

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

Jan 24, 2019

SEAN F. McAVOY, CLERK

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

BEFORE THE COURT is Defendants James Craig Swapp and Swapp Law, PLLC's (collectively, "Defendants") Motion to Dismiss Plaintiff's Amended Complaint, ECF No. 80. Defendants move to dismiss Plaintiff Jade Wilcox's First Amended Class Action Complaint, ECF No. 69. The Court held a hearing in this matter on November 20, 2018. Ms. Wilcox was represented by Robert Barton. Defendants were represented by Ryan McBride. The Court has considered the parties' arguments, briefings, and the record, and is fully informed.

BACKGROUND

1
2 The following are facts alleged in Ms. Wilcox's first amended complaint,
3 ECF No. 69. Following car accidents in Washington, the Washington State Patrol
4 ("WSP") prepares Police Traffic Collision Reports ("PTCRs") using a standardized
5 collision report form. *Id.* at 8. Before this Court issued a preliminary injunction in
6 the *Batiste* case requiring the WSP to institute procedures to redact personal
7 information, the WSP would sell these unredacted records to any third party that
8 would ask and pay for them.¹ *Id.*

9 Ms. Wilcox claims that the PTCRs are prepared using a software called
10 SECTOR. ECF No. 69 at 10. SECTOR allows officers to scan the bar code on a
11 driver's license or a vehicle registration to auto-populate the PTCR form with a
12 driver's personal information. *Id.* The data are placed on the bar codes by the
13 Washington State Department of Licensing ("DOL") when the DOL creates the
14 licenses and registrations. *Id.* The information scanned from a driver's license's
15 bar code includes a driver's name, address, license number, and date of birth,
16 among other things. *Id.* at 10–11. The information scanned from a motor vehicle
17 registration's bar code includes a driver's name and home address, as well as
18 information about the driver's vehicle. *Id.*

19 Ms. Wilcox alleges that Defendants purchased more than 10,000 of these
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21 ¹ The Court has since dissolved that preliminary injunction. *See Wilcox v. Batiste*,
No. 2:17-CV-122-RMP, 2018 WL 6729791 (E.D. Wash. Dec. 21, 2018).

1 PTCRs from the WSP between 2013 and 2017. ECF No. 69 at 13. Defendants
2 would then use the personal information on the PTCRs to send letters and
3 pamphlets to the persons involved in the accidents to solicit clients for Defendants'
4 automobile personal injury practice. *Id.* at 15. The letters would contain
5 Defendant Craig Swapp's signature. *Id.*

6 Ms. Wilcox claims that she was involved in two separate car accidents on
7 August 1, 2015, and on July 11, 2016. ECF No. 69 at 17–18. She alleges that
8 Defendants purchased the PTCRs created as a result of these accidents. *Id.* at 18.
9 Ms. Wilcox alleges that Defendants sent her a letter advertising their services on
10 July 14, 2016, using Plaintiff's personal information gleaned from her Collision
11 Reports. *Id.* The letter was signed by Defendant Craig Swapp. *Id.*

12 **LEGAL STANDARD**

13 A complaint will be dismissed if it fails to state a claim upon which relief
14 can be granted. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under
15 Rule 12(b)(6), the plaintiff must plead "enough facts to state a claim to relief that is
16 plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A
17 claim is plausible when the plaintiff pleads "factual content that allows the court to
18 draw the reasonable inference that the defendant is liable for the misconduct
19 alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

20 In ruling on a Rule 12(b)(6) motion to dismiss, a court "accept[s] factual
21 allegations in the complaint as true and construe[s] the pleadings in the light most

1 favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
2 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required, however, to “assume
3 the truth of legal conclusions merely because they are cast in the form of factual
4 allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam)
5 (internal quotation omitted). “[C]onclusory allegations of law and unwarranted
6 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355
7 F.3d 1179, 1183 (9th Cir. 2004).

