that any conduct that might be described as "solicitation" is proper under the DPPA only if

the "bulk solicitation exception" is met — even if other exceptions (such as the litigation exception) have been satisfied. However, the DPPA's plain language makes clear that the exceptions are separate and independent. Where (as here) the litigation and/or state function exceptions have been satisfied, it is irrelevant whether the bulk solicitation exception is also satisfied. Plaintiffs' construction of the DPPA imposes obligations far exceeding its statutory language.

Plaintiffs cannot dispute that the FOIA Requests and Letters were issued in connection with litigation. To the contrary, the face of the documents plainly reveals that the requests were made in connection with the Herron lawsuit. Plaintiffs have not proffered any evidence to rebut this fact.

Moreover, the record shows that the Attorneys acted under the state function exception. The statute at issue in Herron placed the Attorneys and Consumers in the position of acting as private attorneys general. The Attorneys pursued Herron to protect the public's interests and for the benefit of the consuming public under South Carolina law.

In addition to these grounds, summary judgment was proper in this case for several reasons not reached by the District Court. First, Plaintiffs have proffered no evidence that the Attorneys knew their use of information violated the DPPA. Moreover, Plaintiffs have not proffered any evidence of actual harm from the

challenged conduct. Finally, this Court should reject Plaintiffs' construction of the DPPA because it creates unnecessary constitutional issues.

ARGUMENTS

A. Standard of Review

Summary judgment is proper where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the nonmovant bears the burden of proof on an issue, the movant "bears the initial responsibility of informing the district court of the basis for its motion" and pointing out "that there is an absence of evidence to support the nonmoving party's case." See id. at 323-25. Then, the nonmovant must make a showing sufficient to establish each element of the claim. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to summary judgment as a matter of law' because the nonmoving party has failed to make a showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323.

"When the moving party has carried its burden . . . its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (citations omitted). "[T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial . . . [and w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." See id. at 587 (citations omitted). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (citations omitted).

B. Standards Under the DPPA

The DPPA "regulates the disclosure of personal information contained in the records of state motor vehicle departments." See Reno v. Condon, 528 U.S. 141, 143 (2000). It is part of extensive crime control legislation that stemmed from testimony before Congress about violent criminals using DMV information to perpetrate crimes. See Camara v. Metro-North R.R. Co., 596 F. Supp. 2d 517, 524-25 (D. Conn. 2009).

The DPPA provides that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains" 18 U.S.C. § 2724(a). **Plaintiffs carry the burden** of proving that the DPPA does not permit the challenged conduct. See Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A., 525 F.3d 1107, 1111 (11th Cir. 2008); accord Bailey v. Daniels, 679 F. Supp. 2d 713, 720 (W.D. La. 2009) ("[T]he plaintiff must carry the burden of establishing that the defendant's intended use for the information was not permitted under the DPPA."); Briggman v. Ross, 2009 WL 3254459, at *2 (W.D. Va. Oct. 9, 2009) ("The permissible uses . . . are not affirmative defenses for which a defendant carries the burden of proof; instead, the plaintiff bears the burden of showing that the obtainment, disclosure, or use . . . was not for a purpose enumerated . . . ."); Shadwell v. Clark, 2009 WL 2970515, at *3 (W.D. Va. Sept. 16, 2009) (same).

A DMV may disclose personal information for several enumerated permissible purposes, including:

> Personal information . . . may be disclosed as follows:
>
> (1) For use by any . . . private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions. [the "state function exception"]. . .
>
> (4) **For use in connection with any civil . . . proceedings** in any . . . State, or local court . . . 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. [the "litigation exception"] . . .
>
> (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 [the "bulk solicitation exception"].

See 18 U.S.C. § 2721(b)(1, 4 & 12) (emphasis added). The DPPA recognizes that the state function and litigation exceptions carry greater weight than some of the other exceptions, insofar as the statute allows the litigation and state function exceptions (unlike some of the other exceptions) to trump a lack of express consent to disclosure of "highly restricted personal information." See 18 U.S.C. § 2721(a)(2).

C. Plaintiffs Incorrectly Demand Application of the "Bulk Solicitation Exception"

1. Plaintiffs' Argument Is Contrary to the DPPA's Language

At its core, the heart of Plaintiffs' argument is that the FOIA Requests and Letters are only permissible if the DPPA's bulk solicitation exception is satisfied — irrespective of whether another exception applies. Stated otherwise, Plaintiffs contend that — because the Letters arguably engage in "solicitation" — the Attorneys' conduct can **only** be proper if they satisfy the bulk solicitation exception (which demands express consent). While the Attorneys disagree with Plaintiffs' characterization of them, it is simply irrelevant whether the Letters were

"solicitation". Regardless of whether the Letters "solicit," Plaintiffs cannot survive summary judgment if the "litigation" or "state function" exceptions are satisfied.

The DPPA provides that "[p]ersonal information . . . may be disclosed as follows," followed by a listing of fourteen exceptions. These are separate and independent exceptions to the prohibition on the disclosure of personal information. See Reno v. Condon, 528 U.S. 141, 145 (2000) ("The DPPA's prohibition of nonconsensual disclosures is also subject to a number of statutory exceptions."). They are not **conditions** that must **all** be satisfied; rather, they are alternative routes to permissibility under the DPPA. None of the exceptions are given precedence in application over the others. Nothing in the DPPA suggests that, if a use is permissible under one exception, it must also satisfy other potentially-relevant exceptions. Plaintiffs' contention finds no support in the language of the DPPA. In fact, Plaintiffs read a requirement ("not solicitation") into the litigation exception, which is simply not there.

Plaintiffs posit in their brief that "[b]y its plain terms, the DPPA affirmatively prohibits the use of Protected Information for 'solicitations' unless the State 'has obtained the express consent of the person to whom such personal information pertains.'" (See Pls.' Br., at 22). This statement discloses how Plaintiffs twist the language of the DPPA. The DPPA does no such thing. Far from being prohibitory, or limiting, provisions, the litigation, state function, and

bulk solicitation exceptions create permissible uses. In one section, the DPPA **allows** use of information to solicit where there is consent. In other sections, the DPPA permits uses where other requirements are met. Contrary to Plaintiffs' suggestion, the bulk solicitation exception does not "affirmatively prohibit" anything; rather, it "affirmatively **allows**" uses of information alongside several other independently-operating exceptions.

The litigation exception requires only that DMV Information be used "in connection with" litigation. While the litigation exception contains a few illustrations of uses, it does not restrict or limit what can encompass use "in connection with" litigation. Nothing in the litigation exception expressly prohibits uses that solicit clients, **so long as those uses are "in connection with" litigation**. Likewise, nothing in the state function exception prevents a party from satisfying that exception through conduct that could be construed as solicitation. In short, nothing in Section 2721(b) suggests that all "solicitation" must meet the requirements of the "bulk solicitation exception," even if another exception is satisfied.

