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June 20, 2016

The Honorable Naomi Reice Buchwald
United States District Court for the Southern District of New York
500 Pearl Street
New York, N.Y. 10007

Re: *Boelter v. Advance Magazine Publishers Inc.*, Case No. 15-CV-05671

Dear Judge Buchwald:

I write on behalf of Defendant Advance Magazine Publishers Inc., d/b/a Condé Nast (“Condé Nast”) in response to Plaintiff’s counsel’s June 17, 2016 letter (Doc. 47) regarding an Opinion issued that same date in *Boelter v. Hearst Comm’cns, Inc.*, No. 15-cv-03934 (S.D.N.Y.) (Torres, J.) (the “Opinion”). As Your Honor will hear at the oral argument scheduled for July 12, 2016, the Opinion in the *Hearst* case was wrongly decided; to briefly summarize:

Standing. In filing this putative VRPA class action, Plaintiff’s counsel counted on the notion that pleading a statutory violation, without any individualized harm, would itself be sufficient to both sustain a claim for statutory damages under the VRPA and to confer Article III standing. In recent weeks, it has been made even more abundantly clear that neither proposition is true. The Michigan Legislature has stated that it was never its intent to authorize a no-injury VRPA lawsuit (more on that below); and the Supreme Court has made clear that simply stating a statutory violation, “divorced from any concrete harm” does not “satisfy the injury-in-fact requirement of Article III.” *Spokeo*, 136 S.Ct. at 1549. While *Spokeo* focuses on the “concreteness” element of injury in fact, Article III also requires that the alleged harm be both “fairly traceable to the challenged conduct,” and not “conjectural or hypothetical.” *Id.* at 1547-48. Since Plaintiff presumed that she need not plead actual damages, her attempt to plead injury “in the alternative” was at best an afterthought that falls well short.

Judge Torres recognized in a footnote that under *Spokeo*, a bare statutory violation “is insufficient to confer standing to sue,” but found that Hearst’s “violation of the VRPA, as alleged, caused a concrete and particular injury to Plaintiffs.” (Op. at 8 n. 4.) But her analysis simply takes Plaintiffs’ bare bones, conclusory claims of injury at face value (*id.* at 7), without pointing to any fact or evidence of a concrete and particularized injury that is anything other than entirely hypothetical. In so doing, the Opinion not only failed to address whether those allegations met Article III requirements, but disregarded the mandate that a Complaint’s allegations be both actually “plausible,” and sufficient to show “more than a sheer possibility” of injury. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

And far from plausible, Plaintiff’s claims of the risk of economic harm in this case make no sense and are foreclosed as a matter of law. The Opinion ignored what courts in this district and elsewhere have long held: while “demographic information is valued highly . . . the value of its

collection has never been considered an economic loss to the subject”—rejecting the argument that the “value of this collected information constitutes damage to consumers or unjust enrichment to collectors.” *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 525 (S.D.N.Y. 2001). The notion that, if Plaintiffs had “known that Defendant would disclose their information, they ‘would not have been willing to pay as much, if at all, for [their magazine] subscriptions’” (Op. at 7) is thus implausible and not legally recognized injury.

Plaintiff also conclusorily asserts that she “now receives junk mail and telephone solicitations,” without identifying the nature, source, quantity or time frame, and goes on to speculate that this purportedly recent development is somehow “attributable to Condé Nast’s unauthorized sale and disclosure of her Personal Reading Information.” (Compl. ¶ 7.) These allegations are not supported by any well-pleaded fact, and are entirely “conjectural or hypothetical.” *Spokeo*, 136 S.Ct. at 1547-48. Plaintiff thus does not come close to “‘clearly . . . alleg[ing] facts demonstrating’ each element” of standing, including injury in-fact and “fairly traceable” to the challenged conduct. *Spokeo*, 136 S.Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

Retroactivity. The Michigan Legislature has now conclusively stated that it never was its intention to create a no-injury civil action in the VRPA—instead, only a customer “who suffers actual damages as a result of a violation of this act” may pursue a civil action. SB 490, § 5(2). The Legislature stated “[t]his amendatory act is curative and intended to clarify,” *inter alia*, that “a civil action for a violation of those prohibitions may only be brought by a customer who has suffered actual damages as a result of the violation.” Enacting Provisions, § 2 (emphasis added). See Dkt. 41 (May 3, 2016 Letter) and Dkt. 43 (May 10, 2016 Letter).