8 DISCUSSION

9 Defendants argue that Ms. Wilcox fails to allege facts that establish a DPPA
10 claim. ECF No. 80. The DPPA “sets forth the three elements giving rise to
11 liability, *i.e.*, that a defendant (1) knowingly obtained, disclosed or used personal
12 information, (2) from a motor vehicle record, (3) for a purpose not permitted.”
13 *Howard v. Criminal Info. Servs., Inc.*, 654 F.3d 887, 890–91 (9th Cir. 2011)
14 (quoting *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King and Stevens,*
15 *P.A.*, 525 F.3d 1107, 1111 (11th Cir. 2008)). The Court examines whether the
16 facts in the complaint, construed in the light most favorable to Ms. Wilcox, satisfy
17 the three elements of a DPPA claim.²

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19 ² Ms. Wilcox argued that Defendants’ motion to dismiss was procedurally barred
20 as law of the case and violated Federal Rule of Civil Procedure 12(g)(2) because
21 they previously brought a motion to dismiss the original complaint. ECF No. 95 at
10. The Court rejects these arguments and considers Defendants’ motion on the
merits. *See City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882,
888 (9th Cir. 2001) (holding that law of the case does not prohibit a district court

1 ***Knowingly Obtaining, Disclosing, or Using Personal Information***

2 The first element of a DPPA claim is that the defendant knowingly obtained,
3 disclosed, or used personal information. *Howard*, 654 F.3d at 890–91; 18 U.S.C. §
4 2724(a). The parties dispute whether the complaint sufficiently alleges that
5 Defendant Craig Swapp knowingly used personal information. ECF No. 80 at 19;
6 ECF No. 95 at 21.³

7 The DPPA defines “personal information” as “information that identifies an
8 individual, including an individual’s photograph, social security number, driver
9 identification number, name, address (but not the 5-digit zip code), telephone
10 number, and medical or disability information, but does not include information on
11 vehicular accidents, driving violations, and driver’s status.” 18 U.S.C. § 2725(3).

12 The first amended complaint sufficiently alleges that Defendants received personal
13 information from the PTCRs purchased from the WSP, including drivers’ names and
14 addresses. *See* ECF No. 69 at 18 (alleging that Defendants sent Ms. Wilcox a
15 solicitation letter using her name and address). However, the statute does not define
16 what it means to “use” personal information. *See* 18 U.S.C. § 2725 (definitions).

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19 from reconsidering its prior holdings); *United States v. Somnia, Inc.*, 339 F. Supp.
20 3d 947 (E.D. Cal. 2018) (holding that Rule 12(g)(2) does not prevent raising new
21 arguments on a motion to dismiss an amended complaint).

³ Defendants do not dispute that the first amended complaint sufficiently alleges
that Defendant Swapp Law, PLLC knowingly obtained, disclosed, or used personal
information. *See* ECF No. 80.

1 When a term is undefined in a statute, the term is given its ordinary
2 meaning, often with assistance from a dictionary definition. *Taniguchi v. Kan Pac.*
3 *Saipan, Ltd.*, 566 U.S. 560, 566 (2012). “Use,” as a verb, is defined by Merriam-
4 Webster as “to put into action or service; avail oneself of; employ,” or “to carry out
5 a purpose or action by means of; utilize.” *Use*, Merriam-Webster’s Dictionary
6 Online (last visited Jan. 10, 2019). Black’s Law Dictionary gives the word “use” a
7 similar definition: “[t]o employ for the accomplishment of a purpose; to avail
8 oneself of.” *Use*, Black’s Law Dictionary (10th ed. 2014). The Supreme Court
9 and the Ninth Circuit have found the same ordinary meaning for “use” when
10 interpreting the word in other statutes. *See Smith v. United States*, 508 U.S. 223,
11 228–29 (1993); *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017).

12 Other courts have determined that an actor cannot be vicariously liable for a
13 DPPA violation; there must be some sort of direct conduct by an individual that
14 can be attributed to “using” personal information within the meaning of the statute.
15 *See, e.g., Bass v. Anoka Cty.*, 998 F. Supp. 2d 813, 820 (D. Minn. 2014) (“[T]he
16 DPPA does not impose liability on one who indirectly facilitates *another’s* access
17 of a motor vehicle record” (emphasis in original)). Ms. Wilcox’s first amended
18 complaint must allege that Mr. Swapp personally engaged in conduct that
19 constituted “use” of personal information to sufficiently state a DPPA claim. *Id.*

20 Ms. Wilcox alleges that the solicitation letters Defendants would send out
21 contained Mr. Swapp’s signature. ECF No. 69 at 15. She claims the solicitation

1 letter that she received contained Mr. Swapp's signature as well. *Id.* at 18.