The Eleventh Circuit has rejected Plaintiffs' construction of the DPPA, holding that, where the requirements of another exception are satisfied, the requirements of the "bulk solicitation exception" are not applicable:

> Plaintiff-appellants argue that even if subsection 2721(b)(1) generally applies, subsection 2721(b)(12), which specifically addresses the bulk

> distribution of marketing and solicitation materials, must be complied with instead. . . . Both are exceptions to the general prohibition against the disclosure of drivers' personal information. Subsection (b)(1) applies to a situation not addressed by subsection (b)(12) and vice versa. [T]his case involves two statutory provisions that potentially apply. **While these provisions may overlap, they both apply to situations not governed by the other and both must be given effect unless they "pose an either-or proposition."** [(Citation omitted)]. **Furthermore, nothing in the DPPA suggests that the (b)(12) exception alters the scope or meaning of the separate and independent exception found in subsection (b)(1).** As such, the statutory exceptions found in section 2721(b) are **not mutually exclusive, meaning that any one or more of them may be applicable to a given situation.**

See Rine v. Imagitas, Inc., 590 F.3d 1215, 1225-26 (11th Cir. 2009) (affirming summary judgment) (emphasis added).

Rine's well-reasoned logic invalidates Plaintiffs' arguments and jibes with settled statutory interpretation principles. In Waggoner v. Gonzales, 488 F.3d 632 (5th Cir. 2007), the Fifth Circuit interpreted 8 U.S.C. § 1186a(c)(1) (emphasis added):

> The Attorney General, . . . may remove the conditional basis . . . if the alien demonstrates that-
>
> (A) extreme hardship would result if such alien is removed,
>
> (B) **the qualifying marriage was entered into in good faith by the alien spouse, but** the qualifying marriage has been terminated . . ., or
>
> (C) **the qualifying marriage was entered into in good faith by the alien spouse and** during the marriage the alien spouse or child was battered . . . .

The court held that the requirement of "good faith" of subsections (B) and (C) did not apply to subsection (A):

> Unlike the second and third grounds, the extreme hardship exception does not list the requirement of a good faith marriage. The canon of statutory construction "expressio unius est exclusio alterius (the expression of one thing is the exclusion of another)" indicates that extreme hardship is the only requirement. United States v. Shah, 44 F.3d 285, 293 (5th Cir. 1995). Moreover, to read the extreme hardship exception as implicitly requiring a good faith marriage would render superfluous the words setting forth that requirement in the second and third exceptions. "We must read the statute as a whole, so as to give effect to each of its provisions without rendering any language superfluous." Bustamante-Barrera v. Gonzales, 447 F.3d 388, 397 (5th Cir. 2006), cert. denied, --- U.S. ----, 127 Sect. 1247, 167 L. Ed. 2d 74 (2007). Finally, the three grounds are set forth disjunctively as separate and independent bases to excuse the joint petition and interview requirement. See In re Balsillie, 20 I & N Dec. 486, 491 (BIA 1992)(§ 1186(a)(4) creates three separate waiver provisions); cf. United States v. Canada, 110 F.3d 260, 264 (5th Cir. 1997) (recognizing that terms set forth disjunctively are generally given separate meanings).

See Waggoner, 488 F.3d at 636. Similarly, the consent requirement of the bulk solicitation exception cannot be read into other independent exceptions. Indeed, the DPPA permits disclosure of even “highly restricted personal information” without consent for use in carrying out state functions and in connection with litigation. See § 2721(a)(2).

Aside from being unsupported by the statutory language, Plaintiffs' construction of the DPPA is inconsistent with its purpose. The DPPA, codified in the criminal code, is principally a violence-prevention measure. It was the

congressional response to the murder of actress Rebecca Schaeffer outside her home by a "fan" who obtained her address from DMV records. See 139 Cong. Rec. 29,466 (1993) (Statement of Sen. Boxer). During congressional debate, multiple senators and representatives explained that the bill was designed to prevent violent crimes by regulating the states' release of personal information. See e.g., 139 Cong. Rec. 27,328 (1993) (statement of Rep. Moran) ("This bill by itself will not stop stalking. But it will stop State government from being an accomplice to the crime."); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb) (giving examples of stalking and harassment cases using DMV information); 139 Cong. Rec. 29,470 (1993) (statement of Sen. Harkin) (same); 139 Cong. Rec. 29,470 (1993) (statement of Sen. Biden) ("This amendment closes a loophole in the law that permits stalkers to obtain -- on demand -- private, personal information about their potential victims."). Congress enacted the DPPA to protect safety, not to discourage unwanted solicitation. There is nothing in the legislative history to suggest that Congress intended for the DPPA to remedy perceived bothersome solicitation. Rather, the "bulk solicitation exception" was part of a legislative effort to protect people from having information used in commercial bulk solicitation, which could disclose their identities to potential criminals, without consent.

Bulk solicitation is one of 14 DPPA exceptions, all of which recognize that certain important uses for DMV Information trump privacy concerns. For example, the DPPA recognizes that the need for privacy must give way to the use of DMV Information in connection with litigation. Whether the information is used for investigation or solicitation in connection with litigation is irrelevant. Rather, the DPPA recognizes the vital importance of litigation to our justice system and protects uses of DMV Information in that context. Bearing in mind the DPPA's anti-crime purposes, it is clear that the "litigation" and "state function" exceptions are separate from and independent of the "bulk solicitation exception." If the "litigation" or "state function" exception apply, the use is permissible, even if the ultimate use of the DMV Information could also be described as solicitation.

2. Plaintiffs' Cases Are Inapposite

As set forth above, Plaintiffs argue that the FOIA Requests and Letters had to fulfill the bulk solicitation exception. The cases Plaintiffs cite for their interpretation of the DPPA are inapposite.

First, Plaintiffs misconstrue Pichler v. UNITE (Pichler V), 542 F.3d 380, 396-97 (3rd Cir. 2008). In Pichler V, information was literally used for multiple purposes – that is, in several different manners. As Plaintiffs concede, "UNITE had claimed that it was working to vindicate employee rights and that it was not merely recruiting new union members, but was also actively assisting in

investigating and bringing lawsuits." (Pls.' Br., at 31-32). Thus, while the information was arguably used for speculative litigation, its primary use was an entirely unrelated use (union formation). The Third Circuit reached the unremarkable conclusion that, where there was a completely independent primary **use wholly unrelated to litigation**, DPPA liability could attach for that impermissible use. See Pichler V, 542 F.3d at 395 ("Because UNITE obtained and used the confidential information for an impermissible purpose — union organizing — it does not matter what other permissible purpose UNITE may have had.").

Pichler V is inapplicable here. It is undisputed that the FOIA Requests and Letters were "in connection with" Herron and part of the performance of a state function. There is no evidence that the Attorneys did anything that was wholly unrelated to protecting the interests of unnamed Consumers in Herron. Irrespective of whether the Attorneys engaged in "solicitation," that same conduct would still satisfy other requirements (unlike the facts in Pichler V). Plaintiffs twist Pichler V to rewrite the DPPA to require that any use of DMV information must satisfy every exception. This is inconsistent with the DPPA's language and misapplies Pichler V, which does not require this Court to examine each potential subjective intention of the Attorneys seeking a "hidden purpose."

