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The Honorable Patrick J. Schiltz
United States District Court
14E U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

VIA ECF

Re: *Sheila Potocnik v. Walter Anton Carlson, et al.*
Court File No. 13-CV-2093

Dear Judge Schiltz:

We write to address the impact of *Spokeo v. Robins*, 136 S.Ct. 1540 (2016), on Defendants' pending motion for summary judgment in the above-referenced matter. *Spokeo* easily disposes of Defendants' longstanding arguments that Plaintiff's intangible injuries are insufficient to satisfy Article III and that she must have suffered actual damages. Defendants' position that the privacy rights protected by the DPPA are not rooted in the common law is careless and inattentive to precedent.

First, Plaintiff has a real, concrete injury. In *Spokeo*, the Court explained that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* at 1548. Plaintiff presented evidence at summary judgment that she suffered longstanding anxiety, fear, loss of sleep, and stress based on her interactions with Carlson. Plaintiff also feared that Carlson and his colleagues would abuse their authority and harm her and her career in law enforcement. Plaintiff presented evidence of the numerous, concrete steps she took to address her emotional distress. Nothing more is required. And the ease or difficulty of Plaintiff proving her alleged damages has no bearing on the standing analysis.

Defendants' incredulity that a concrete injury could possibly result from law enforcement obtaining and viewing Plaintiff's private data for an unauthorized purpose is irrelevant. Congress disagreed. As written, the DPPA prohibits obtaining, using, and disclosing private data for an unauthorized purpose. The remedies provision of the DPPA contemplates harm from unauthorized obtainment of private data, and the liquidated damages provision contemplates that such harm would be difficult to quantify. In any event, Plaintiff is not merely asserting a statutory violation of the DPPA as her injury. Plaintiff has explained in detail why *these* Defendants' obtainment and use of *her* private data in violation of the DPPA caused *her* emotional distress. Finally, Defendants' position is untenable in light of the evidence indicating that these Defendants did not merely view Plaintiff's data, they used it and threatened Plaintiff.

Second, *Spokeo* puts to rest Defendants' long-standing argument that Plaintiff needs to assert and prove actual damages to satisfy the injury-in-fact requirement of Article III. In *Spokeo*, the Court confirmed that intangible injuries resulting from statutory violations can be concrete and constitute an injury-in-fact. *Id.*; *see also Doe v. Chao* 124 S.Ct. 1204, 1220-21 (2004). The Court observed that although tangible injuries may be easier to recognize, "*intangible injuries can nevertheless be concrete*." *Spokeo,* 136 S.Ct. at 1548 (emphasis added). Accordingly, Plaintiff's intangible but concrete emotional distress injuries are sufficient to withstand scrutiny under Article III. *Spokeo* prohibits Defendants' proposed injury-in-fact standard that requires actual economic damages, and the Court should reject it.

Finally, Defendants have made the remarkable argument that Plaintiff's injuries are not related to any privacy interest protected at common law. This cramped understanding of the common law right to privacy is based on two sentences in *Spokeo*, where the Court said that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles" and it is "instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." 136 S.Ct. at 1549. It is an enormous leap in logic to rely on these sentences in *Spokeo* to assert that violations of the DPPA do not invade an interest protected at common law.[1]

The right to privacy was protected at common law. "[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." *U.S. Department of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 763 (1989). Congress has recognized in a plethora of federal statutory and regulatory provisions that "a strong privacy interest inheres in the nondisclosure of compiled computerized information," including the Freedom of Information Act and the Privacy Act of 1974. *Id.* at 765-66. There is a "privacy interest in keeping personal facts away from the public eye" and a "centralized computer file pose[s] a 'threat to privacy.'" *Id.* at 770. Indeed, "our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." *Id.* at 767. The Court explained that "[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 865 (referencing FBI criminal history reports, i.e., "rap sheets").

Here, just as the compilation and disclosure of FBI computerized rap sheets pose a threat to the right to privacy, the compilation, obtainment, and use of private drivers' license and related personal data compiled and stored in a single database poses a threat to the right to privacy. Defendants' argument that the data at issue here do not implicate a right to privacy protected at common law is not credible. *See id; see also Pichler v. UNITE*, 542 F.3d 380, 388-89 (3d. Cir. 2008) (concluding that the DPPA provides redress for violation of a person's protected interest in the privacy of her motor-vehicle records and the identifying information therein and such claims "are analogous to common law causes of action ordinary decided in the

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[1] As this Court recently noted at hearing in the *Taylor* case, this District's dismissal of intrusion-upon-seclusion claims in DPPA matters has a completely different and unrelated threshold than the standing issue here.

courts of law in the late 18th century."). For the same reason, Defendants' anticipated argument that Congress did not elevate the viewing of private data to the status of concrete harm is also not credible, particularly in light of the liquidated damages provision of the DPPA and the express prohibitions involving the unauthorized obtainment of private data. *See U.S. Department of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. at 763-70.

Similarly infirm would be the argument that previous district court decisions dismissing intrusion-upon-seclusion claims somehow demonstrates that the information protected by the DPPA does not invade an interest protected by the common law. The fact that Minnesota, like most states, has adopted the "highly offensive" standard for actionable tort claims does not mean that the underlying privacy interest in controlling personal information did not exist at common law. *See U.S. Department of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. at 763-70. Moreover, just because some federal courts have concluded that Plaintiff has not met the high threshold for stating a claim for intrusion-upon-seclusion, this does not mean that her common law privacy interest, elevated to the status of a statutory right by the DPPA, is not implicated by Defendants' actions.

In sum, Plaintiff has not alleged a "bare procedural violation [of the DPPA], divorced from any concrete harm." *See Spokeo,* 136 S.Ct. at 1550. She is not alleging the kind of statutory violation akin to the distribution of an incorrect zip code. *See id.* Instead, she has articulated the emotional distress she has suffered resulting from Defendants' accesses of her private data by law enforcement who misused their authority. Accordingly, Plaintiff satisfies the injury-in-fact requirement of Article III. Not only are her injuries concrete and particularized, they are directly traceable to the specific, willful conduct of Defendants in accessing the DVS database, searching by Plaintiff's name, obtaining Plaintiff's private data, and, in some cases, using that data and threatening Plaintiff. A favorable decision for Plaintiff will provide her redress in the form of monetary damages for each of the violations, as well as potential remedial non-monetary outcomes. Accordingly, Plaintiff meets the "irreducible constitutional minimum of standing." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Sincerely,

s/Robin M. Wolpert

Robin M. Wolpert

RMW/sar
cc : All Counsel of record (via ECF)

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