

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Dec 21, 2017

SEAN F. MCAVOY, CLERK

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JADE WILCOX on behalf of herself  
and all others similarly situation,

Plaintiff,

v.

JAMES CRAIG SWAPP,  
individually; and SWAPP LAW,  
PLLC, doing business as Craig  
Swapp and Associates,

Defendants.

NO: 2:17-CV-275-RMP

ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS FOR  
FAILURE TO STATE A CLAIM

BEFORE THE COURT is Defendants' Motion to Dismiss Class Action  
Complaint for failure to state a claim upon which relief may be granted, ECF No.  
15. A hearing took place on December 20, 2017. Robert Barton and Thomas  
Jarrard appeared on behalf of Plaintiff Jade Wilcox. Barbara Duffy and Ryan  
McBride appeared on behalf of Defendants James Swapp and Swapp Law, PLLC  
(collectively, "Defendants"). The Court has reviewed the pleadings, heard the  
parties' arguments, and is fully informed.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO  
STATE A CLAIM ~ 1

1 **BACKGROUND**

2 Plaintiff Jade Wilcox brought this putative class action lawsuit against  
3 Defendants alleging that Defendants violated the Driver’s Privacy Protection Act  
4 (DPPA), 18 U.S.C. §§ 2721-2725, by purchasing accident reports from the  
5 Washington State Patrol (“WSP”) and using the information in the accident reports  
6 to solicit legal business. ECF No. 1.

7 The DPPA protects the “disclosure of personal information contained in the  
8 records of state motor vehicle departments (DMVs).” *Maracich v. Spears*, 133  
9 S.Ct. 2191, 2195 (2013). The DPPA accomplishes this goal by regulating the  
10 “[s]tates’ ability to disclose a driver’s personal information without the driver’s  
11 consent.” *Reno v. Condon*, 528 U.S. 141, 144 (2000). The DPPA makes it  
12 “unlawful for any person knowingly to obtain or disclose personal information,  
13 from a motor vehicle record,” for a use not encompassed by one of the enumerated  
14 exceptions. 18 U.S.C. § 2722(a). Any person who “knowingly obtains, discloses  
15 or uses personal information, from a motor vehicle record, for a purpose not  
16 permitted under this chapter shall be liable to the individual to whom the  
17 information pertains.” 18 U.S.C. § 2724(a).

18 The DPPA “sets forth the three elements giving rise to liability, *i.e.*, that a  
19 defendant (1) knowingly obtained, disclosed, or used personal information, (2)  
20 from a motor vehicle record, (3) for a purpose not permitted.” *Howard v. Criminal*  
21 *Info. Servs., Inc.*, 654 F.3d 887, 890-91 (9th Cir. 2011) (quoting *Thomas v. George*,

1 *Hartz, Lundeen, Fulmer, Johnstone, King and Stevens, P.A.*, 525 F.3d 1107, 1111  
2 (11th Cir. 2008)). The burden of proving these elements is on the plaintiff. *Id.*

3 The Court has subject matter jurisdiction over this matter pursuant to 28  
4 U.S.C. § 1331 as a civil action arising under the laws of the United States because  
5 Plaintiff Wilcox alleges violations of the Driver’s Privacy Protection Act (DPPA),  
6 18 U.S.C. §§ 2721-2725.

## 7 DISCUSSION

### 8 *Legal Standard for Rule 12(b)(6) Motion to Dismiss*

9 The Federal Rules of Civil Procedure allow for the dismissal of a complaint  
10 where the plaintiff fails to state a claim upon which relief can be granted. Fed. R.  
11 Civ. P. 12(b)(6). A motion to dismiss brought pursuant to this rule “tests the legal  
12 sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In  
13 reviewing the sufficiency of a complaint, a court accepts all well-pleaded  
14 allegations as true and construes those allegations in the light most favorable to the  
15 non-moving party. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir.  
16 2010) (citing *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031-  
17 32 (9th Cir. 2008)).

