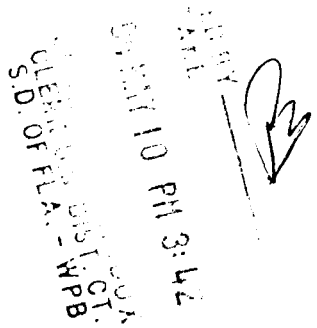
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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 RENEWED MOTION FOR SUMMARY JUDGMENT**

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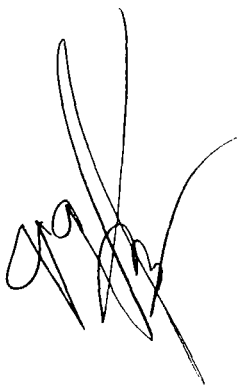


Defendant, Fidelity Federal Bank and Trust ("Fidelity") replies to Plaintiff's Opposition to Defendant's Renewed Motion for Summary Judgment, as follows.

## I. There is No Evidence That Fidelity Obtained any Information About Plaintiff from the State.

Plaintiff fails to address the first ground set forth by Fidelity for entry of summary final judgment: there is no evidence that information relating to Plaintiff was, in fact, sold by the State of Florida to Fidelity. Simply stated, without such a sharing, Plaintiff lacks standing to bring this action. *Seacoast Sanitation, Ltd. v. Broward Cty.*, 275 F.Supp. 2d 1370, 1372 (S.D. Fla. 2003)(In a class action, the party invoking federal jurisdiction bears the burden of establishing standing). The record is devoid of any such evidence. There is no list of names supplied by the State; Fidelity does not have any record of receiving information about Plaintiff; the third party corporation that mailed the brochures has no record of the names; and there is no evidence that Plaintiff received any mail from Fidelity. Although Plaintiff cannot recall receiving any such mail, Plaintiff assumes, because he purchased a new vehicle during the time period that Fidelity was purchasing information from the State of Florida, that his information was supplied to Fidelity. In their Statement of Facts in Opposition, Plaintiff offers speculation from witnesses on whether Plaintiff's information was supplied by witnesses as if it is direct evidence. Other than speculation, there is no support in the record for Plaintiff's standing. This is fatal to Plaintiff's case.

Plaintiff asked a number of witnesses at deposition if it was "possible" that Plaintiff's information was supplied to Fidelity (*e.g.* Messrs. Casey, Perryman and Walden). This is the only "evidence" that Plaintiff's information was obtained by Fidelity. However, the employees of the State of Florida, Department of Highway Safety & Motor Vehicles, Division of Motor Vehicles ("DMV") testified that they could not testify that Plaintiff's information was, as a matter of fact, (rather than

as a matter of speculation) supplied to Fidelity. For example, David Perryman, a record technician at DMV, testified that, although there was a possibility, he could not testify under oath that such information was in fact supplied.

> Q. Mr. Perryman, as you sit here today, you don't know any of the specifics of the information that was actually supplied to Fidelity by the state Department of Motor Vehicles, do you, such as names, addresses?
>
> A. Not the individuals, no, sir.
>
> Q. So do you know whether in fact information relating to James Kehoe was contained in the data supplied to Fidelity?
>
> A. I have no idea, sir.
>
> Q. Sir, would you agree with me that, as you sit here today, you cannot swear under oath that information about James Kehoe was in fact supplied by the State of Florida to Fidelity Federal?
>
> A. That's correct.

Perryman Deposition, p.73, l.13 - p.74 - l.1.

Likewise, Clayton Boyd Waldren, the Bureau Chief of Titles and Registrations at DMV, and one of Mr. Perryman's supervisors, testified that, while it was possible that Mr. Kehoe's information may have been supplied, he could not testify that it was as a matter of fact. He testified:

> Q. As you sit here today, do you have any knowledge as to what specific names were provided to Fidelity by the State of Florida?
>
> A. No, I do not have any knowledge of that.
>
> Q. Would you agree with me, as you sit here today, you can't swear under oath that information about James Kehoe was provided by the State of Florida to Fidelity?
>
> A. No, I can't swear to that, no.

Waldren Deposition, p.16, l.15 - l.22.

Without evidence that Fidelity did, as a matter of fact and not as a matter of conjecture, obtain information about Plaintiff from the State, Fidelity is entitled to entry of a summary final judgment because there is no evidence that Plaintiff has standing as a member of the putative class. Because the record is devoid of evidence that Fidelity received information about Plaintiff from the State, Fidelity is entitled to summary judgment. *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)("The complaining party must also show that he is within the class of persons that will be concretely affected"); *Foster v. Center Township of Lararte County*, 798 F.2d 237, 242 (7th Cir. 1986)(A general interest in insisting that governmental officials comply with statutory or constitutional obligations is not enough to confirm class action standing).

