UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 15-61927-CIV-ZLOCH/HUNT

MOLLY CAROLINE MCCRAE, individually and on behalf of others similarly situated,

Plaintiff,

v.

BROWARD SHERIFF'S OFFICE, and CITY OF FORT LAUDERDALE,

Defendants.
_____/

REPORT & RECOMMENDATION ON DEFENDANTS' CITY OF FORT LAUDERDALE AND BROWARD SHERIFF'S OFFICE MOTIONS TO DISMISS

This matter is before this Court on Defendant City of Fort Lauderdale's Motion to Dismiss Amended Class Action Complaint, ECF No. 12, and Defendant Broward Sheriff's Office's Motion to Dismiss Plaintiff's Amended Class Action Complaint and Incorporated Memorandum of Law, ECF No. 25. On January 4, 2016, the Honorable William J. Zloch referred this case to the undersigned for a Report and Recommendation concerning disposition of all dispositive motions. ECF No. 32; *see also* 28 U.S.C. § 636(b); S.D. Fla. Mag. R. 1. The undersigned conducted oral argument on these Motions on February 24, 2016. Plaintiff conceded at oral argument, and Defendant agreed, that the proper party defendant should be Broward Sheriff Scott Israel, in his official capacity, instead of the Broward Sheriff's Office. Additionally,

Defendants conceded and abandoned certain arguments previously raised in their Motions, solely for purposes of these Motions to Dismiss. The undersigned has reflected those concessions herein and they are fully detailed in the transcript of the hearing before this Court. *See* ECF No. 41.

Having carefully reviewed the Motions, the Responses and Replies thereto, the Notices of Supplemental Authority, the entire case file, and applicable law, oral argument of counsel and being otherwise fully advised in the premises, the undersigned respectfully recommends that Defendants' Motions be DENIED, with the exception of the agreed substitution of Broward Sheriff Scott Israel, in his official capacity, for Defendant Broward Sheriff's Office, which shall be removed from this action.

BACKGROUND

At all times relevant, Plaintiff has been an attorney employed by the Broward County Public Defender's Office. Plaintiff's one count Amended Class Action Complaint ("Complaint") alleges that law enforcement officers employed by Broward Sheriff's Office ("BSO") and the City of Fort Lauderdale ("the City") violated her rights under the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §2721, et. seq. Specifically, Plaintiff alleges that Fort Lauderdale Police Officer Ethan Hodge accessed her motor vehicle records on one occasion and that BSO Officers Ronald Cusumano and Anthony Lucca accessed her information on three other occasions, once by Cusumano and twice, in the span of a minute, by Lucca. Plaintiff alleges that the officers improperly accessed her personal information through the Driver and Vehicle Information Database ("DAVID") system. Plaintiff states that this action "centers on the practice, by law

enforcement officers employed by the Broward Sheriff's Office and the City of Fort Lauderdale, of obtaining protected personal information from the DMV records of Broward County public defenders, without any permissible purpose for doing so." ECF No. 7 at 5. Further, Plaintiff alleges that while "these law enforcement personnel may have obtained public defenders' motor vehicle records to gather personal information about an attorney in advance of trial or deposition testimony, or just purely out of curiosity, there is no legitimate basis for obtaining private, personal information about public defenders who are not parties or witnesses to criminal proceedings or investigations." *Id*.

As stated above, Plaintiff sues the City and BSO in a one count Complaint alleging that Plaintiff's information was obtained in violation of the Drivers Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721, et seq.

PERTINENT FACTS

The City and BSO essentially raise many of the same arguments in their Motions to Dismiss Plaintiff's Complaint. As such, the undersigned will address the arguments collectively instead of repeating the analysis.

The undersigned has carefully reviewed the allegations of the Amended Complaint and the case law from all over the country on the issues raised herein.[1] The

[1] The allegations referenced have been taken directly from the Amended Complaint. ECF No. 7. (pin cites to the Complaint are omitted unless specifically referenced). Plaintiff has submitted documents attached as exhibits to her Response to Defendant BSO's Motion to Dismiss, ECF No. 30, and asks this Court to review those documents in responding to Defendant BSO's Motion to Dismiss. Defendant objects to same. Although a court may review documents outside of the pleadings on a motion to dismiss if they are public records or necessarily embraced by the pleadings, in the ordinary

Complaint alleges that the officers improperly obtained Plaintiff's personal information in violation of the DPPA. ECF No. 7. The Complaint alleges that Plaintiff has been a Public Defender since 2009. At all times relevant, Plaintiff had a valid Florida driver's license, and provided her personal information to the state DMV for purposes of obtaining and maintaining her driver's license. As part of defending and representing her clients, Plaintiff frequently takes the depositions of law enforcement officers and also cross-examines officers at trial and evidentiary hearings. Plaintiff has never been the subject of a criminal investigation; has never been stopped or been pulled over while driving a motor vehicle or issued a traffic ticket or warning within Broward County; has never been arrested or accused of a crime; and has never filed a police report or initiated any internal affairs complaints.[2]