Plaintiffs also rely on Menghi v. Hart, 2010 WL 3937181 (E.D.N.Y Sept. 30, 2010), as "illustrat[ing] the relationship between permissible and impermissible purposes in a defendant's distinct acts of obtaining and using protected Personal Information." (See Pls.' Br., at 32). In Menghi, the defendant (a police officer) arrested plaintiff for DUI; the plaintiff then received threatening telephone calls. Investigation revealed that defendant had called plaintiff, using information he obtained from the DMV on license plate searches. Plaintiff sued the defendant, inter alia, under the DPPA. A jury found for plaintiff and granted a monetary award. The court denied defendant's motion for judgment as a matter of law, holding:

> In addition, the jury was specifically instructed that "as a matter of law, the obtaining of the plaintiff's DMV records at the time of her arrest was permissible under the DPPA. However, it is for you, the jury, to determine whether the defendant Hart subsequently used the information permissibly obtained at the time of the arrest for a later impermissible purpose." Tr. 810-11. There was evidence that would support a jury finding that Hart obtained Menghi's personal information during the arrest from her driver's license rather than from Menghi herself during an interview. Menghi testified that Hart took her license when he first approached her car during her arrest, and that it was not returned to her until the next day. Id. 435. There was also testimony that Menghi's address and plate number were recorded on a notepad kept by Hart, id. 348 and Ex. 10, and Hart acknowledged that the information could have come from a DMV record, Tr. 365, or could have been written the night of her arrest. Id. 380. I find that there was also evidence for the jury to find that Hart used the information permissibly obtained at the time of the arrest for a later impermissible purpose.

See id., 2010 WL 3937181, at *6. Menghi is distinguishable from this matter. This case does not involve a secondary separate, distinct use of properly-obtained information for criminal ends. While Plaintiffs claim there were multiple motives for obtaining and using information, there was only one "use": locating Consumer victims to protect their rights in Herron. There is no evidence that the Attorneys engaged in any use of information beyond the context of the Herron litigation.

There is no evidence that the Attorneys used personal information permissibly obtained in connection with one lawsuit to solicit clients for unrelated litigation or representation. There is no evidence that the Attorneys made use of information outside of the context of litigating representative claims in Herron. To the contrary, the uncontroverted facts establish that the Attorneys obtained and used information only in connection with Herron. Moreover, Plaintiffs proffer no evidence that the Attorneys used information to commit a crime, threaten Plaintiffs, or engage in any violent conduct. Plaintiffs proffer no evidence that the Attorneys did anything beyond what they indicated they would do: use information to protect the rights of unnamed Consumers in Herron. Thus, the cases Plaintiffs cite are inapposite.

D. The Letters Were Not "Solicitation"

Although not relevant to the issues on this appeal, Plaintiffs devote substantial effort to characterizing the Letters as "solicitation." While the

resolution of that question has no bearing on the outcome of this appeal, the Attorneys strongly disagree with Plaintiffs.

The Attorneys did not engage in "solicitation," insofar as they had preexisting obligations to unnamed Consumers. The Letters were not sent in an effort to create new relationships or to drum up new business. Rather, the Attorneys were simply attempting to locate individuals **on whose behalf they had already (or would imminently) filed suit**. Under such circumstances, it is inaccurate to refer to the Letters as "solicitations."

E. Plaintiffs Proffer No Evidence of an Impermissible Use

1. The Litigation Exception

a. Plaintiffs Do Not Rebut the Face of the FOIA Requests and Letters

Bearing the burden of proof on the issue, to avoid summary judgment, Plaintiffs were obligated to proffer evidence that the FOIA Requests and Letters were not for a permissible use. Plaintiffs proffer no such evidence to rebut what the FOIA Requests and Letters state concerning their purpose.

The FOIA Requests all expressly reference the DPPA litigation exception. (J.A. 205-12, 235-46, 321-27). All of the FOIA Requests were sent in connection with the pending or imminent Herron lawsuit. The initial FOIA Request was copied to the DMV's Chief Legal Counsel. (J.A. 39). The DMV approved that FOIA Request, and all subsequent requests, under the litigation exception. It is the

written policy of the South Carolina DMV that: "[i]nformation protected under the Driver's Privacy Protection Act of 1994 or other confidential information that is exempt under the law will not be released." (J.A. 1349-51). The unrebutted fact that the FOIA Requests cited the litigation exception and that the DMV approved them eliminates Plaintiffs' claim of an impermissible purpose. Aside from describing the Attorneys' conduct as "solicitation," Plaintiffs proffer no evidence that the Attorneys engaged in any impermissible conduct.

Moreover, the Attorneys' legitimate litigation purpose is evident from the Letters, which reference a "group of consumers in a pending lawsuit" involving "car dealerships charging an add-on" "in violation of South Carolina law." (J.A. 66-84, 328-32). While the initial FOIA Request was made approximately two months before the filing of Herron (J.A. 39), the first Letter was not sent until over six months later, well after the filing of Herron. (J.A. 67). It is undisputed that all of this occurred in connection with Herron, a case filed for the benefit of the public.

The face of these documents is sufficient to carry the Attorneys' summary judgment burden. In response, Plaintiffs proffer no rebuttal evidence, despite bearing the burden of proof. The documents disclose that the Attorneys requested and used personal information "in connection with" Herron, and Plaintiffs cite no record evidence to the contrary. Since the only evidence is that there was a

connection between the FOIA Requests and the Letters and Herron, summary judgment was proper.

Manso v. Santamarina & Assoc., 2005 WL 975854 (S.D.N.Y. 2005), is a factually similar case demonstrating the propriety of summary judgment. There, plaintiff Manso alleged that defendant attorneys (representing Manso's opponent in a lawsuit) "acted knowingly and willfully under false pretenses" when they used DMV data in litigation. Manso alleged that the attorneys obtained information for purposes other than those stated. Id. at *2. Manso alleged that the data concerned an irrelevant issue, and, therefore, the attorneys could have no true litigation purpose. See id., at *4-5. After examining the record, the court concluded that it was "quite clear that the litigation exception applies." Id., at *5. The court relied on the fact that there was a specific proceeding in the course of which the attorneys used the DMV information in an effort to establish a point. Id. The court found that the litigation exception applies where there was a specific proceeding in which the information was used, even though the data might not have any actual bearing on the outcome of the case and might be only peripherally relevant. Id. at *5-6. The court distinguished Pichler v. UNITE, 339 F. Supp. 2d 665 (E.D. Pa. 2004), stating that Pichler "was too conceptually distant from any pending case to qualify as being 'in connection' with one," and "no proceeding in connection with which the driver's-record information could have been used was even identified." Id., at

*5. Because Manso failed to proffer evidence of an impermissible purpose, the court dismissed the action. Id. at *4, 15. Likewise, here, Plaintiffs failed to present any evidence that the challenged conduct was not for the stated litigation purpose, aside from making innuendos about "solicitation."

