UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80593-Civ-HURLEY/LYNCH

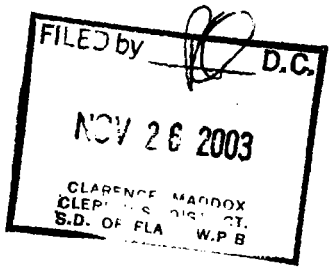
JAMES KEHOE, on behalf of himself and all others similarly situated,

Plaintiff,

v.

FIDELITY FEDERAL BANK AND TRUST,

Defendant.
_____/



DEFENDANT'S, FIDELITY FEDERAL BANK AND TRUST, REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant, Fidelity Federal Bank and Trust ("Fidelity") replies to Plaintiff's Opposition to Defendant's Motion to Dismiss Or, In the Alternative, For Summary Judgment ("Plaintiff's Opp.") as follows.

AS A MATTER OF STATUTORY CONSTRUCTION, A CLAIM OF LIQUIDATED DAMAGES UNDER THE DPPA IS DEPENDENT UPON A BASE ALLEGATION OF ACTUAL DAMAGES

Plaintiff, James Kehoe ("Plaintiff") completely fails to address the merits of Fidelity's grammatic construction of 18 U.S.C. §2724(b)(1). Rather, Plaintiff simply states without grammatical analysis or without parsing the language of the statute that Fidelity "tortures the plain language of 18 U.S.C. §2724(b)(1)". Plaintiff's Opp., p.4. Fidelity's reading of the statute is not only compelling but it would torture all grammatic rules to conclude that the phrase "but not less than"

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does not require a person to sustain actual damages to recover the Act's minimum damage award of $2,500. Plaintiff ignores the rules of grammar even though the rule is delineated as follows:

> The ordinary rules of grammar will be applied for the purpose of ascertaining the meaning of a statute, but they are not controlling when an intent in conflict therewith is disclosed, and must thereupon be disregarded so as to give effect to the legislative intention.

82 C.J.S. Statutes §324. In this case, there is no contrary legislative intent and the statutory language must be construed in accordance with the rules of grammar and common sense.

The construction of 18 U.S.C. §2724(b)(1)[1] is straightforward. The word "but" is part of the subordinating conjunction ("but not less than") that introduces the dependent clause "liquidated damages in the amount of $2,500." In the context of 18 U.S.C. §2724(b)(1), 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 dependent upon a demonstration of actual damages. Plaintiff does not refute this straightforward reading of 18 U.S.C. §2724.

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[1] Plaintiff claims that the constitutionality of the statute has been upheld by the United States Supreme Court. Plaintiff's Opp., p.2. *Reno v. Condon*, 528 U.S. 141 (2000) held that DPPA did not "run afoul" of the federalism principles enunciated in *New York v. United States, 505 U.S. 144 (1992)*, and *Printz v. United States*, 521 U.S. 898 (1997). *Reno* did not consider in any way the constitutionality of DPPA, if Plaintiff's view of DPPA's damages provision is correct. In *Fresco v. Auto Data Direct, Inc.*, Case No. 03-61063 CIV-Martinez/Dube, a similar class action based upon DPPA, pending in the United States District Court for the Southern District of Florida, Defendant, eFunds Corporation, Inc. has filed a constitutional challenge to DPPA claiming in part that DPPA violates the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution and Article I.§9 of the Florida Constitution and First Amendment to the United States Constitution, if the Plaintiff's reading of DPPA is correct, by imposing "an automatic penal standard" bearing no relation to a reasonable forecast of actual damages. [D.E. #131].

To accept Plaintiff's reading of 18 U.S.C. §2724(b)(1), the Court will need to rewrite that section. Liquidated damages would be available regardless of actual damages if, and only if, the Court were to interpret the actual language of the statute:

> The court may award (1) actual damages, but not less than liquidated damages in the amount of $2,500.

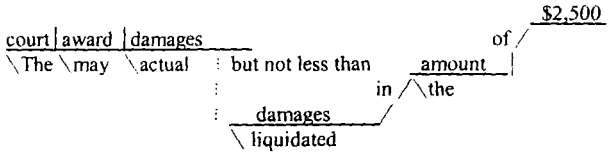
to mean:

> The court may award (1) actual damages **or** not less than liquidated damages in the amount of $2,500.

