UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-80593-Civ-HURLEY/LYNCH

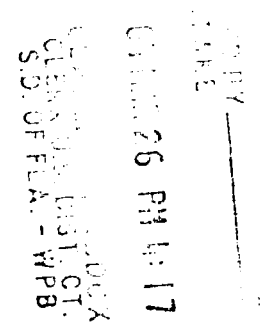
JAMES KEHOE, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

FIDELITY FEDERAL BANK AND
TRUST,

Defendant. /



DEFENDANT, FIDELITY FEDERAL BANK AND TRUST'S, MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT

Defendant, Fidelity Federal Bank and Trust ("Fidelity"), files this Memorandum in Support of its Renewed Motion for Summary Judgment.

I. Introduction

The Court should grant Fidelity's Renewed Motion for Summary Judgment because (1) there is no evidence that Fidelity obtained any information relating to Plaintiff, James Kehoe ("Plaintiff") in violation of the Driver's Privacy Protection Act, 18 U.S.C. §§2721-24 ("DPPA"); (2) Plaintiff suffered no actual damages; and (3) Fidelity did not know that the State had not obtained the express consent of the individuals whose information was released.

II. Legal Standard.

> Summary judgment is warranted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). The moving party bears the burden of meeting this exacting standard. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970). In determining whether summary judgment

is appropriate, the facts and inferences from the facts are viewed in the light most favorable to the non-moving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of his claims, such that a reasonable jury could find in his favor. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). In response to a properly-supported motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

"The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *See Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. If the non-moving party fails to "make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof," then the court must enter summary judgment for the moving party. *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1294 (11th Cir. 1998).

Vardaq, M.D. v. Motorola, Inc., 264 F.Supp. 2d 1056, 1058 (S.D. Fla. 2003).

III. Fidelity is Entitled to Summary Judgment as a Matter of Law.

A. Undisputed Facts.

Plaintiff has not alleged any actual harm or injury suffered by himself or any member of the putative class. It is undisputed that Plaintiff has suffered no harm by any action of Fidelity. At his deposition, taken on December 15, 2003, Plaintiff testified:

Q. Has any harm come to you individually as a result of what you have alleged in the Complaint?

A. No.

(Kehoe Deposition, p.34, l.4-6).

In fact, Plaintiff could not recall receiving anything in the mail from Fidelity:

Q. Do you recall getting anything in the mail by way of solicitation or an advertisement from Fidelity Federal?

A. Not that I can remember.

(Kehoe Deposition, p.36, l.6-9).

There is no evidence in this record that Fidelity (a) obtained information about Plaintiff; (b) used information about Plaintiff for a purpose not permitted by DPPA; (c) caused any actual harm to Plaintiff (or any member of the putative class); or (d) knew, or had reason to know, that Florida was selling information in violation of DPPA. These undisputed facts are fatal to Plaintiff's claim.

1. There is no Evidence That Fidelity Obtained Any Information About Plaintiff From the State.

There is no evidence that Fidelity obtained any information about Plaintiff from the State. As noted, Plaintiff does not even recall receiving any mailing from Fidelity (Kehoe deposition, p.36, l.6-9). Without evidence that Fidelity obtained information about Plaintiff from the State, Fidelity is entitled to a summary judgment.

2. A Claim for Liquidated Minimum Damages Under DPPA is Dependent Upon a Base Allegation of Actual Damages as a Matter of Statutory Construction.

It is well-accepted that "[i]n construing a statute [courts] must begin, and often should end as well, with the language of the statute itself."[1] *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1254 (11th Cir. 2003) (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997)). "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *In re Paschen*, 296 F.3d 1203, 1209 (11th Cir. 2002) (quoting *United States v. Ron Pair*

[1] The issue of whether an award of liquidated damages is independent of or dependent on a showing of actual damage under DPPA is one of first impression.