In their Complaint, Plaintiffs cited Wemhoff v. District of Columbia, 887 A.2d 1004 (D.C. Ct. App. 2005), for the proposition that "[a]cquiring Personal Information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not permitted by 18 U.S.C. § 2721(b)(4)." (J.A. 22-23 ¶ 16). In Wemhoff, a lawyer requested addresses of motorists receiving traffic citations from a malfunctioning traffic camera. Wemhoff's FOIA request did not specify a purpose or indicate that it was made pursuant to a DPPA exception. The DMV denied Wemhoff's request. Importantly, there was no pending action in Wemhoff. Prior to being retained by any client, Wemhoff attempted to file a class action suit styled "Thousands of Motorists to be Identified" v. District of Columbia" — **without naming any plaintiffs**. It was summarily dismissed because **he could not identify any individual plaintiff**. Id. at 1107 n.1. Wemhoff had no attorney-client relationship with any person, had no existing lawsuit filed on behalf of anyone and had no pending (or imminent) litigation whatsoever. Wemhoff was not proceeding under a statute like the MDDA providing a substantive right to bring a group representative action. As a result, unlike the Attorneys, Wemhoff had no

fiduciary obligations to investigate or obtain information to protect the rights of any person.

Wemhoff stands only for the proposition that the litigation exception does not authorize an attorney to obtain personal information to drum up business for non-existent litigation where he has no existing clients. Here, in contrast, there was no solicitation of persons to bring Herron, as that case was either imminent or filed. An attorney-client relationship already existed between the named Consumers and the Attorneys. Moreover, the attorneys owed duties to protect the rights of unnamed Consumers, on whose behalf Herron had been filed. Wemhoff involved no such prior relationship or existing lawsuit.

In their brief, Plaintiffs also cite Pichler v. UNITE, 585 F.3d 741, 751 (3d Cir. 2009), cert. denied sub nom, National Right to Work Legal Def. Found'n, Inc. v. UNITE, 178 L. Ed. 2d 22 (2010), for the proposition that "the litigation exception of the DPPA requires something more than merely using the protected records to identify potential litigants." As set forth herein, the Attorneys **were not** attempting to locate litigants to bring **a potential** case; rather, representative litigation on behalf of the unnamed Consumers had already commenced (or was imminent). This is unlike the situation in Pichler, where litigation was highly speculative.

For these reasons, because Plaintiffs have not proffered evidence rebutting the Attorneys' express purposes in the FOIA Requests and Letter, summary judgment was proper. Moreover, as discussed in the following sections, the record actually establishes (again without rebuttal) the specific purposes for which the Attorneys used information in Herron.

b. Investigation to Determine the Scope of the Dealers' Misdeeds

Shortly before the Attorneys commenced Herron, information was sought to determine whether a large number of Dealers engaged in prohibited practices because — if the action was "of common or general interest to many persons" or the injured parties were too numerous to join — the Attorneys could file a representative MDDA action. S.C. Code. § 56-15-110(2). The first pre-suit FOIA Request, dated June 23, 2006, confirms this purpose:

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

(J.A. 39 (emphasis added)). The second pre-suit FOIA Request of August 24, 2006, asked for the same information from a larger geographical area and was also submitted pursuant to the litigation exception. (J.A. 44-45). Both FOIA Requests

were within 60 days before filing Herron, with the second only five days before filing. (J.A. 39, 44-45, 553-73). Plaintiffs present no evidence that the first two FOIA Requests were for a purpose other than to investigate the scope of the Dealers' wrongdoing in connection with litigation.

Plaintiffs present no evidence that any personal information obtained through these pre-Herron FOIA Requests was used to identify the eight named Consumers. The purpose of obtaining the information was clearly not, as Plaintiffs claim, to solicit unknown clients for undefined, possible future litigation. To the contrary, the first two FOIA Requests were issued in connection with imminent representative litigation. There was no communication between the Attorneys and the unnamed Consumers until five months after Herron commenced. (J.A. 67, 235-46). These facts support that the first two FOIA Requests were for the permissible purpose of investigation in anticipation of litigation.

One court has interpreted the litigation exception to require: (1) "actual investigation;" (2) "likely" litigation; and (3) a "reasonable likelihood" that "the decision maker would find the information useful in the course of the proceeding." Pichler v. UNITE, 339 F. Supp. 2d 665, 668 (E.D. Pa. 2004) (finding litigation exception inapplicable where plaintiff did not identify likely proceeding in which information might be used); accord Wemhoff v. Dist. of Columbia, 887 A.2d 1004 (D.C. Ct. App. 2005). Other courts have interpreted the litigation exception more

broadly. For example, in Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A., 525 F.3d 1107 (11th Cir. 2008), the defendant attorneys obtained and used 284,000 DMV records to mail 1,000 letters. The purpose of those letters was to locate witnesses to testify in lawsuits against car dealers for fraud. Id. at 1114. The Eleventh Circuit found that the "litigation exception" applied, rejecting the argument that only a portion of the DMV information was actually used for litigation purposes. "By affixing significance solely to the number of letters sent out, [plaintiff] overlooked that [the attorney's] initial review of the total amount of records is just as much tied to 'investigation in anticipation of litigation' as the eventual sending out." Id. at 1115. The plaintiffs posited that the attorneys had a "second ulterior motive" to use the records "for prospective, not-yet-filed litigation—as opposed to currently pending cases." Id. at 1115 n.5. The court rejected these arguments — without discussing Pichler — and stated: "even if the accumulation of potential witness related, in part, to certain cases not yet filed, we do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause." Id.

The undisputed record establishes that the Attorneys' pre-Herron FOIA Requests permissibly sought information for use "in anticipation of litigation." Unlike Pichler, there was in Herron actual pre-suit investigation regarding the scope of the Dealers' misconduct in connection with discrete claims involving the

imposition of illegal fees. (J.A. 39-45). Litigation was likely, as evidenced by the Letters' reference to investigating violations of state law and by the brief interval between the FOIA Requests and the filing of suit. (Id.). Finally, the information sought in the pre-suit FOIA Requests was reasonably likely to be useful in Herron, for example, in determining whether Herron could be filed as a representative action and the identities of Dealers. The Attorneys' alleged pre-Herron conduct was not only appropriate; it was precisely the sort of pre-filing investigation demanded of attorneys under South Carolina's professionalism standards. See e.g., Ex parte Gregory, 663 S.E.2d 46 (S.C. 2008) (discussing pre-filing investigations requirement); accord S.C. Code §§ 15-36-10, et seq. (construed as requiring pre-suit investigation); S.C.R. Civ. P. 11 (same). Unlike Pichler, where the request was conceptually distant from any pending litigation, here the information obtained via pre-suit FOIA Requests directly related to the investigation of specific, imminent litigation.

The applicability of the litigation exception to these FOIA Requests is supported by Bailey v. Daniels, 679 F. Supp. 2d 713 (W.D. La. 2009). There, the defendant believed plaintiff had committed a crime. Since he did not know the plaintiff's name, he used plaintiff's license plate to acquire DMV information to identify him and enable the filing of charges. The court granted summary judgment for the defendant, holding:

> Mr. Daniels genuinely believed that a crime had been committed against him; as it turns out, he was correct…. Under these circumstances, we cannot say that the information was not acquired for the purpose of prospective litigation, be it criminal or civil, as contemplated by the litigation exception to the DPPA. See 18 U.S.C. § 2721(b)(4). Thus, the defendant's reliance upon the exception is highly plausible.
>
> More importantly, the plaintiff has not raised a genuine issue of material fact regarding Mr. Daniels's permissible purpose for obtaining the information. … .
>
> [A]t the time Mr. Daniels … acquired the information, he did so for the permissible purpose of investigating a possible crime against himself in anticipation of future litigation.
>
> In sum, with the extremely odd facts of this case, Mr. Bailey has failed to present a genuine issue of material fact regarding whether Mr. Daniels obtained the personal information for a use not permitted by the statute. Such proof is a required element in order to maintain an improper obtainment claim under the DPPA.