2 Construing the first amended complaint in the light most favorable to Ms. Wilcox,

3 Mr. Swapp's personal signature on the letter to Ms. Wilcox sufficiently supports

4 Ms. Wilcox's plausible allegation that Mr. Swapp put the personal information

5 from the PTCRs into action or service, carried out a purpose or action with Ms.

6 Wilcox's personal information, and employed her personal information for the

7 accomplishment of a purpose by placing his signature on the solicitation letters.

8 *See Use, Merriam-Webster's Dictionary Online* (last visited Jan. 10, 2019); *Use,*

9 *Black's Law Dictionary* (10th ed. 2014). Mr. Swapp's signature gave the

10 solicitation letters legitimacy in Defendants' offering of legal services.

11 Accordingly, the complaint adequately alleges that Mr. Swapp "used" personal

12 information within the meaning of the DPPA.

13 In their reply brief and at oral argument, Defendants argue that the complaint

14 fails to allege that Mr. Swapp personally penned his signature on the solicitation

15 letters, and that the lack of that allegation shows that Mr. Swapp did not personally

16 "use" the personal information within the meaning of the DPPA. ECF No. 96 at

17 13. Essentially, Defendants argue that because there is no allegation that Mr.

18 Swapp signed the letters himself, rather than someone else putting his signature on

19 the letter for him, Mr. Swapp cannot be liable under the DPPA. *Id.*

20 The idea that Mr. Swapp cannot be liable for his own signature on a

21 document because someone else placed it there is flawed. An attorney's signature

1 represents the attorney's endorsement of the content within the document and the
2 purpose for which the document was used. *See* Fed. R. Civ. P 11(b) (stating that
3 by signing a document and presenting it to the Court, the attorney makes certain
4 promises and assurances); Wash. Rule of Professional Conduct § 1.0(n) (defining
5 "signed writing" as a writing that is "executed or adopted by a person with the
6 intent to sign the writing"). An attorney would not be absolved from Rule 11
7 misconduct by alleging he or she did not personally sign a document submitted to
8 the Court. The Court finds that Mr. Swapp, an attorney, should understand the
9 significance of having his personal signature attached to the letter to Ms. Wilcox
10 and others. Therefore, Mr. Swapp's argument is not persuasive.

11 The Court finds that the first amended complaint sufficiently alleges that Mr.
12 Swapp used personal information within the meaning of the DPPA.

13 ***From a Motor Vehicle Record***

14 The second element of a DPPA claim is that the personal information used,
15 obtained, or disclosed was from a "motor vehicle record." *Howard*, 654 F.3d at
16 890–91; 18 U.S.C. § 2724(a). The parties dispute whether a driver's license or
17 motor vehicle registration is a "motor vehicle record" for the purposes of DPPA
18 liability. ECF No. 80 at 12; ECF No. 95 at 15. Additionally, the parties dispute
19 whether DPPA liability attaches when the driver gives his or her driver's license
20 and registration to a police officer to create a PTCR. ECF No. 80 at 12; ECF No.
21 95 at 18.

1 The DPPA defines a “motor vehicle record” as “any record that pertains to a
2 motor vehicle operator’s permit, motor vehicle title, motor vehicle registration, or
3 identification card issued by a department of motor vehicles.” 18 U.S.C. § 2725(1).
4 Interpreting this definition, one circuit court has held that “pertains” in this statute
5 means “to belong as a part, member, accessory, or product.” *Lake v. Neal*, 585 F.3d
6 1059, 1061 (7th Cir. 2009). With this definition, some district courts have
7 concluded that driver’s licenses and motor vehicle registrations are not motor
8 vehicle records because objects cannot “pertain” to themselves. *See, e.g., Whitaker*
9 *v. Appriss, Inc.*, 266 F. Supp. 3d 1103, 1108 (N.D. Ind. 2017) (“A driver’s license
10 isn’t a part, member, accessory, or product of a motor vehicle operator’s permit; it is
11 a motor vehicle operator’s permit” (emphasis in original)).