Enters., Inc., 489 U.S. 235, 242 (1989)) (alteration in original) (internal quotation marks omitted).[2]

To construe the meaning of a statute, courts look to the placement of the terms in the statute, taking into account the rules of grammar. *Miller's Apple Valley Chevrolet Olds-Geo, Inc. v. Goodwin*, 177 F.3d 232, 234 (4th Cir. 1999). Courts also delve into the "structure of a statute and the context in which different provisions are written." *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1249 (11th Cir. 2003). "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal citations and quotation marks omitted).

The Supreme Court has cautioned that where a statute provides a particular set of remedies, a court must not read others into the statute. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20, 100 S. Ct. 242, 246-47 (1979) ("[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15,101 S. Ct. 2615, 2623 (1981) ("In the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.").

Applying these rules of statutory construction, the plain language of the DPPA is the starting point, and the ending point, of this statutory construction analysis. The relevant language reads:

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[2] Because the text of a statute controls, courts "may not 'consider legislative history when the statutory language is unambiguous.' " *Allapattah Servs.*, 333 F.3d at 1255 n.6 (quoting *Valdivieso v. Atlas Air, Inc.*, 305 F.3d 1283, 1287 (11th Cir. 2002) (*per curiam*)); *Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002) (*en banc*) ("Even if a statute's legislative history evinces an intent contrary to its straightforward statutory command, 'we do not resort to legislative history to cloud a statutory text that is clear'"). The legislative history of DPPA is silent as to the nature and purpose of the liquidated damages provision and the interrelationship between the remedy of actual damages and its liquidated damage floor.

"The Court may award actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. §2724(b)(1).

It is apparent from a review of the language that this provision, first and foremost, vests the court with the discretion to award "actual damages."[3] That independent clause is followed by a dependent clause – "liquidated damages in the amount of $2,500". That clause is introduced by the subordinating conjunction "but". The dependent clause ("liquidated damages in the amount of $2,500") modifies the independent clause ("The Court may award actual damages"). As a grammatical matter (and a matter of logic), the recovery of liquidated damages is thus dependent upon a demonstration of actual damages.

Under a well-established rule of statutory construction, the liquidated amount is to be applied to the immediately preceding terms in the statute. *In re Paschen*, 296 at 1209 (the rule of the last antecedent, which is a well-established cannon of statutory construction, provides that "qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to and including others more remote.") (quoting *United States v. Correa*, 750 F.2d 1475, 1481 n.10 (11th Cir. 1985)) (internal quotation marks and citations omitted). Thus, the liquidated amount of $2,500 qualifies the court's discretion in awarding "actual damages." Mirroring its placement in a dependent clause, the liquidated damages amount is hence not an independent remedy, but is dependent upon proof of actual damages.

The structure of the "Remedies" section, where the liquidated amount is found, supports this construction of the statute. In the Remedies section, each of the four numbered subsections begins by setting forth a particular remedy and concludes with language qualifying that remedy. For example, a court may award punitive damages, but only upon proof of willfulness. 18 U.S.C. §

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[3] Notably, this provision is found in the "Remedies" section of the act and not the section entitled "Penalties". 18 U.S.C. §2723.

2724(b)(2). A court may award attorneys' fees and costs, but only those that are reasonably incurred. 18 U.S.C. § 2724(b)(3). A court may award preliminary and equitable relief, but only as the court deems appropriate. 18 U.S.C. § 2724(b)(4). Similarly, a court may award "actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b)(1). Thus, as is apparent from the structure of the Remedies provision itself, the liquidated damages amount is not an independent remedy, but merely the minimum amount of actual damages recoverable.

Just as punitive damages are not awardable unless a plaintiff proves compensatory damages, by analogy, the liquidated sum of $2,500 is not available unless Plaintiff proves some actual damages.