See id., at 721-22. Similarly, in this case, Plaintiffs have failed to proffer any evidence that the pre-Herron FOIA Requests were not proper as being in connection with the imminent Herron lawsuit.

c. Representing the Interests of All Consumers and Responding to the Standing Challenge

The Attorneys filed Herron pursuant to the MDDA's private attorney general provision, S.C. Code § 56-15-110(2), "for the benefit of all car buyers who paid administrative fees." Once Herron was filed, there was actual litigation, to which all subsequent FOIA Requests and Letters were connected. As Judge Early ruled on several occasions, the Consumers' MDDA claims were a "group representative

action" in which the named Consumers asserted standing to represent unnamed Consumers without all of the procedural certification formalities of a traditional class action under South Carolina law. (J.A. 1310-13, 1344-48, &1352-61). He further ruled that "the unnamed members of the group have an interest in the case that needs to be protected." (J.A. 1356). "S.C. Code Ann. § 56-15-110(2) is designed so that one person can stop a car dealer from perpetrating wrongdoing against many car purchasers. This right to group injunctive relief was given by the General Assembly to prevent car dealerships from perpetrating mass wrongdoing on the public. This is a significant right … " (J.A. 1371). The South Carolina Supreme Court has also held in Herron that the MDDA's private attorney general provision is so important that it cannot be avoided through an arbitration agreement. (J.A. 1388-1402).

As Judge Early recognized throughout Herron, the Attorneys have owed obligations to protect the rights of unnamed Consumers from Herron's inception. Under the MDDA, the filing of Herron implicated the rights and interests of all injured Consumers, both named and unnamed. At that point, the unnamed Consumers' legal interests were indisputably entitled to be protected by the Attorneys. As counsel for the Consumers, the Attorneys assumed an obligation to represent those absent Consumers in the most meaningful sense of taking appropriate steps to protect their interests under the MDDA. (J.A. 1310-13).

While the Attorneys might not have had an express attorney-client relationship with unnamed Consumers, their professional and fiduciary obligations to them were nonetheless imperative.

As Judge Early ruled, Herron is not a traditional "class action" under S.C.R. Civ. P. 23; it is a group representative action **analogous to** a class action.[4] Judge Early's numerous orders make clear that, as a matter of state law and procedure, Herron was a representative action under the substantive governing law. He has clearly expressed that the Attorneys — from the onset — have been acting on behalf of the consuming public and owed duties to that public.

Although Herron is not a traditional "class action," authorities regulating attorneys in the context of class actions are persuasive. Those authorities recognize that, even where a class has not been certified, class counsel owes a duty to unnamed members, arising out of a fiduciary obligation flowing to those absent persons. See 3 Herbert Newberg & Alba Conte, Newberg on Class Actions § 15.14 at 55 (4th ed. 2002) (noting constructive attorney-client relationship between counsel and class members); Manual for Complex Litigation (Third), § 30.24 at

[4] Section 56-15-110(2) is a substantive statute authorizing a representative suit under circumstances similar to a Rule 23 class action. Compare S.C. Code § 56-15-1102 (where the action is of "common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole ….") with Fed. R. Civ. P. 23(a)(1) & (2) (authorizing a representative suit if, among other factors, "the class is so numerous that joinder of all members is impracticable" and "there are questions of law or fact common to the class.").

233 (stating that before class certification "there is at least an incipient fiduciary relationship between class counsel and the class he or she is seeking to represent"); see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("[C]lass attorneys … owe the entire class a fiduciary duty once the class complaint is filed."), cert. denied, 516 U.S. 824 (1995); In re "Agent Orange" Prod. Liab. Litig., 800 F.2d 14, 18 (2d Cir. 1986) ("C]lass attorney's duty does not run just to the plaintiffs named in the caption of the case; it runs to all of the members of the class"); Kingsepp v. Wesleyan Univ., 142 F.R.D. 597, 599 (S.D.N.Y. 1992) ("[T]he role of class counsel is akin to that of a fiduciary for the class members."); Wagner v. Lehman Bros. Kuhn Loeb, 646 F. Supp. 643, 661 (N.D. Ill. 1986) (stating class counsel "stands in a fiduciary relationship with the absent class"); Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973) ("[C]lass action counsel possess, in a very real sense, fiduciary obligations to those not before the court"). At a minimum, upon filing Herron as a representative suit, the Attorneys accepted a fiduciary obligation towards unnamed plaintiffs. Cf. Piambino v. Bailey, 757 F.2d 1112, 1144 (11th Cir. 1985) (quoting Shelton v. Pargo, Inc., 582 F.2d 1298, 1305 (4th Cir. 1978)); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 665-66 (E.D. Pa. 2001) (noting class action is representative suit in which putative class members have "at least" fiduciary relationship with

class counsel and observing "truly representative" nature of class action grants rights to absent class members).

In a representative action like Herron, counsel cannot disregard the interests of unnamed represented members; they "may not abandon the fiduciary role they assumed … if prejudice to the members of the [group] they claimed to represent would result." Shelton, 582 F.2d at 1305. Accordingly, "'[s]olicitation' of parties to help maintain the action on behalf of the putative group "may be entirely appropriate, **if not required**, as part of class counsel's fiduciary duty." In re Avon Sec. Litig., 1998 WL 834366, at *10 (S.D.N.Y. Nov. 30, 1998) (emphasis added).

In Avon, a class representative withdrew prior to certification, and counsel needed to identify substitute plaintiffs. Counsel for the putative class contacted absent persons, presumably unaware of the case, to encourage them to become class representatives. The defendant claimed that those plaintiffs were improperly solicited. The court rejected this claim, finding no evidence of improper solicitation. The court stated that, even if counsel's conduct constituted solicitation, it was not only proper, but **required**, as part of counsel's fiduciary duty to the putative class. Id. at *10 (emphasis in original). The court found instructive authority in the Manual for Complex Litigation, which encourages counsel to "make reasonable efforts to **recruit** and **identify**" representatives necessary to maintain the action and protect the interests of the group. Manual for

Complex Litigation (Fourth), § 21.26 at 277 (emphasis added).[5] The court concluded that counsel's efforts to "solicit" substitute plaintiffs were consistent with their ethical obligations. Id.

"Solicitation" by mail is not inherently bad or discouraged in the context of representative litigation. In fact, named and unnamed parties often benefit from communications with counsel to determine their interest in pending litigation. Moreover, mail communication with prospective clients is constitutionally protected commercial speech that may only be restricted to serve a substantial governmental interest. See e.g., Shapero v. Kentucky Bar Assoc., 486 U.S. 466 (1988). The litigation exception acknowledges the role of lawyers and the need to develop cases, gather witnesses and evidence and contact individuals about their rights. Congress' inclusion of this exception is understandable and consistent with lawyers' constitutionally protected right to communicate about legal services. Id. Communicating with clients or potential members is not impermissible solicitation; it is an inherent part of representative litigation. Once the Attorneys filed Herron, the Letters — informing unnamed Consumers about the suit and seeking to determine their interest in joinder to protect their claims from standing challenges

[5] The Avon court cited Manual for Complex Litigation (Third) § 30.16, which is Section 21.26 in the Fourth Edition.