18 To withstand dismissal, a complaint must contain “enough facts to state a  
19 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.  
20 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual

1 content that allows the court to draw the reasonable inference that the defendant is  
2 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

3 While specific legal theories need not be pleaded, the pleadings must put the  
4 opposing party on notice of the claim. *Fontana v. Haskin*, 262 F.3d 871, 877 (9th  
5 Cir. 2001) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

6 A plaintiff is not required to establish a probability of success on the merits;  
7 however, he or she must demonstrate “more than a sheer possibility that a  
8 defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S.  
9 at 556). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to  
10 relief’ requires more than labels and conclusions, and a formulaic recitation of the  
11 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

12 Ms. Wilcox alleges that Defendants violated the DPPA when they purchased  
13 collision report information from the WSP for the purpose of sending marketing  
14 materials. ECF No. 1 at 2. Ms. Wilcox alleges that Defendants purchased DPPA-  
15 protected collision report information and that they did so knowingly. *Id.*

16 Defendants argue that Ms. Wilcox’s complaint contains conclusory  
17 statements and factual allegations insufficient to survive a motion to dismiss.  
18 Defendants argue that Ms. Wilcox must make specific factual allegations that the  
19 information in the two accident reports that have been introduced originated with  
20 Washington’s Department of Licensing (DOL). Defendants also argue that Ms.  
21 Wilcox’s allegations regarding the process by which the WSP prepares and gathers

1 collision report are legal conclusions rather than factual allegations because the  
2 allegations reference the Court’s order granting a temporary restraining order in  
3 *Wilcox v. Batiste*, No. 17-cv-00122-RMP. See ECF No. 1, ¶¶ 4.9, 4.10. Finally,  
4 Defendants argue that Ms. Wilcox has failed to allege facts sufficient for the Court  
5 to infer that Defendants knew that information in the WSP collision reports came  
6 from the DOL.

7 Ms. Wilcox contends that she has set forth sufficient facts to establish a legal  
8 claim that survives the standard for a dismissal pursuant to Rule 12(b)(6). She  
9 argues that to prevail in their motion, Defendants must show that the complaint  
10 lacks plausible factual allegations. She contends that she has alleged that the two  
11 WSP collision reports at issue utilized personal information “obtained from the  
12 DMV’s motor vehicle records.” ECF No. 1, ¶¶ 4.25, 4.27. Ms. Wilcox contends  
13 that the fact that there are other possible sources for that information is irrelevant  
14 for the purposes of this motion to dismiss. Ms. Wilcox also argues that she has  
15 alleged sufficient facts for the Court to infer that Defendants had knowledge that  
16 the information they purchased was protected by the DPPA.

17 Ms. Wilcox alleges that Defendants possessed the knowledge required for  
18 establishing liability under the DPPA. ECF No. 1 at 14-15. She alleges four  
19 reasons to support her claim that Defendants knew that they were obtaining  
20 personal information in violation the DPPA when they purchased WSP collision  
21 reports. *Id.*

1 First, she alleges that Defendants purchased over 10,000 WSP collision  
2 reports, and that Defendants claim to practice law in the area of automobile  
3 accidents in Washington State and should be expected to have a working  
4 understanding of how Washington State collision reports are created. *Id.* at 14-15.  
5 Second, Ms. Wilcox alleges that Defendants knew, or should have known, that in  
6 2013 the United States Supreme Court held that legal solicitation and marketing  
7 were not a permissible purpose under the DPPA. *Id.* at 14; *see Maracich*, 133  
8 S.Ct. at 2195. Third, Ms. Wilcox alleges that a 2016 Washington State Bar  
9 Association complaint against Defendants put Defendants on notice that the  
10 practice of obtaining such information for marketing purposes was being  
11 challenged. *Id.* at 14-15. And, fourth, Ms. Wilcox alleges that Defendants had  
12 notice that using driver's license information to contact accident victims violated  
13 the DPPA, when Defendants were featured in a July 21, 2016, *Inlander* article. *Id.*  
14 at 15.

15 At oral argument, counsel for Ms. Wilcox argued that Defendants have made  
16 five errors in their argument for dismissal. First, Ms. Wilcox argues that  
17 Defendants have confused the standard for granting a dismissal pursuant to Rule  
18 12(b)(6) with an inapplicable higher standard. The standard for deciding a Rule  
19 12(b)(6) motion is whether the plaintiff has alleged "enough facts to state a claim  
20 to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Defendants  
21 appear to argue that the Court should make findings as to whether the accident

1 reports are created as Ms. Wilcox alleges. *See* ECF Nos. 15 and 19 and oral  
2 argument. In consideration of a motion to dismiss, the Court declines to make  
3 factual or legal findings beyond determining the sufficiency of the allegations in  
4 deciding this motion for dismissal.