## II. As a Matter of Statutory Construction, a Claim for Liquidated Damages Under DPPA is Dependent Upon a Base Allegation of Actual Damages.

Plaintiff also fails to address the merits of Fidelity's textual analysis of 18 U.S.C. §2724(b)(1). Rather, Plaintiff cites the court to Respondent's brief and to the transcript of the oral argument in *Chao v. Doe*, 540 U.S. ___, 124 S.Ct. 1204 (U.S. 2004) to support his reading of the statute. Plaintiff's only reference to Fidelity's grammatical analysis of DPPA is to refer to it as "tortured" and to "urge this Court to ignore Defendant's statutory gymnastics". Plaintiff's Opposition, p.10. 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" does not require a person to sustain actual damages to recover DPPA's minimum damage award of $2,500.

Plaintiff misrepresents Fidelity's citation to the opinion in *Doe v. Chao*, 540 U.S. ___, 124 S.Ct. 1204 (U.S. 2004). Fidelity does not argue (and has never argued) that *Chao* held that "statutory liquidated damages have been eliminated in all privacy lawsuits under all federal statutes." Plaintiff's Opposition, p.1. Rather, Fidelity cites the *Chao* case for the "straightforward textual analysis" that

the court used to analyze the Federal Privacy Act. Once such an analysis is done of DPPA, it is obvious that the recovery of liquidated damages is contingent on actual damage.

Plaintiff's citation to the brief filed by the Solicitor General of the United States and the transcript of the oral argument in *Chao* are both unpersuasive for a number of reasons. First, because the Supreme Court issued an opinion, Plaintiff's citation to either to support its position is irrelevant. This is true because much of what Plaintiff cites is not contained in the court's opinion.

Second, in the transcript of oral argument, the Assistant Solicitor General focused on those statutes written with "either/or" language: "[t]here are a lot of statutes with wording, for instance, to the effect of a plaintiff who establishes a violation will receive actual damages or $1,000, whichever is greater" and agreed that most of those would not require proof of actual damages. Transcript p.*45. The DPPA does not contain "either/or" language.

Third, Plaintiff relies on the oral argument transcript for the proposition that "a prominent subject at oral argument in *Chao* was the fact that the *Chao* statute is limited to suits against the government." Plaintiff's Opposition, pp.3, 8. It should be noted, that this proposition played no role in the majority opinion in *Chao*. It is not true, as Plaintiff claims, that "an obvious factor relied upon by the court in *Chao* was the protection of the United States Treasury from large damages claims." Plaintiff's Opposition, p.3. Moreover, the same can be said with respect to businesses. Congress could not have envisioned that companies, such as a community bank, would be put out of business, by the entry of a class action judgment in excess of $1.4 billion, for alleged violations of DPPA. This is especially true in light of the legislative history which focuses mainly on stalkers and other crimes.

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.

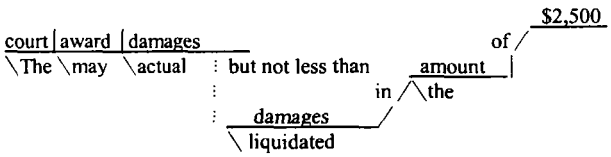
to mean:

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

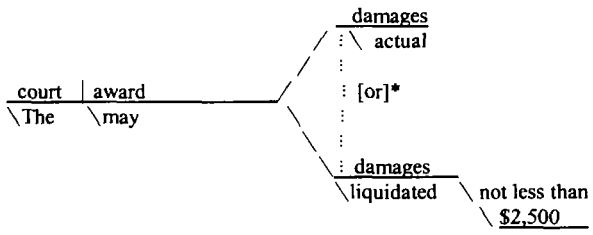
The court should not follow Plaintiff's interpretation. *See Williams v. Taylor*, 529 U.S. 420 (2000) ("Courts give the words of a statute their 'ordinary, contemporaneous, common meaning'"). F. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv.J.L.R.Pub. Policy 59, 65 (1988)(stating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

As previously demonstrated to the Court, diagraming the language of the Statute and Plaintiff's interpretation[1], graphically points out the critical differences:

Statutory Language




Plaintiff's Interpretation




*word "or" not in statute

[1] Plaintiff refers to the diagraming of the text statutory as "statutory gymnastics". For generations, school aged children learned to diagram sentences to determine the sentences' meaning. Such an analysis is far from a "tortured analysis" or "statutory gymnastics".

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 §2724(b)(1) to allow such a result.