12 Other district courts have come to the opposite conclusion: that the personal
13 information in a driver’s license is protected by the DPPA. *Pavone v. Law Offices of*
14 *Anthony Mancini, Ltd.*, 205 F. Supp. 3d 961, 966 (N.D. Ill. 2016). The *Pavone* court
15 supported its interpretation of the statute with two points. First, the personal
16 information in a driver’s license did come “from a motor vehicle record” because the
17 driver’s license was created with information from motor vehicle records created and
18 held by the state DOL. *Id.* Second, the information on the driver’s license,
19 including the driver’s license number, address, and name, is a “part” of the driver’s
20 license itself, and therefore “pertains to” the motor vehicle operator’s permit. *Id.*
21 Therefore, because the information on driver’s licenses originated from a motor

1 vehicle record kept by the state DOL, and the information on a driver’s license
2 pertains to a motor vehicle operator’s permit, a driver’s license qualifies as a “motor
3 vehicle record” under the statute. *Id.*

4 When presented with these potential readings of the statute at oral argument,
5 Defendants argued that it was not the intent of Congress to potentially criminalize
6 certain uses of a driver’s license by businesses that hold driver’s licenses as
7 collateral for renting or using a business’s services, such as reserving or renting a
8 locker at a gym. According to Defendants, the personal information must come
9 directly from a motor vehicle record kept by the state’s DOL to receive DPPA
10 protection.

11 In response, Ms. Wilcox argued that personal information is protected by the
12 DPPA even if it is found in a location other than a state DOL record if that
13 information is originally sourced to the state licensing department. She argued that
14 it makes no difference where the personal information is found; if its original source
15 is a motor vehicle record from the state licensing department, Ms. Wilcox argues
16 that the DPPA protects that information.

17 When interpreting a statute, the Court begins with the statute’s text. *United*
18 *States v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015). “We interpret statutory terms in
19 accordance with their ordinary meaning, unless the statute clearly expresses an
20 intention to the contrary.” *Id.* Courts should interpret statutes as a whole, giving
21 meaning to each word and avoiding interpretations that render other words or

1 provisions of the statute inconsistent, meaningless, or superfluous. *Boise Cascade*
2 *Corp. v. U.S. Env'tl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991). “Particular
3 phrases must be construed in light of the overall purpose and structure of the whole
4 statutory scheme.” *United States v. Lewis*, 67 F.3d 225, 228–29 (9th Cir. 1995).
5 The Court will not read additional terms, phrases, or words into a statute unless it
6 must do so to avoid absurd results. *Mobil Oil Corp. v. Higginbotham*, 436 U.S.
7 618, 625–26 (1978) (“There is a basic difference between filling a gap left by
8 Congress’ silence and rewriting rules that Congress has affirmatively and
9 specifically enacted.”).

10 The Court turns to the plain text of the statute. Starting with the definition
11 of a motor vehicle record, Ms. Wilcox has provided several different
12 interpretations that would satisfy the “pertains” definition from *Lake* while also
13 applying to Defendants’ conduct in this case. First, the information on the driver’s
14 license or motor vehicle registration itself is a “part of” the motor vehicle
15 operator’s permit or registration, showing that the information may “pertain” to the
16 motor vehicle’s operator permit or registration. Second, the first amended
17 complaint alleges that PTCRs are created with the SECTOR system, which
18 requires police officers to scan the bar code on the back of a driver’s license or
19 registration card. ECF No. 69 at 10. A bar code is at least a part of, if not also a
20 member, accessory, or product of, a motor vehicle operator’s permit or
21 registration. *See Lake*, 585 F.3d at 1061.