— were not ploys to drum up business, but efforts to fulfill professional obligations to absent Consumers.

The facts establish that the Attorneys had existing, formal attorney-client relationships with the named Consumers unrelated to any FOIA requests. Under the substantive provisions for a representative action under the MDDA, § 56-15-110(2), there was no need to create a formal attorney-client relationship with the unnamed Consumers for the Attorneys to owe them duties. Indeed, Judge Early judicially confirmed such a relationship throughout Herron. (J.A. 1310-13, 1329-42). The Rules of Professional Conduct recognize that a lawyer's communication with "persons with whom the [lawyer] has a prior professional relationship" is not "contact with [a] prospective client[]." See Rule 7.3(c) & (d) (excepting from the Rules communications with persons with whom the lawyer has a "prior professional relationship"). Consequently, communications with the unnamed Consumers — to whom the Attorneys already owed a duty of some measure — was neither impermissible nor solicitation. As a matter of law, the Attorneys were obligated to competently and zealously maintain Herron on behalf of unnamed Consumers.

Upon the Attorneys' filing of Herron on behalf of known clients and unnamed injured Consumers, the Dealers moved to dismiss the claims of certain unnamed Consumers based upon lack of standing against Dealers without a named

Consumer as a customer. Identifying unnamed Consumers would greatly assist in the Consumers' opposition to the Dealers' motions to dismiss. If the motions to dismiss were granted, unnamed Consumers, unaware of their rights and unable to make informed decisions about participating in Herron, could lose their claims. The Attorneys were obligated to communicate with unnamed Consumers to protect their interests and to adequately respond to the challenges raised by the Dealers' standing arguments. (J.A. 65-84). The information at issue was obtained and used to communicate with persons to whom a duty was owed, in part, to assist in the litigation of a highly contested issue – standing of named Consumers to represent the unnamed Consumers.

It was the Dealers, not the Consumers, that filed motions to dismiss challenging standing. (J.A. 574-76, 664-738). From Herron's inception, the Attorneys relied upon S.C. Code § 56-15-110(2) as authority to bring a group representative action and believed that it was unnecessary to name a Consumer corresponding to each Dealer. Judge Early initially accepted this position in his July 31, 2007 denial of the motions to dismiss. (J.A. 1310-13). That ruling enabled named Consumers to proceed in a representative capacity for **all** unnamed Consumers who paid the illegal administrative fees without having to link a named Consumer with a specific Car Dealer. Ultimately, Judge Early would reconsider

this decision and hold that Consumers could only sue Dealers with whom they conducted business. (J.A. 1329-42).

The post-commencement FOIA Requests were submitted after the Dealers began making the standing argument in an obvious effort to gather information and witnesses in support of the Consumers' claims. These motions to dismiss were filed between September, 2006 and February 12, 2007. The post-suit FOIA Requests are dated October 26, 2006 through January 23, 2007, and the Letters communicating with the unnamed Consumers are dated January 3 through May 8, 2007, before Judge Early's initial denial of the motions to dismiss and subsequent reconsideration. (J.A. 46-84). Judge Early heard argument on the motions to dismiss on April 4, 2007. The timing of the FOIA Requests and Letters shows that these actions were taken in response to the Dealers' motions to dismiss. Most importantly, Plaintiffs have proffered no evidence to rebut this appropriate use in connection with litigation.

While the Attorneys believed the MDDA authorized them to proceed for "the benefit of the whole" without naming a Consumer for every Dealer, they also realized that an unfavorable ruling from Judge Early could be detrimental to the interests of unnamed Consumers. In an effort to protect the unnamed Consumers' interests, the Letters were sent to inform them of their rights and the potential for joinder. The Letters themselves, and the attendant circumstances, demonstrates

that the Letters were to protect the interests of unnamed Consumers. It was imperative, in the interest of all Consumers, to reach out to unnamed Consumers about Herron.

The information was obtained and used to fulfill the Attorneys' duties to unnamed Consumers in the course of ongoing litigation in light of the standing arguments made in that case. The DPPA recognizes that use of DMV data in connection with litigation is a paramount interest; it permits the release of even "highly restricted personal information" without consent of the individual to whom the information pertains for that use. 18 U.S.C. § 2721(a)(2). The unnamed Consumers had a right to learn about Herron and how the Dealers had cheated them, so they could determine whether they wanted to join. (J.A. 89). Lawsuits are always matters of public concern, but this is particularly true when they involve allegations of widespread consumer fraud as in Herron. The public has a legitimate interest in being informed about such suits and warned of unfair practices. See Parker v. Evening Post Pub. Co., 317 S.C. 236, 244, 452 S.E.2d 640, 645 (Ct. App. 1994). Without knowledge of even the existence of Herron and in light of the pending motions to dismiss, there was a serious risk that unnamed Consumers' rights might be lost. Obtaining and using DMV data was reasonably related to serving the best interests of the entire group of Consumers, enabling the Consumers to address the standing issues raised in the motions to dismiss.

2. State Function Exception

The state function exception provides a second basis for summary judgment against Plaintiffs. The FOIA Requests and Letters fall within this permissible purpose because the Attorneys brought Herron on behalf of the public under authority of the MDDA, acting as private attorneys general performing a function of the South Carolina Attorney General. In determining whether this exception applies, this Court should ask: (1) were the Attorneys carrying out a function of the state and (2) were the Attorneys acting on behalf of the State. See Rine v. Imagitas, Inc., 590 F.3d 1215 (11th Cir. 2009). The record supports — and Plaintiffs proffer no contrary evidence — that the answer to both questions is "yes."

The MDDA allows both the Attorney General and private citizens to enforce the "common or general interest" against dealers engaging in deceptive practices. S.C. Code §§ 56-15-40(5) & 56-15-110(2). The MDDA authorizes the Attorney General to investigate, issue cease and desist orders and injunctive relief. See S.C. Code § 56-15-40(5). The MDDA also authorizes private citizen enforcement through a suit for "the benefit of the whole" when the "action is one of common or general interest" or the parties are too numerous to practicably bring before the court. See S.C. Code § 56-15-110(2). In this regard, the MDDA authorizes a

"private person or entity [to] act[] on behalf of a … State, or local agency in carrying out its function," a permissible use under the state function exception.

The Consumers (represented by the Attorneys) asserted MDDA claims alleging deceptive practices and seeking, inter alia, relief "for the benefit of all car buyers who paid administrative fees." (J.A. 553-73). For this reason, Judge Early construed the MDDA to conclude that from Herron's commencement the Attorneys acted as private attorneys general performing a state function:

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

(J.A. 1357 (citations omitted)). In this regard, the Attorneys and Consumers are acting on behalf of the State as private attorneys general. Cf. Ferraro v. Tamarac Ridge Condo. Assoc., 2009 WL 1873793, at *4 (Conn. Super. Ct. June 3, 2009) (addressing Connecticut Unfair Trade Practices Act); Coneff v. AT&T Corp., 2009 WL 1459111 (W.D. Wash. May 22, 2009) (class action allow "[p]rivate citizens to act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices" (internal quotations and citations omitted)). Pursuant

to the MDDA's private attorney general provision, the Attorneys performed a function of the state in enforcing that statute and acted on behalf of the state in that regard.