In the only reported opinion in which a court has considered the application of DPPA in the context of a class action, Judge Duval, of the Eastern District of Louisiana granted, in part, a motion to dismiss a DPPA claim finding that the complaint failed to adequately assert an "improper use" claim and an "improper obtainment" claim. *Russell v ChoicePoint Services, Inc.*, 300 F. Supp. 2d 450 (E.D. La. 2004). In its analyses of the "improper obtainment" claim the court performed a detailed analyses of the statute which began with "the statute's actual words because when 'the language of the federal statute is plain and unambiguous, it begins and ends [the court's inquiry]'" *Id.* at 455. Although the court noted that "[l]argely in response to mounting public safety concern over stalkers' and other criminals' access to the personal information maintained in state DMV records, Congress enacted DPPA , the court did not resort to legislative history to interpret the statute and rather simply analyzed the statutory language and consulted Webster's Third New International Dictionary, in reaching its conclusion that the plaintiff class failed to state a cause of action for "improper obtainment". *Id.* 452.

It is not true, as Plaintiff claims, that the Tax Reform Act and the Electronic Communications Privacy Act ("ECPA") are "very similar to DPPA", Plaintiff's Opposition, pp.8, 9. The language of both is actually very different than DPPA. The Tax Reform Act says "actual damages sustained by the person but in no case shall a person be entitled to receive less than the sum of $1,000." The statute specifically says "but in no case shall . . . receive less than . . .". This is very different from DPPA which is permissive and says "actual damages but not less than . . .". The ECPA is worded exactly like the Privacy Act and contains the "entitled to recover" language. There are no cases that have addressed ECPA and whether a plaintiff has to prove actual damages prior to recovering the statutory amount. Given the court's decision in *Chao*, it appears that the ECPA will also require a showing of actual damages.

## III. Fidelity Did Not Know and Had No Reason to Know that the State Had Not Obtained Express Consent.

Plaintiff misunderstands Fidelity's third ground for summary judgment. Fidelity does not argue that "it did not know about DPPA". Plaintiff's Opposition, p.4. Fidelity seeks summary judgment on the ground that it did not know a ***fact*** that is an element of the offense: the state of Florida had not obtained the express consent of the individuals whose information the State sold to Fidelity. Without evidence of such knowledge of this fact, the Court must enter summary final judgment.

Plaintiff, in both the Complaint (¶15) and the Plaintiff's Opposition (p. 18), cites to the case of *Bryant v. United States*, 524 U.S. 184 (1988) for the proposition that unless "the text of a statute dictates a different result, the term 'knowingly' merely requires proof and knowledge of the facts that constitute the offense." Although Plaintiff correctly cites the law, Plaintiff misapplies this standard. There is no evidence that Fidelity knew that the State had not received the consent from the

individuals whose information the State sold to Fidelity. Without such a showing, there can be no violation of DPPA.

Plaintiff attempts to create a factual issue by stating that "In fact, Fidelity's Director of Marketing, Dennis Casey, testified that he knew that disseminating such information was likely illegal. See transcript of Dennis Casey's deposition, [D.E. #75 at 27-28]." Mr. Casey did not testify that he knew that the dissemination of the information by the State of Florida was likely illegal. On this point, Plaintiff is being disingenuous with the Court, because, in fact, Mr. Casey was being questioned about the sale by Fidelity of the names of its customers to third parties. His actual testimony is as follows.

> Q. You wouldn't sell the name of bank's customers to someone, would you?
>
> A. No.
>
> Q. Why not?
>
> A. First of all, I believe it is illegal. Second of all, I don't think it is good practice in any form, we have a right to hold on to those records so . . .

*Id.* at 27-28. Believing it is illegal to sell the name of your customers does not equate to knowing that the State of Florida had not complied with DPPA. This testimony does not create an issue of fact as Plaintiff claims.

There is no evidence that demonstrates that Fidelity knew that the State of Florida had not obtained the express consent of the persons whose personal information was disclosed. The reason is simple: Fidelity did not know.

Plaintiff is incorrect when he states that the situation here is dissimilar from cases decided under the Resource Conservation Recovery Act ("RCRA"). In those cases (cited on pages 16-18 of Defendant's Memorandum in Support of its Renewed Motion for Summary Judgment), the

transporter was found not to have violated RCRA because it did not know the materials it was carrying were hazardous. Likewise, in the current situation, because Fidelity did not know that the State had not obtained the consent of the individuals whose personal information was sold, Fidelity could not have "knowingly" violated DPPA.

## IV. Conclusion.

For the reasons set forth above and in Fidelity's prior memorandum of law, Fidelity respectfully requests that its Motion for Summary Judgment be granted.

Dated: May 10, 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, [ ]Facsimile, [ ]Hand Delivery, [ ] overnight delivery, this 10 day of May, 2004.

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