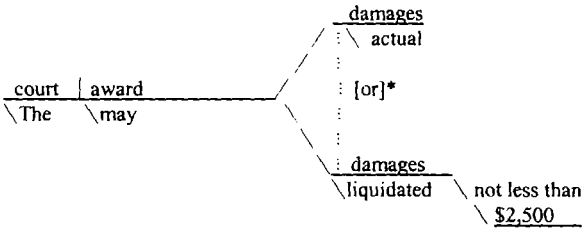
The court should not follow Plaintiff's interpretation. *See Williams v. Taylor*, 529 U.S. 420 (2000) ("Courts give the words of a statute their 'ordinary, contemporaneous, common meaning'"). F. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv.J.L.R.Pub. Policy 59, 65 (1988)(stating that questions of statutory interpretation should turn on how "a skilled, objectively reasonable user of words would have understood the text of the statute").

Diagraming these two sentences, graphically points out the critical differences in their meaning:

Statutory Language



Plaintiff's Interpretation



*word "or" not in statute

The phrase "but not less than liquidated damages in the amount of $2,500" appears only after the statute confines the remedy to "actual damages". The phrase is not logically read to disavow that

limitation on recovery – a demonstration of actual damages. The plain language of 18 U.S.C. §2724(b)(1) requires a plaintiff to demonstrate "actual damages" and, only then, does a plaintiff become eligible for a minimum damage award of $2,500. Had Congress intended to create an automatic damages award (*i.e.* a pure liquidated damage award in the absence of actual damages) it would have drafted the section using the disjunctive "or"; permitting recovery of "actual damages" **or** $2,500 in liquidated damages. Congress chose not to do this and the court should decline to rewrite the §2724(b)(1) to allow such a result.

Fidelity's straightforward reading of the statute, that a person must prove actual damage in order to recover any damages under DPPA, balances the aims of DPPA and our nation's goals of open government and free exchange of non-stigmatizing information. DPPA's goals will be best served by an interpretation of the civil remedies provision that (i) penalizes disclosures of protected personal information only when actual harm occurs and (ii) does not chill the valid exchange of such information.

Plaintiff argues that Fidelity's reliance on *Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002) is misplaced[2] and that the Eleventh Circuit has "implicitly" disagreed with *Chao*. Plaintiff's Opp., p.5. To support this argument, Plaintiff cites *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982). That case, however, decided only the question of whether the Privacy Act's use of the phrase "actual damages"

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[2] Plaintiff's statement that Fidelity's reliance on *Chao* is "misplaced" is ironic because the vast majority of Plaintiff's legal argument in his memorandum is copied verbatim from the Brief for Petitioner in *Buck Doe v. Elaine L. Chao*, filed in the Supreme Court of the United States, Case No. 02-137. The decision in *Chao* is very relevant because the Appellate Court engaged in a similar grammatic construction of the Privacy Act and found the Privacy Act's remedial provision requires a plaintiff to demonstrate some "actual damages" before she may recover the statutory minimum award of $1,000. *Doe v. Chao*, 306 F.3d 170, 178 (4th Cir. 2002). The court concluded that "Congress's decision only '*to augment*' damage awards for persons able to demonstrate some 'actual damages' . . . serve[d] a competing objection: preventing the imposition of potentially substantial liability for violations of the Act which caused no 'actual damages' to anyone."

included general or compensatory damages or, instead, was limited to out-of-pocket or pecuniary losses. *See id.* at 328 (reciting court's holding). The court did not analyze the separate, discrete question of whether any showing of actual damages was necessary to recover the $1,000. In *Fitzpatrick*, the court simply refers to the $1,000 liquidated damage amount as "the statutory minimum" *Id.* Further, the Internal Revenue Service, as appellee in that case, did not contest the plaintiff's entitlement to the $1,000 award. *Id.* at 329. Because the Court did not address the question of statutory construction resolved by the Fourth Circuit Court of Appeals in *Chao,* there is no disagreement, implicitly or explicitly, between *Chao* and *Fitzpatrick.*

In fact, the *Chao* opinion is the first direct and considered analysis of the question, albeit in the slightly different context of the Privacy Act. All of the decisions upon which Plaintiff relies simply mention in dicta the availability of "the statutory minimum" while resolving other questions under the Privacy Act, in the absence of any dispute between the parties as to the nature of the liquidated remedy.

In *Johnson v. Department of Treasury*, 700 F.2d 971 (5th Cir. 1983), the question before the court was whether "actual damages" includes non-pecuniary damages for mental injuries. In one footnote, the court commented that "the statutory minimum of $1,000, of course, is recoverable." *Id.* at 977, note 12. But that is dictum, entirely unnecessary to the resolution of the case, in which the plaintiff was granted recovery based on a finding that he suffered actual damages. *Id.* at 986. The comment is therefore at odds with the court's acknowledgment that Congress "rejected liability for presumed damages" and that Congress was "concerned about the drain on the Treasury created by a rash of privacy suits." *Id.* at 978, note 15 (citation omitted) and 982.