5 Second, Ms. Wilcox argues that Defendants mislabel factual allegations as  
6 conclusory. A complaint based upon conclusory allegations will not survive a  
7 motion to dismiss. *See Twombly*, 550 U.S. at 555. However, the Court finds that  
8 Defendants have confused the concept of conclusory allegations with the accuracy  
9 of allegations. Ms. Wilcox does not need to prove the accuracy of her allegations  
10 at this stage of the proceedings. She only needs to allege sufficient facts to support  
11 that a claim to relief is plausible. Whether or not Ms. Wilcox's factual allegations,  
12 such as how DOL is involved in the production of accident reports, prove accurate  
13 at trial, the Court finds that Ms. Wilcox has made sufficient factual, rather than  
14 conclusory, allegations to support her claims.

15 Third, Ms. Wilcox argues that Defendants rely on extraneous documents to  
16 contradict the factual allegations in Ms. Wilcox's Complaint. On a motion to  
17 dismiss pursuant to Rule 12(b)(6), neither the parties nor the Court considers the  
18 probability of success on the merits. *See Iqbal*, 556 U.S. at 678 (citing *Twombly*,  
19 550 U.S. at 556). Thus, as discussed previously, at this stage in the litigation the  
20 Court will not consider Defendants' arguments regarding the merits of Ms.  
21 Wilcox's claims in making its Rule 12(b)(6) finding.

1 Fourth, Ms. Wilcox argues that Defendants draw inferences from allegations  
2 that Ms. Wilcox has not made regarding whether Ms. Wilcox personally provided  
3 her private information to the officer who prepared the WSP collision report. The  
4 Court concludes that Defendants are attempting to argue the probability of success  
5 on the merits of the case by raising these inferences, rather than challenging the  
6 sufficiency of Ms. Wilcox’s factual allegations, which is the appropriate standard  
7 at the motion to dismiss level.

8 Fifth, Ms. Wilcox argues that Defendants combine Ms. Wilcox’s factual  
9 allegations and draw legal inferences relating to the interpretation of “motor  
10 vehicle records” and whether any information that Ms. Wilcox may have provided  
11 personally is dispositive of her claims. Again, the Court finds that Defendants’  
12 arguments relate to the probability of success on the merits of the case, which is an  
13 issue appropriately raised at the summary judgment or trial level, rather than the  
14 sufficiency of Ms. Wilcox’s factual allegations, which is the issue before the Court  
15 at this stage.

16 In deciding a Rule 12(b)(6) motion to dismiss, the Court accepts all well-  
17 pleaded allegations as true and construes those allegations in the light most  
18 favorable to the non-moving party. Taking Ms. Wilcox’s factual allegations that  
19 Defendants knowingly purchased DPPA-protected information as true and the  
20 allegation that the collision reports are populated, in part, or in whole, with data  
21 collected by the DOL, the Court finds that Ms. Wilcox’s Complaint alleges



1 sufficient factual content for the court to draw the reasonable inference that the  
2 defendant is liable for the misconduct alleged. *See Ashcroft v. Iqbal*, 556 U.S. 662,  
3 678 (2009). Therefore, the Court denies Defendants' motion to dismiss for failure  
4 to state a claim upon which relief can be granted.

5 ***Class Action Dismissal***

6 At oral argument, Ms. Wilcox argued, and Defendants conceded, that any  
7 action to dismiss the putative class action is untimely. Defendants must wait until  
8 Ms. Wilcox files a motion for class certification to pursue dismissal of the class.

9 Accordingly, **IT IS HEREBY ORDERED** that Defendants' Motion to  
10 Dismiss Class Action Complaint for Failure to State a Claim, **ECF No. 15**, is  
11 **DENIED**.

12 The District Court Clerk is directed to enter this Order and provide copies to  
13 counsel.

14 **DATED** December 21, 2017.

15  
16 *s/ Rosanna Malouf Peterson*  
17 ROSANNA MALOUF PETERSON  
18 United States District Judge  
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