Plaintiff reads DPPA to provide that he is entitled to either (i) his actual damages or (ii) the sum of $2,500, ***whichever is greater***. If that was the remedy Congress intended, Congress easily could have said so. In fact, Congress has provided precisely that remedy in connection with other statutes. 18 U.S.C. § 2520(c)(1)(A) ("the court shall assess the ***greater*** of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500."); 18 U.S.C. § 2520(c)(1)(B)("the court shall assess the ***greater*** of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000."); 18 U.S.C. § 2712(a)(1)("the Court may assess as damages--actual damages, but not less than $10,000, whichever amount is ***greater***"); 49 U.S.C. § 32710 ("A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is ***greater***.").

2. The Conditional Nature of Liquidated Damages Under DPPA is Supported by the *Doe v. Chao* Opinion.

Fidelity's straightforward textual analysis of DPPA, namely that a person must prove actual damage in order to recover minimum liquidated statutory damages, is supported by *Doe v. Chao*, 540

U.S. ___, 124 S.Ct. 1204 (U.S. 2004). In *Doe*, the issue before the Court was whether a plaintiff adversely affected by an intentional willful violation of the Privacy Act was entitled to the $1,000 liquidated minimum damage on proof of nothing more than a statutory violation. That is, could a plaintiff collect the liquidated statutory minimum damages without any showing of actual damage and by only showing a violation of the Privacy Act. The court held that the liquidated minimum damages were available only to a plaintiff who could prove some actual damages.

The Privacy Act is a statutory framework for the management of records kept by Federal agencies. The Act provides civil relief to persons aggrieved by the Government's failure to comply with the Act's requirements. In *Doe*, the petitioner, Doe, had filed for black lung benefits with the Department of Labor. The respondent used Doe's social security number to identify his claim on official agency documents, including a multi-captioned hearing notice that was sent to a group of claimants, their employers and lawyers. The trial court awarded Doe the statutory minimum of $1,000 based on his uncontroverted testimony about suffering distress upon the learning of the improper disclosure. The Fourth Circuit reversed, holding that the $1,000 minimum is available only to plaintiffs who suffer actual damages, and that Doe had not raised a triable issue of fact without such damages. *Doe v. Chao*, 306 F.3d 170, 177 (4th Cir. 2002).

Doe's claim fell within a catchall category for someone who suffered an "adverse affect" from a failure to comply with the Act that was not otherwise specified in the remedial section of the Act. 5 U.S.C. §552(a)(g)(1)(D). *Id.* at 1208. Under section 552(a)(g)(4) of the Privacy Act:

> In any suit brought under the provisions of sub-section (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner that was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of – (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recover receive less than the sum of $1,000.

The Supreme Court upheld the Fourth Circuit by engaging in a straightforward textual analysis of the statute. The court reasoned that the $1,000 minimum guaranty goes only to victims who prove some actual damages. The court noted:

> When the statute gets to the point of guaranteeing the $1,000 minimum, it not only has confined any eligibility to victims of adverse effects caused by intentional or willful actions, but has provided expressly for liability to such victims for "actual damages sustained." It has made specific provision, in other words, for what a victim within the limited class may recover. When the very next clause of the sentence containing the explicit provision guarantees $1,000 to a "person entitled to recovery," the simplest reading of that phrase looks back to the immediately preceding provision for recovering actual damages, which is also the Act's sole provision for recovering anything (as distinct from equitable relief). With such an obvious referent for "person entitled to recovery" in the plaintiff who sustains "actual damages," Doe's theory is immediately questionable in ignoring the "actual damages" language so directly at hand and instead looking for "a person entitled to recovery" in a separate part of the statute devoid of any mention either of recovery or of what might be recovered.

Id. at 1208.

Based upon its "straightforward textual analysis," the court held that a plaintiff must prove actual damages to be entitled to the statutory minimum damages. Having so held, the court then addressed three "loose ends." First, *Doe* had argued "it would have been illogical for Congress to create a cause of action for anyone who suffers an adverse affect from intentional, willful agency action than deny recovery without actual damages." The court rejected this argument.