F. Claimed Need for More Discovery

Plaintiffs suggest that summary judgment was improper because they needed to conduct additional discovery and were deprived of the chance to do so. This argument is without merit.

Before the parties moved for summary judgment, all parties represented to the District Court that summary judgment could be decided on the documents that had already been submitted to the Court on the Attorneys' motions to dismiss, **without any additional discovery**:

> THE COURT: Because the reason I raise it is because if they do and your side comes back and says, wait a minute, we needed to depose all these lawyers and get into the same thought processes that they – the privileged information that they objected to before, we have a problem.
>
> MR. ELBERT: Yes, that's correct. **And I don't see that based on the issues that were raised in the motion to dismiss.**

(See J.A. 201-02 (emphasis added)). The Attorneys' counsel confirmed that the summary judgment motion "would look very much like the 12(b)(6) motion that we filed. The things that we would refer to would be matters that are already of record in the underlying case." (See J.A. 202). In reliance on these representations, the Court modified the stay for the limited purpose of allowing the

parties to move for summary judgment. Plaintiffs' representations to the District Court (which the court relied upon), made clear that they did not need additional discovery to litigate summary judgment motions raising arguments similar to the Attorneys' prior motions to dismiss.

In response to the Attorneys' Motion for Summary Judgment, Plaintiffs filed an Affidavit of Counsel Pursuant to Fed. R. Civ. P. 56(f).[6] Plaintiffs did not move to continue or delay the motions for summary judgment. This affidavit did not set forth reasons why Plaintiffs could not present facts essential to their opposition to summary judgment. In their Response to Defendants' Motion for Summary Judgment, Plaintiffs mentioned their counsel's affidavit in only passing. (See Dckt. Entry # 83, at 4 n.3). Plaintiffs did not contend that summary judgment could not be adjudicated upon the then-existing record.

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[6] By amendment, the former Rule 56(f) is now Rule 56(d). This Rule provides that:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order

See Fed. R. Civ. P. 56(d) (formerly Rule 56(f)).

Where, as here, a nonmovant does not first ask to continue summary judgment, he cannot later complain that additional discovery was needed:

> ATI has waived the issue of inadequate discovery with respect to SBC. Under Federal Rule of Civil Procedure 56(f), the appropriate way to raise the issue is for the party opposing the motion for summary judgment **to file a motion for a continuance with an attached affidavit** stating why the party cannot present by affidavit facts essential to justify the party's opposition.

Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694, 719 (5th Cir. 1999) (emphasis added); accord Medical Mut. of Ohio v. K. Amalia Enterps., Inc., 548 F.3d 383, 394 n. 8 (6th Cir. 2008) (“MMO did not file a motion under Rule 56(f) when it responded to the motion for summary judgment."). Without moving for a continuance, Plaintiffs cannot now claim to need discovery to properly litigate summary judgment. While they filed an ambiguous affidavit "out of an abundance of caution," they did not request any specific relief. They did not identify what information they needed to discover and how they planned to do so. They did not set forth reasons why they could not present facts essential to their opposition. They did not affirmatively seek to prevent summary judgment from being determined without discovery. They did not even serve discovery requests or seek to take depositions. Plaintiffs' passive effort to preserve their rights was deficient.

G. Plaintiffs Proffer No Evidence of the Requisite Intent

The DPPA imposes liability on a "person who **knowingly** obtains, discloses or uses personal information, from a motor vehicle record, **for a purpose not**

permitted." See 18 U.S.C. § 2724(a). This language requires Plaintiffs to prove not only that the Attorneys knew that they obtained or used "personal information," but also that they knew that they did so "for a purpose not permitted." The record is devoid of such evidence.

Statutory interpretation begins with plain language. U.S. Dep't of Labor v. N.C. Growers Ass'n, 377 F.3d 345, 350 (4th Cir. 2004). A court must presume that Congress says what it means and means what it says. BedRoc, Ltd. v. United States, 541 U.S. 176, 183 (2004). Statutory construction involves reading the statute in its entirety, accounting for its text, language, punctuation, structure, and subject matter. United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993).

Interpreting the DPPA in context,[7] its plain language conveys that an essential element of liability is knowledge **that the Attorneys did not have a permissible purpose**. The only reasonable reading requires knowledge of the wrongfulness of the use. If the "knowingly" requirement does not attach to the use, the statute would impose liability on a party that innocently, but mistakenly, believed he had a permissible use. Congress's use of "knowingly" can only

[7] A "cardinal rule" of statutory construction is that "statutory language must be read in context [since] a phrase gathers meaning from the words around it." Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 596 (2004).

reasonably be construed to distinguish innocent persons from those who act with intent to obtain information for impermissible uses.

The DPPA's legislative history supports this interpretation. The author of the amendment that became Section 2724 stated that "the amendment **only** penalizes individuals who **knowingly obtain, disclose or use personal information for a purpose not permitted under the amendment**." 140 Cong. Rec. H2523 (1994) (statement of Rep. Moran). These words mirror the enacted language, except for the addition of "from a motor vehicle record."

Congress enacted the DPPA as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. It was "a crime fighting measure, not a general privacy act." Margan v. Niles, 250 F. Supp. 2d 63, 69 n.4 (N.D.N.Y. 2003) (detailing legislative history); accord 140 Cong. Rec. H2518-01, H2527 (1994) (statement of Rep. Goss) ("[T]he intent of this bill is simple and straightforward: We want to stop stalkers from obtaining the names and addresses of their prey before another tragedy occurs… [T]he DPPA … is a reasonable and practical **crime fighting** measure.") (emphasis added). Congress's focus was to prevent **knowing** criminal abuse of information. Accordingly, Congress intended to create criminal and civil liability only for knowing misuse.

The DPPA imposes criminal liability under the following provision: "It shall be unlawful for any person **knowingly to obtain or disclose personal**

information, from a motor vehicle record, for any use not permitted . . . ." See 18 U.S.C. § 2722(a) (emphasis added).[8] As a criminal statute, Section 2722 must be construed to require knowingly wrongful conduct. Liparota v. United States, 471 U.S. 419 (1985) (law disfavors interpreting criminal statutes without mens rea where interpretation would "criminalize a broad range of apparently innocent conduct."). It is common sense that "knowingly" should have the same meaning throughout the DPPA. Consequently, civil liability should also require proof that a defendant knew that it did not have a permissible purpose. Under Plaintiffs' interpretation, persons with legitimate needs for information would risk DPPA liability for simply being wrong.

Plaintiffs proffer no evidence that the Attorneys "knew" they obtained or used information for an impermissible purpose under the DPPA. As discussed supra, the FOIA Requests stated that they were proper under the DPPA litigation exception. Plaintiffs proffer no evidence that the Attorneys knew, or even had reason to know, that the conduct at issue was impermissible under the DPPA. Under a proper reading of the statute, this is an additional reason to affirm the entry of summary judgment.