Where, as here, the legislature describes its enactment as “curative and clarifying,” that means that it should be applied retroactively. As the Sixth Circuit has explained, by expressing an intent to clarify, the amendment operates as “a legislative interpretation of the original act” that “explains how the legislature intended the original statute to operate” and as such “applies retroactively as if it was enacted as part of the original statute.” *In re Oswald*, 444 F.3d 524, 528 (6th Cir. 2006) (Michigan law); *Detroit Edison Co. v. Janosz*, 350 Mich. 606, 614 (1957). And where, as here, that clarifying intent is manifest, the term “retroactive” need not also be used. The Opinion’s conclusion that such “additional qualifying language” is required (Op. at 9) has no basis in, and is contrary to, Michigan law. See *People v. Sheeks*, 244 Mich. App. 584 (2001) (no express “retroactivity” language, but since legislature intended to “clarify, rather than substantively alter, the existing statutory provision,” applied retroactively); *Kelly Servs., Inc. v. Treas. Dept.*, 296 Mich. App. 306, 317 (2012); *ACCO Indus., Inc. v. Dep’t of Treas.*, 134 Mich. App. 316, 321-22 (1984).¹ Indeed, even where legislation does not include express “curative and clarifying” language like the amendment does here, the legislature may “impliedly indicate[]” that it “inten[ded] to give the statute retroactive effect” by clarifying the

¹ Beyond what the Legislature explicitly said in the Enacting Provisions are still more textual indicia of retroactive intent: SB 490 provides, in section 3(d), that the VRPA does not prohibit disclosures incident to the ordinary course of business. That section only applies to “information that is created or obtained after the effective date of the amendatory act that added this subdivision.” SB 490, § 3(d). In contrast, the actual damages requirement (§ 5) is *not* restricted to prospective application. The presence of language of future application in one section of the law, and its absence in another is clear evidence of legislative intent. *People v. Peltola*, 489 Mich. 174, 185 (2011).

legislature's original intent. *Allstate Ins. Co. v. Faulhaber*, 157 Mich. App. 164, 166-67 (1987) (emphasis added); *Production Credit Ass'n of Lansing v. Dep't of Treas.*, 404 Mich. 301, 318 (1978).

Where, as here, an amendment is “enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change.” *Detroit Edison Co. v. State*, 320 Mich. 506, 520 (1948). That is *exactly what happened here*. The amendment was not enacted in a vacuum. While the VRPA sat on the books for over twenty years, it was only recently that enterprising plaintiffs' class action lawyers dusted it off, suing magazine publishers for millions in damages on behalf of subscribers that suffered no actual harm. And the Michigan Legislature took notice. The Opinion improperly discounted this critical context, commenting that Hearst “provided no evidence that the law was passed in response to legal controversy.” (Op. at 11.) In fact, the legislature was acutely aware of the VRPA class action lawsuits—in which Michigan federal judges were grappling, *inter alia*, with whether actual damages were required to support standing—and heard testimony both from the plaintiffs' bar and from representatives of the magazine industry that were defending them.²

The Opinion also disregarded Michigan law in concluding that the amendment was not “remedial.” (Op. at 12.) A “remedial statute” is one relating to “the means employed to enforce a right or redress an injury.” *Seaton v. Wayne Cty. Prosecutor*, 233 Mich. App. 313, 320 (1998) (quoting *Rookledge v. Garwood*, 340 Mich. 444, 453 (1954)). A statute is also remedial if it “remed[ies] defects” in existing legislation, “or mischiefs thereof.” *Id.* The amendment here relates to the remedies for violation and is nothing if not “remedial.”

Finally, even if, as Judge Torres held, amending the VRPA to disallow the statutory damage remedy could somehow be deemed substantive and not remedial, and as such was still available to Plaintiff, the legislature has unequivocally stated that its intent *ab initio* was that statutory damages were never awardable without proof of actual damages—notwithstanding errant decisions out of the Eastern District of Michigan that had rejected such an interpretation of the VRPA. The Michigan Legislature has conclusively expressed its contrary intent, which is consistent with how similar provisions in other statutes have been interpreted. *See, e.g., Doe v. Chao*, 540 U.S. 614, 619 (2004) (similar language in Privacy Act requires proof of actual damage). For the reasons discussed above, that clarifying intent is to be given immediate effect.

Other. The Opinion also incorrectly rejected other grounds for Hearst's Motion. Defendant here raises additional prudential and statutory interpretation arguments which were not raised in *Hearst*, and which this Court will have the first opportunity to consider. Defendant also raises First Amendment and other arguments framed differently than in *Hearst*. Condé Nast appreciates the Court's consideration of this letter and looks forward to an opportunity to address the Court on its Motion.

² *See, e.g.*, Testimony of Mary Holland, V.P. of Gov't Affairs for MPA-Ass'n of Magazine Media, Comm. Cmte., Mich. Senate (the “lack of clarity on actual damages has been exploited by entrepreneurial class action lawyers in the magazine lawsuits”) (audio recording at http://www.senate.michigan.gov/committeeaudio/2015-2016/Commerce/Commerce-12-2-2015_0832AM_15_88.mp3); Testimony of Ari J. Scharg, Cmte. on Commerce and Trade, Mich. House of Reps., Feb. 9, 2016, p. 4 (plaintiffs' counsel; noting that bill was a response to “civil actions to enforce” VRPA).



The Honorable Naomi Reice Buchwald
June 20, 2016, Page 4

Respectfully submitted,

/s/ Sandra D. Hauser

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cc (via CM/ECF system): All counsel of record

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