> But this objection assumes that the language in section (g)(1)(D) recognizing a federal "civil action" on the part of someone adversely affected was meant, without more, to provide a complete cause of action and of course this is not so.

Id. at 1210. The court then noted

> An individual subjected to an adverse affect has injury enough to open the courthouse doors, but without more has no cause of action under the Privacy Act.

Id. at 1211. Similarly, a person whose information has been unlawfully obtained in violation of DPPA (if Plaintiff can prove it) has injury enough to "open the courthouse doors" but without a showing of actual damages has no cause of action for damages under DPPA.

Second, *Doe* had argued that "there is something peculiar in offering some guaranteed damages, as a form of presumed damages not requiring proof of amount, only to those plaintiffs who can demonstrate actual damages." *Id.* at 1211. The court rejected this argument, reasoning that such a statutory scheme was similar to the common law damages recoverable for defamation, that is, certain defamations were redressed by general damages but only when a plaintiff first proves some "special harm" *i.e.*, harm of a material and generally of a pecuniary nature. *Id.* at 1211.

Third, *Doe* had argued that later enacted statutes with remedial provisions similar to section 552(a)(g)(4) supported his claim. Those statutes were the Tax Reform Act of 1976 and the Electronic Communications Privacy Act of 1986. The court again summarily rejected *Doe's* arguments. First, it noted one of the acts had language too far different from the Privacy Act's language to serve as a sound basis for analogy. Second, and more important, the Court was troubled with *Doe's* position in its reliance on the legislative history of a completely separate statute passed well after the Privacy Act. *Id.* at 1212. The court noted that the court has repeatedly taken the position that "'subsequent legislative histories will rarely override a reasonable interpretation of a statute that can be gleamed from the language and legislative history prior to its enactment'". *Solid Waste Agency of Northern Cook County v. Army Corps. of Engineers*, 531 U.S. 159, 170 note 5, 121 S.Ct. 675, 148 L.Ed.576 (2001) (quoting *Consumer's Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, note 13, 100 S.Ct. 2051, 65 L.Ed.2d 766 (1980)". *Id.* at 1212.

3. The Requirement of Proof of Actual Damages is Supported by the Common Law.

Another recognized rule of statutory construction provides that a court may presume that Congress has legislated with an expectation that the common law rules will apply. *See, Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Thus, where a common-law principle is well-established . . . the courts may take it as given that Congress has legislated with an

expectation that the principle will apply except when a statutory purpose to the contrary is evident.") (internal citations and quotation marks omitted).

Based upon this rule of construction, this Court may presume that Congress' provision of damages for a violation of DPPA conforms to common-law rules on damages in privacy actions, unless a contrary intent is evident. Under the traditional rule on damages in privacy actions, a plaintiff not only has "the burden of proving that the disclosure was the proximate cause of his injury, but must also show the nature and extent of the injuries and damages claimed to have been suffered." 43 Am. Jur. Proof of Facts 2d 449, *Invasion of Privacy By Public Disclosure of Private Facts*, § 13; 62A Am. Jur. 2d *Privacy* § 254; *Restatement (Second) of Torts* Section 652H (1977) (a plaintiff is entitled to recover damages for "his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion"). "In most jurisdictions, the plaintiff is required to show some general damages, even though he is not required to prove either the amount or that there were special damages. Without a showing of general damages, he is entitled to recover only nominal damages." 43 Am. Jur. Proof of Facts 2d 449, *Invasion of Privacy By Public Disclosure of Private Facts*, § 13. Thus, under any construction of the liquidated damages provision, this Court may safely presume that a claim for liquidated damages under DPPA requires, at a minimum, a showing of "some general damages, even though [the plaintiff] is not required to prove either the amount or that there were special damages." 43 Am. Jur. Proof of Facts 2d 449, *Invasion of Privacy By Public Disclosure of Private Facts*, § 13. Further, a minimum amount of proof is necessary to ensure that imposition of liquidated damages on a defendant would be reasonable in light of the actual loss sustained by the plaintiff. *See* Restatement (Second) of Contracts § 356 (1981) (requiring under principles of contract law that the liquidated damages amount be reasonable in light of anticipated or actual loss caused by the breach and the difficulties of proof of loss).