Wilborn v. Department of Health and Human Services, 49 F.3d 597 (9th Cir. 1995) is also of no help to Plaintiff. That case decided liability issues under the Privacy Act and it was only in closing that the court noted that "Wilborn has limited the damages he seeks to a statutory minimum of $1,000" and awarded him that amount. *Id.* at 601. There is no language in the opinion that indicates the award was made in the absence of proof of actual damages. The court in *Wilborn* did not analyze the text of the Privacy Act. Nor did the court in *Parks v. IRS*, 618 F.2d 677 (10th Cir. 1980).[3]

Plaintiff cites a number of cases that apply different federal statutes to support his reading of 18 U.S.C. §2724(a)(1). Plaintiff's Opp., pp.8-10. None of these cases actually support Plaintiff's position. First, the decisions cited do not contain a detailed grammatical analysis of DPPA's remedy provision. Second, Plaintiff misreads the holdings of these cases.

In *Dirkes v. Borough of Runnemede*, 936 F.Supp. 235 (D.N.J. 1996), the issue was whether plaintiffs had standing to bring suit under the Videotape Privacy Protection Act. The issue was not whether a plaintiff had to prove actual damage to recover the Act's liquidated statutory minimum.[4]

In *Campiti v. Walonis*, 467 F.Supp. 464 (D.Mass. 1979) the defendants "conceded their liability for liquidated damages". The issue present here was not present in *Campiti*. Fidelity

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[3] Plaintiff's citation to *United Laboratories, Inc. v. Rukin*, 1999 WL 608712 (N.D. Ill.) is of no persuasive force. The opinion cited by plaintiff is an unreported Report & Recommendation ("R&R") by a United States Magistrate Judge. There is no reported opinion by the United States District dealing with the R&R. A search of the internet by counsel for Fidelity indicates that the United States District Court accepted the R&R but no opinion was retrievable.

[4] Plaintiff claims that the Court's conclusion is contained in footnote 4. The court in that footnote simply states that to have standing to sue under the Videotape Act a party need only show (i) he is "aggrieved" and (ii) need not demonstrate harm. Standing is a different issue than the damages available, if standing exists.

obviously does not concede it is liable for liquidated damages, because DPPA contains on its face no such liability.

In *In re Lubanski*, 186 Bankr. 160 (D.Mass. 1995) the issue was whether an award of liquidated statutory damages pursuant to Massachusetts' wiretapping Act was dischargeable under the Bankruptcy Code as a "fine" or "penalty" because the award did not satisfy the "injury" requirement of 11 U.S.C. §523(a)(b). In determining that the award was non-dischargeable, the court stated that

> The court is satisfied that, for the purposes of §523(a)(b), the damages awarded by the state court were designed to remedy an actual injury.

Id. at 167. The court found the liquidated damage award not to be a penalty because it was remedying "an actual injury." A careful reading of the opinion actually supports Fidelity's position.

Because Plaintiff has not and cannot assert a claim for actual damages, Plaintiff has failed to state a cause of action under DPPA.

PLAINTIFF CANNOT PREVAIL BECAUSE HE HAS NOT ALLEGED AND CANNOT PROVE THAT FIDELITY KNEW, OR HAD REASON TO KNOW, THE STATE HAD NOT OBTAINED EXPRESS CONSENT.

Plaintiff has failed to state a cause of action under DPPA because Plaintiff has not alleged, nor can he prove, that Fidelity knew, or had reason to know that the State of Florida had not obtained the express consent of the persons' whose personal information was disclosed by the State to Fidelity. In its Memorandum in Support of its Motion to Dismiss and/or in the Alternative, Motion for Summary Judgment, Fidelity allocates approximately ten pages in support of its position on this point. In response, Plaintiff claims that it needs more discovery and that because the relief sought

by Plaintiff is civil there is no "mens rea" (or criminal state of mind) showing that must be made. Both these arguments are without merit.