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[8] The DPPA also imposes criminal fines on persons "who **knowingly** violate[] this chapter . . . ." See 18 U.S.C. § 2723(a) (emphasis added).

The Attorneys understand that cases under the DPPA have been decided contrary to their argument. See Pichler v. UNITE, 542 F.3d 380, 396-97 (2008), cert. denied, 129 S. Ct. 1662 (2009) (holding DPPA does not require plaintiff to show that defendant knew purpose was impermissible); Rios v. Direct Mail Express, Inc., 435 F. Supp. 2d 1199, 1201 (S.D. Fla. 2006) (same). These opinions are not binding. See Virginia Society for Human Life, Inc. v. Federal Election Comm., 263 F.3d 379, 393 (4th Cir. 2001). These decisions ignore precedent, rules of grammar and canons of statutory construction; this Court should decline to follow them.[9]

H. Plaintiffs Proffer No Evidence of Actual Damages

The DPPA authorizes recovery of "actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b)(1). "Liquidated damages" means an amount stipulated for the amount of actual damages. See Black's Law Dictionary, at 395 (7th ed. 1999). While the DPPA sets a minimum "liquidated damages," Plaintiffs must nevertheless prove actual

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[9] The Attorneys' argument finds further support by implication from Supreme Court Justices Scalia and Alito, who have expressed concern about the "important legal question" of whether a defendant "can be held liable under the [DPPA] if it did not know that" it lacked a permissible purpose. Fidelity Fed. Bank & Trust, 547 U.S. 1051 (2006) (concurring). Those Justices stated that the "scienter question remains open," in concurring in the denial of certiorari. Id. This language at least suggests that the Supreme Court considers this an open question (and might not follow the present DPPA jurisprudence on this point).

"actual damages" in the first instance. The DPPA's plain language discloses that "actual damages" are what a party may recover thereunder. Nothing in the DPPA authorizes — or even suggests — recovery without proof of actual damages.

In Doe v. Chao, 540 U.S. 614 (2004), the Supreme Court, interpreting a similarly-worded statute,[10] held that proof of actual damages was a prerequisite to recovery. It noted that "it was hardly unprecedented for Congress to make a guaranteed minimum contingent upon some showing of actual damages, thereby avoiding giveaways to plaintiffs with nothing more than abstract injuries." Id. at 625-26. Like the statute interpreted in Doe, the DPPA expresses Congress's intent to allow recovery of actual damages, with a minimum floor.

Plaintiffs have proffered no evidence of actual damages, so their claims must fail. For this additional reason, Plaintiffs cannot survive summary judgment.

The Attorneys recognize that the only cases directly addressing the issue have held that proof of actual damages is not required. See Pichler, 542 F.3d at 397-400 (DPPA claim does not require actual damages); Kehoe v. Fidelity Fed. Bank & Trust, 421 F.3d 1209, cert. denied, 547 U.S. 1051 (2006). The Court should decline to follow these nonbinding decisions, because they are inconsistent with the DPPA's language and Supreme Court precedent as discussed above.

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[10] That statute created liability for "actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. 552a(g)(4)(A).

Moreover, Justices Scalia and Alito have expressed concern about the "important question of statutory construction—whether 'actual damages' must be shown before a plaintiff may recover under the [DPPA]." Fidelity Fed. Bank & Trust v. Kehoe, 547 U.S. 1051 (2006) (concurring). They noted the enormous potential liability exposure ($1.4 billion), but concurred in denying certiorari because the appellate court had remanded the case. Id.

I. Plaintiffs' Interpretation of the DPPA Invites Constitutional Problems

The District Court's granting of summary judgment was also proper because Plaintiffs' construction could render the DPPA unconstitutional.

In Reno v. Condon, 528 U.S. 141 (2000), the Supreme Court found the DPPA constitutional, as applied to regulate state government sales of DMV data in interstate commerce:

> The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.

Id. at 148.

Congress's Commerce Clause power does not allow it to statutorily prohibit lawyers from obtaining publicly-available information from a state in connection with state litigation. At no point was the DMV information here an economic good

or article of interstate commerce. The information was never purchased or sold. It was used in connection with a state court lawsuit. The Commerce Clause should not be construed to permit restrictions on the use of information in this purely **intra**state matter. Courts should avoid interpreting statutes so as to raise constitutional questions, regardless of how those questions might ultimately be resolved. Clark v. Martinez, 543 U.S. 371, 380-81 (2005). To interpret the DPPA as prohibiting the use of DMV information here would raise serious constitutional implications. Not only was the DMV information indisputably used for permitted purposes, but those purposes were wholly disconnected from interstate commerce. To apply the DPPA to this case would potentially render it unconstitutional.

CONCLUSION

For the foregoing reasons, the Attorneys respectfully request that this Court affirm the District Court's entry of summary judgment.

REQUEST FOR ORAL ARGUMENT

The Attorneys respectfully request oral argument.

Respectfully Submitted this 21st day of January, 2011.

By: s/E. Bart Daniel
E. BART DANIEL
Seven State Street
Charleston, SC 29401
843.722.2000 (Office)
843.722.6254 (Fax)
Attorney for All Appellees

s/Charles E. Hill
CHARLES E. HILL
TURNER PADGET GRAHAM & LANEY, P.A.
1901 Main Street, Suite 1700 (29201)
Post Office Box 1473
Columbia, SC 29202
803.227.4240 (Office)
803.400.1493 (Fax)
Attorney for Defendants
Richard A. Harpootlian and
Richard A. Harpootlian, P.A.

s/Curtis W. Dowling
CURTIS W. DOWLING
BARNES, ALFORD, STORK & JOHNSON, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
803.799.1111 (Office)
803.254.1335 (Fax)
Attorneys for Defendants
Michael Eugene Spears and
Michael Spears, P.A.

s/John B. White, Jr.
JOHN B.WHITE, JR.
HARRISON, WHITE, SMITH & COGGINS, PC
178 West Main Street
Post Office Box 3547
Spartanburg, SC 29304
864.585.5100 (Office)
864.591.0491 (Fax)
Attorney for All Defendants

s/M. Dawes Cooke, Jr.
M. DAWES COOKE, JR.
CRAIG E. BURGESS
JOHN W. FLETCHER
BARNWELL WHALEY PATTERSON
& HELMS, LLC
Post Office Drawer H
Charleston, SC 29402-0197
843.577.7700 (Office)
843.577.7708 (Fax)
Attorneys for Defendants
Gedney M. Howe, III and
Gedney M. Howe, III, P.A.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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/s/ E. Bart Daniel
Counsel for Appellees

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I hereby certify that on January 20, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Philip N. Elbert
Elizabeth S. Tipping
NEAL & HARTWELL
1 Nashville Place
150 4th Avenue, North
Suite 2000
Nashville, TV 37219

Gary L. Compton
LAW OFFICE OF GARY L. COMPTON
296 South Daniel Morgan Avenue
Spartanburg, VA 29306

Counsel for Appellants

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ *Carly A. Ramey*
Carly A. Ramey
GIBSON MOORE APPELLATE SERVICES, LLC
421 East Franklin Street, Suite 230
Richmond, VA 23219