4. **Without Actual Damages, Fidelity's Potential Damages Would Be Grossly Out of Proportion to Any Harm Suffered by the Plaintiff Class.**

The Eleventh Circuit has held that a showing of actual harm may be required to maintain a class action, even where the cause of action does not require a showing of actual harm, where "the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff." *London v. Wal-Mart Stores, Inc.*, No. 02-12257, 2003 WL 21805304 (11th Cir. Aug. 7, 2003) (citing to several cases wherein the courts found that the aggregate of statutory damages would be grossly disproportionate to any actual harm suffered by the plaintiffs).

In this case, Plaintiff seeks liquidated damages of $2,500 for himself and for all members of a loosely defined class whose personal information contained in motor vehicle records was allegedly obtained by Fidelity, without their consent, since June 1, 2000. Such a recovery would result in damages of approximately $1.4 billion, obviously grossly disproportionate to the actual harm suffered (which is none), given that (i) Plaintiff has not alleged any actual harm to himself or *any* other class member; (ii) Plaintiff has testified that he suffered no harm; and (iii) common sense tells us that there could be no actual damages resulting from the mere receipt by mail of an envelope containing an automobile loan solicitation. Such an award would be punitive and violative of due process. DPPA should not be interpreted to permit, in the absence of actual damages, such an extraordinarily large award.[4] Such an award would be grossly disproportionate to the harm, if any, caused by Fidelity and such an award would be financially devastating to Fidelity.

"[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated

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[4] In fact, Plaintiff himself testified that such a result would, in his opinion, be unfair. "Q. Assume that the $2,500 damages per each member of the class would bankrupt Fidelity Federal about eight times and put about 800 employees out of a job. Would that be fair to you?" Answer: "No." (Kehoe deposition, p.42, l.16-21)

to construe the statute in favor of the alternative interpretation to avoid such [constitutional] problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 & n.12, S. Ct. 2271, 2279 & n.12 (2001) (internal citations and quotation marks omitted). Any construction of DPPA that would permit a class of members who have not suffered any actual damages to recover aggregate liquidated damages grossly disproportionate to any actual harm and financially devastating to Fidelity would raise serious due process concerns. Such a construction should be avoided in favor of an interpretation of DPPA that requires actual harm. *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350-51 (N.D. Ill. 2002) (recognizing due process concerns where statutory damages would be "grossly disproportionate" to any actual damage suffered by plaintiffs). Fidelity's net worth is $178 million, only approximately 13% of the potential award in this case if Plaintiff's reading of DPPA is followed. Casey aff. ¶¶ 2 and 4. Therefore, Plaintiff's reading of DPPA to permit an extraordinarily large damages award, in the complete absence of actual damages, cannot stand.

DPPA is more reasonably construed as correlating a plaintiff's entitlement to the liquidated damages amount to the actual harm suffered by the plaintiff, with the liquidated damages provision merely providing to persons with nominal actual damages the certainty of a minimum recovery and thus an incentive to sue.

5. <u>The Relevant Legislative History</u>.

There is little relevant legislative history on point.[5] However, two points should be made.

First, there is nothing in the legislative history that would indicate that Congress ever intended that institutions, such as Fidelity, should be exposed to billions of dollars of damages when their conduct was perfectly innocent. Further, there is nothing in the legislative history that indicates that actual damages are not required, and nothing that indicates liquidated damages are permitted,

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[5] As noted in footnote 2, the court should only consider the Act's legislative history if the court determines the language of the statute is ambiguous, which it is not.

absent actual damages. Finally, there is nothing in the legislative history to indicate that Congress intended to bankrupt financial institutions, such as Fidelity, for relying upon the State to comply with federal law.