This Court should not delay ruling on the Motion or deny the Motion because Plaintiff seeks time for additional discovery. During the last five months, Plaintiff has had an adequate time to conduct discovery as evidenced by the fact that he served requests for production and interrogatories, Fidelity responded to the discovery, and no depositions have been scheduled despite the fact this Motion has been pending for two months and Plaintiff has had every opportunity to schedule depositions, if it chose to do so. This Court should rule on the Motion without permitting additional discovery because (1) if the Court rules on the Motion as a motion to dismiss, it is limited to the pleadings (no discovery could be considered), and (2) if the Court reviews the Motion under Rule 56, summary judgment is appropriate because (a) Plaintiff failed to file an affidavit opposing the Motion or setting forth the reasons why an affidavit opposing the Motion could not be obtained pursuant to Federal Rule of Civil Procedure 56(f), and (b) Plaintiff has had sufficient time to conduct discovery.

First, when ruling on a motion to dismiss this Court cannot consider matters outside the pleadings. *Gutherman v. 7-Eleven, Inc.*, 278 F.Supp.2d 1374 (S.D. Fla. 2003)(granting a motion to dismiss). Because no discovery would be considered by the Court when ruling on the Motion as a motion to dismiss, Plaintiff's request for additional discovery as to that Motion is irrelevant.

Second, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, this Court may consider the Motion as a summary judgment request based on the failure to state a cause of action and review matter outside the pleadings. In the context of a summary judgment motion, the Eleventh

Circuit has recognized that a party opposing such a motion must rely on more than vague assertions that additional discovery will produce needed, but unspecified facts. *Barfield v. Brierton*, 883 F.2d 923 (11th Cir. 1989)(affirming the trial court's denial of a motion to stay summary judgment pending additional discovery because plaintiff failed to diligently pursue discovery). Likewise, the United States District Court for the Southern District of Florida followed the same rule when granting summary judgment in *Miccosukee Tribe of Indians of Florida v. U.S.*, 980 F.Supp. 448 (S.D. Fla. 1997), *aff'g* 163 F.3d 1359 (11th Cir. 1998). This Court recognized that there is no need for a court to allow a party to present additional evidence when it failed to raise a genuine issue of material fact. *Id.*

Rule 56(f) provides a safe guard against the premature entry of summary judgment. A party requesting a continuance under subsection (f) must present an affidavit containing specific facts regarding the failure to respond to the motion and establish genuine issues of material facts. *Barfield*, 883 F.2d at 931. Under subsection (f), the Court may order a continuance to allow depositions or additional discovery. In this case, Plaintiff failed to file an affidavit to either (1) create a genuine issue of material fact or (2) explain why additional discovery would enable him to present issues of material fact. Based on the fact that there are no genuine issues of material fact, summary judgment should be granted in favor of Fidelity.

Plaintiff has argued only two purposes for its allegedly needed discovery: to establish (1) Fidelity employees did not expressly consent to the DMV release of information, and (2) DMV does not have a form to provide for express consent. Plaintiff's Opp. p.12. Neither of these issues is relevant to the summary judgment Motion. The Motion implicitly assumes, for purposes of the

Motion, that (1) none of the class, including Fidelity employees, consented to the release and (2) DMV did not obtain such consent (therefore it would be irrelevant whether DMV had a form to obtain such consent).

As to the substance of Fidelity's Motion for Summary Judgment, Plaintiff argues in three paragraphs that Fidelity's conduct in obtaining the information satisfied the "knowing" requirement of DPPA, because Fidelity "knew" it was obtaining and using the information. Plaintiff's Opp., pp.12-13. Plaintiff's argument again ignores the clear language of the statute. The statute reads: "A person who knowingly obtains, discloses, or uses personal information . . . for a purpose not permitted under the Chapter . . . ." 18 U.S.C. §2724(a). Section 2721(b)(12) lists as a permitted use: "solicitations if the State has obtained the express consent of the persons to whom such information pertains." Obviously, when these two sections are read together (as they must), to violate DPPA Fidelity must have known that the State had not received the express consent required for the permitted use of solicitation. Plaintiff has never pled or argued that Fidelity had such knowledge, nor has Plaintiff requested additional discovery on this issue. Thus, there is no genuine issue of material fact and Fidelity cannot be liable because it had no knowledge, *i.e.*, Fidelity was not knowing of the critical underlying predicate fact for DPPA liability that the State had failed to obtain consent.

CONCLUSION

For the reasons set forth above, the Complaint should be dismissed for failure to state a cause of action and/or, in the alternative, summary judgment should be entered in favor of Fidelity.

Dated: November 26, 2003.

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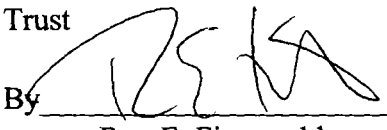
By 

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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, [ ]Facsimile, [ ]Hand Delivery, [ ] overnight delivery, this 26th day of November, 2003.

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