1 The plain language of the statute is also devoid of the requirement that the
2 personal information come directly from a state’s licensing department, as
3 Defendants argue. The statute only says that the personal information comes
4 “from a motor vehicle record.” 18 U.S.C. § 2724(a). The statute does not say that
5 the personal information must be copied directly from a motor vehicle record, or
6 that the information loses its protected status if it is first put on another object, like
7 a driver’s license; rather, the statute states that the personal information is
8 protected if it comes “from a motor vehicle record.” *Id.*

9 The Court will not read a direct-source requirement into the statute as
10 Defendants ask the Court to do here. *Mobil Oil Corp.*, 436 U.S. at 625–26; ECF
11 No. 80 at 13. Therefore, the Court concludes that the DPPA protects the
12 information on driver’s licenses and motor vehicle registrations, because the
13 information on those items come “from a motor vehicle record” at the state DOL.
14 The Court finds that Ms. Wilcox has sufficiently alleged that the personal
15 information received by Defendants on PTCRs came from a motor vehicle record.

16 For the same reasons, the Court also rejects Defendants’ argument that Ms.
17 Wilcox cannot allege DPPA violations because she provided her driver’s license
18 and registration to the police officer, who used them to create the PTCRs.
19 Defendants cite to several cases in their motion that have all held that the state’s
20 licensing department must be the direct source of the information for DPPA
21 liability to attach. ECF No. 80 at 17. But, as stated above, there is no requirement

1 in the text of the statute that the state licensing department be the direct source of
2 the personal information. *See Whitaker v. Appriss, Inc.*, No. 3:13-CV-826-RLM-
3 CAN, 2014 WL 4536559, at *4 (N.D. Ind. Sept. 11, 2014) (“If the original source
4 of the other government agency’s information is the state department of motor
5 vehicles, the DPPA protects the information throughout its travels.”).

6 The cases cited by Defendants do not endorse a voluntariness requirement,
7 i.e., that the DPPA only protects information when it is involuntarily given to other
8 people, rather than voluntarily given. ECF No. 80 at 17. Because the Court finds
9 that the complaint sufficiently alleges the information on the PTCRs originated
10 from the Washington State DOL, and finds that such information is protected by
11 the DPPA, the distinction between voluntary and involuntary transfers of personal
12 information is irrelevant to the Court’s decision.⁴ For this reason, the Court will
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14

15 ⁴ Defendants argue that a “parade of horrors” might result from this interpretation
16 of the DPPA that would result in cashiers at convenience stores “violating” the
17 DPPA by checking a person’s driver’s license for that person’s birthday when the
18 person tries to buy tobacco. ECF No. 80 at 15–16. However, Defendants’
19 hypothetical situations differ from this case. This case involves a third party
20 allegedly obtaining and using personal information by affirmatively purchasing
21 PTCRs and using that information for an improper purpose. *See* ECF No. 69. In
Defendants’ proposed scenario, a customer offers up his or her identification to
effectuate the customer’s goal; i.e., the purchase of tobacco. That situation is far
different from a driver giving a police officer his or her license and registration, as
mandated by state law, and then a third party obtaining and using the information
from the license and registration down the line. One situation involves a person
willingly giving identification to effectuate the person’s desired purpose, while the

1 not rule on this issue, and instead finds that Ms. Wilcox’s complaint against
2 Defendants sufficiently alleges that the information obtained and used by
3 Defendants was “from a motor vehicle record.”

4 ***For a Purpose Not Permitted***

5 The third element of a DPPA claim is that the personal information from a
6 motor vehicle record was obtained, disclosed, or used for a purpose not permitted
7 under the statute. *Howard*, 654 F.3d at 890–91; 18 U.S.C. § 2724(a). The parties
8 do not dispute that using DPPA-protected information for the solicitation of legal
9 services is a purpose not permitted by the DPPA. *See Maracich v. Spears*, 570
10 U.S. 48, 78 (2013).

11 Therefore, the Court finds that Ms. Wilcox’s complaint sufficiently alleges
12 that Defendants obtained and used DPPA-protected personal information for a
13 purpose not permitted.

14 Accordingly, **IT IS HEREBY ORDERED** that Defendants’ Motion to
15 Dismiss, **ECF No. 80**, is **DENIED**.

16 The District Court Clerk is directed to enter this Order and provide copies to
17 counsel.

18 **DATED** January 24, 2019.

19 *s/ Rosanna Malouf Peterson*
ROSANNA MALOUF PETERSON
United States District Judge

20 _____
21 other involves a third party taking advantage of a person doing what state law
mandates in a certain situation.