Secondly, in paragraph 5 of the Complaint, Plaintiff enumerates the type of incidents that gave rise to the passage of DPPA. Paragraph 5 reads as follows:

> The DPPA was included as part of omnibus crime legislation passed by Congress in 1993, known as the Violent Crime Control and Law Enforcement Act of 1993. Senator Boxer, one of DPPA's Senate sponsors, described several well-publicized incidents in which criminals had used publicly available motor vehicle records to identify and stalk their victims. Those incidents included:
>
> a. the murder of actress Rebecca Schaeffer in California by a man who had obtained Schaeffer's address from California's Department of Motor Vehicles;
>
> b. home invasion robberies by a gang of Iowa teenagers who identified their victims by copying the license numbers of expensive automobiles and used those license numbers to obtain the addresses of the vehicle owners from the Iowa Department of Transportation; and
>
> c. the Arizona murder of a woman whose home address was identified from the Arizona Department of Motor Vehicles.
>
> Senator Boxer also explained the ease with which a California stalker had obtained the addresses of young women by copying their license numbers and requesting their addresses from the California Department of Motor Vehicles.

Each of these incidents involved serious and actual harm. Murders and home invasion robberies are entirely different than the mailing of automobile loan solicitations.

B. Fidelity Did Not Know And Had No Reason to Know That the State Had Not Obtained Express Consent.

It is undisputed that Fidelity did not know and had no reason to know, that the State had not obtained the express consent of the persons whose personal information was disclosed by the State to Fidelity. *See* Casey Aff. ¶5. The absence of any such evidence is fatal to Plaintiff's claim and Fidelity is entitled to summary judgment.

[redacted]

the express consent of the person to whom such personal information pertains. Only if Fidelity knew that the State had not obtained express consent would there be a violation of DPPA. It is that simple.

To summarize, the facts that Fidelity must have known before it can be liable for a violation of DPPA are:

(a) Fidelity obtained, disclosed or used personal information;
(b) That information came from a motor vehicle record; and
(c) The State had not obtained the express consent of the person to whom such personal information pertains.

There is no genuine issue of material fact on this issue. It is undisputed that Fidelity did not have the required knowledge at the time it obtained the information from the State. *See* Casey Aff., ¶¶3 and 5. Not only does Plaintiff fail to allege that Fidelity knew knowledge, or had reason to know, of the fact that the State had not obtained the express consent of the person whose personal information was disclosed, but the undisputed facts demonstrate that Fidelity did not possess such knowledge.

2. The Majority of the Relevant Case Law Supports Plaintiff's Allegation in Paragraph 15 that "The Term 'Knowingly' Requires Proof and Knowledge of the Facts that Constitute the Offense."

a. DPAA Cases.

There is no case interpreting DPPA which speaks directly to whether the defendant must have known that the State had not obtained express consent. In *Mattivi v. Russell*, 2002 WL 31949898 (D. Colo.), the court granted defendant's motion for summary judgment because the court interpreted the conduct in question not to be violative of DPPA because a "motor vehicle record" as defined by DPPA was not involved. The court noted that interpretation of DPPA is a matter of federal law and then discussed at some length the rules of statutory interpretation as established by the Tenth Circuit, noting that "the literal language of the statute controls its construction, absent 'ambiguity or irrational result.'" *Id.* at *2.

The only other DPPA case with some relevance is *Morgan v. Niles*, 250 F. Supp.2d 63 (N.D.N.Y. 2003). In that case, in noting that there was no independent cause of action for conspiracy to violate DPPA, the court pointed out that such a holding did not mean that plaintiffs may not offer proof of a conspiracy to violate DPPA.

> Evidence of a conspiracy may be used to connect the actions of the various defendants with a violation of the DPPA. In the instant case, the extent to which McKenna knew of, and participated in, Niles and Johnston's conduct or scheme is relevant to the issue of whether McKenna knowingly obtained, disclosed, or used personal information from a motor vehicle record "for a purpose not permitted" by the DPPA. [Citations omitted.]

Id. at 76.

In other words, the court was willing to permit evidence of a conspiracy, even though there was no cause of action for it, to show whether McKenna knew that personal information had knowingly been obtained, disclosed or used "for a purpose not permitted" by DPPA. Therefore, the court impliedly recognized that in order for McKenna to be liable for a violation of DPPA, he must have known that the information was to be obtained, disclosed or used "for a purpose not permitted" by DPPA.

b. <u>Resource, Conservation and Recovery Act ("RCRA") Cases</u>.

There are a line of cases which have interpreted the "knowing" requirement in the context of the RCRA, 42 U.S.C. § 6928(b)(2). That section provides:

> (d) Criminal penalties
> Any person who–
> . . .
> (2) ***knowingly*** treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either–
> (A) without having obtained a permit under § 6925 of this title . . .; or
> (B) in ***knowing*** violation of any material condition or requirement of such permit; or
> . . .
> shall, upon conviction, be subject to [fines, imprisonment or both]. (emphasis added).

The Third Circuit in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 667, 669 (3d Cir. 1984), interpreted this language to require proof that the defendant knew that the waste was

hazardous and knew that there was no permit. As to the first point, the application of knowingly to "hazardous waste," the Third Circuit held:

> If the word "knowingly" in § 6928(d)(2) referred exclusively to the acts of treating, storing or disposing, as the government contends, it would be an almost meaningless addition since it is not likely that one would treat, store or dispose of waste without knowledge of that action. At a minimum, the word "knowingly," which introduces subsection (A), must also encompass knowledge that the waste material is hazardous. Certainly, "[a] person thinking in good faith that he was [disposing of] distilled water when in fact he was [disposing of] some dangerous acid would not be covered." [Citations omitted.]

Id. at 668. Moreover, even though that subsection contains no mention of the word "knowing" the *Johnson & Towers* court concluded that even absent the phrase in that subsection, the government still had to prove that the wrongdoer had actual knowledge that a permit had not been obtained.

Applying this holding to § 2724(a) of DPPA, the functional equivalent of "hazardous waste," as to which the knowing requirement is applied, is "personal information, from a motor vehicle record, for a purpose not permitted under this Chapter." The knowing requirement must work its way all the way down through a "purpose not permitted," because there is nothing *per se* wrong with "disclosing personal information," "disclosing personal information from a motor vehicle record," or "disclosing personal information from a motor vehicle record for a purpose permitted under the Chapter." There is only an offense if the purpose is not permitted. Thus, for Fidelity to be liable for a purpose not permitted, Fidelity must have known the fact that the State had not obtained the express consent of the individuals whose personal information was disclosed.

In *United States v. Hayes International Corp.*, 786 F.2d 1499 (11th Cir. 1986), the Eleventh Circuit considered two issues. First, it considered whether knowledge of the regulations was required under § 6928(a)(d)(1). The court determined that the defendant could not claim a lack of knowledge of the definition of hazardous waste "within the meaning of the regulations." *Id.* at 1503. This is simply another way of saying that ignorance of the law is no defense. However, the Eleventh Circuit did not take away the requirement that the defendant have knowledge that the material was hazardous waste before he would be liable. Thus, as held in *Johnson & Towers*, *supra.*, a person

thinking in good faith that he was disposing of distilled water when, in fact, he was disposing of some dangerous acid, would ***not*** be liable for a violation of the statute. *Id.* at 668.

More importantly, the Eleventh Circuit then went on to hold that the alleged wrongdoer must know that there was no permit. Otherwise, the wrongdoer would have liability under the statute even "if the defendant reasonably believed that the site had a permit, but, in fact, [the defendant] had been misled by the people at the site." The court noted that if Congress wanted to intend such a strict statute, it could have dropped the term "knowingly" altogether.

Applying this logic to DPPA, if the "knowing" requirement is read to apply only to "obtains, discloses, or uses personal information" that term has little or no content and is nothing but surplusage because it is almost unimaginable how one could obtain, disclose or use personal information in an unknowing capacity. Therefore, to give substance and content to the term "knowingly", it must apply to the rest of the clause including the requirement that the information come from a motor vehicle record and the requirement that the personal information be used "for a purpose not permitted under this Chapter." That is the most common sense reading of the statute.

c. <u>Food Stamp Act Cases</u>.

In *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), the court considered the interpretation of the Food Stamp Act, 7 U.S.C. § 2024(b):

> (W)hoever knowingly uses, transfers, acquires . . . or possesses (food) coupons . . . in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons are of a value of $100 or more, be guilty of a felony.

The defendant contended that the government was required to prove that he knew his actions were in violation of the law, and the Eighth Circuit agreed. The specific question was whether the word "knowingly" applied to not only "uses, transfer, acquires" but also to "in any manner not authorized by this Chapter." The government pointed out that the adverb "knowingly" immediately precedes the verbs "uses, transfers, acquires" and was some distance away from the crucial clause "in any manner not authorized by this Chapter." However, the court held that:

> [P]urely as a verbal matter, the word "knowingly" in subsection (b) may naturally be read to modify the entire remainder of the clause in which it appears, including the phrase, "in any manner not authorized," etc. To read "knowingly" as having nothing to do with the phrase, "in any manner not authorized," is, we suppose, verbally tenable, but it is not the only meaning the words will bear, nor even, we think, the more natural one.

Id. at 1226.

Accordingly, the Eighth Circuit held that the government had to prove that the alleged wrongdoer knew that his conduct was "not authorized by this Chapter." An important point should be made here. Unlike the Food Stamp Act, DPPA does not require that one know that he is breaking the law. Certain statutes require such allegations and proof, but the general principle is that ignorance of the law is no defense. But that is not to say that Fidelity need not have knowledge of the underlying facts before it can be liable for a violation of DPPA. Congress could not have intended that Fidelity could be liable for violating DPPA if it did not know that the State had not obtained express consent, and such a reading would be fundamentally unfair to Fidelity. DPPA clearly requires that the alleged wrongdoer knowingly obtain, disclose, or use the personal information for a purpose not permitted under the Chapter. Thus, to be liable under DPPA, Fidelity must have known that the State had not obtained express consent, a fact Fidelity did not know. Casey aff. ¶ 5.

4. Before Fidelity May be Liable, Plaintiff Must Plead and Prove That Fidelity Knew of the Facts Giving Rise to Liability Under the DPAA.

In summary, as the Plaintiff has conceded in paragraph 15 of the Complaint, before Fidelity may be liable for a violation of DPPA, it must have "knowledge of the facts that constitute the offense." There is no genuine issue of material fact that Fidelity did not possess this required knowledge.

This requirement is supported by a textual analysis of DPPA. In order to give any meaning and content to the "knowingly" requirement of § 2724(a), that requirement must modify the entire clause which is the object of the verbs "obtains, discloses or uses." That entire clause is "from a

motor vehicle record, for a purpose not permitted under this Chapter . . . ." Therefore, before Fidelity can be liable under DPPA, Fidelity must have known that its purpose in acquiring the information was not permitted. To learn this fact, Fidelity would have to have known that the State did not obtain express consent as required by § 2721(b)(12). That has not been alleged or proved.

This reading of § 2724(a) is supported by standard rules of statutory construction and the interpretation courts have made of similarly constructed statutes. This reading is the only reading that requires the alleged wrongdoer to have knowledge of the facts (but not the law) giving rise to his liability.

V. Conclusion.

For the reasons set forth above, summary judgment should be entered in favor of Fidelity and against the putative class.

Dated: March 24, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to all parties on the attached service list, by [X]U.S. Mail, [X]Facsimile, [ ]Hand Delivery, [ ] overnight delivery, this 10th day of March, 2004.

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