As a result of a concern that her motor vehicle records may have been improperly accessed, Plaintiff requested from the State of Florida a listing of the instances, if any, where her motor vehicle records were obtained from August 3, 2011 through August 3, 2015. Florida's Department of Highway Safety and Motor Vehicles provided Plaintiff with a written report showing that law enforcement officers from the

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course, a court does not consider matters outside the pleadings. *See* Fed. R. Civ. P. 12(d); *Loeffler v. City of Anoka*, 79 F. Supp. 3d 986 (D. Minn. 2015); *Kennedy v. City of Braham*, 67 F. Supp. 3d 1020, 1028 (D. Minn. 2014). The undersigned, however, finds it unnecessary to review the documents in question in light of the finding that the Amended Complaint sufficiently alleges a DPPA action against Defendants. For further clarification, the undersigned notes that this Court does not address the propriety of relying on the Memorandums of Understanding or the Affirmation between Defendant BSO and the Department of Highway Safety and Motor Vehicles and any obligations established between those agencies.

[2] *See Kennedy*, 67 F. Supp. 3d at 1043 (finding by District Court that Plaintiff's claim that she has never been an interested party in any law enforcement matter supports the inference that a permissible purpose for accessing her records did not exist).

City and BSO obtained Plaintiff's motor vehicle records on four separate occasions in 2011 and 2012. Plaintiff alleges the specific dates and times that each officer accessed her motor vehicle records through DAVID. ECF No. 7 at 24, 28, 34. Plaintiff also alleges that prior to accessing her confidential, personal information each officer had either been subpoenaed to appear for deposition or subpoenaed as a witness for trial.[3] Plaintiff alleges that these officers had "no legitimate purpose for obtaining Plaintiff's motor vehicle records" but rather the "only plausible inference is that [the officers] sought Plaintiff's private records to access confidential, personal information about her in advance of providing testimony." ECF No. 7 at 26, 27, 32, 33. Plaintiff further alleges that this information was obtained without her consent and without a permissible purpose for doing so. ECF No. 7 at 38.

In addition, Plaintiff alleges that none of the access to her personal information fell within the DPPA's permitted exceptions for procurement of her private information and that she did not consent to access or use of her information for anything but legitimate law enforcement business. ECF No. 7 at 50-54. Rather, Plaintiff alleges that "law enforcement officers obtained Plaintiff's motor vehicle record for the purpose of personal curiosity or to improperly acquire non-public information about a defendant's attorney" in advance of providing testimony. ECF No. 7 at 26, 32, 38, 50.

Plaintiff brings her claims as a class action on behalf of herself and others similarly situated, defining her class as all current or former employees of the Broward County Public Defender's Office. The undersigned has not quoted Plaintiff's complete

[3] Plaintiff does not have specific information regarding the date of a deposition or trial subpoena directed at Officer Lucca at this time, but does allege that he accessed the DAVID system and impermissibly obtained Plaintiff's information.

class action definition because Defendants concede that it is premature to rule at this time on the portion of their Motions to Dismiss that asks this Court to deny Plaintiff's request for class certification. Therefore, the undersigned finds, in light of Defendants' concession and the applicable law, that the Defendants' attack on class treatment at this early stage of the proceedings is premature. "The question of class certification is generally not addressed on a motion to dismiss." *Carriuolo v. General Motors, LLC*, 72 F. Supp. 2d 1323, 1328 (S.D. Fla. 2014). The propriety of class certification is most commonly addressed when a plaintiff files a motion for class certification. *See Chaney v. Crystal Beach Capital*, LLC, 2011 WL 17639, at *2 (M.D. Fla. Jan. 4, 2011). Accordingly, the undersigned does not address the merits of class certification treatment at this time.

ANALYSIS

Defendants argue that Plaintiff has failed to state any claim upon which relief can be granted against them and that, accordingly, Plaintiff's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). "In considering a motion to dismiss under Rule 12(b)(6), a court must accept the factual allegations of the complaint as true and evaluate all inferences derived from those facts in the light most favorable to the plaintiff." *Santarlas v. Minner*, 2015 WL 3852981, at *3 (M.D. Fla. June 22, 2015) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). "Conclusory allegations, unwarranted factual deductions, or legal conclusions masquerading as facts, however, are not entitled to the assumption of truth." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003)).

The DPPA creates a private right of action against persons who knowingly obtain, disclose or use personal information, from a motor vehicle record, for a purpose not permitted under the DPPA. 18 U.S.C. § 2724. Not all use of personal information from motor vehicles is wrongful. In §2721(b), the DPPA provides for fourteen permissible uses. Plaintiff alleges that the access to her records were for an impermissible use and those allegations are taken as true for purposes of these Motions to Dismiss. At oral argument, the City abandoned, solely for purposes of this Motion, two of the arguments presented in its Motion to Dismiss. The City, for purposes of its Motion to Dismiss, no longer is pursuing the arguments raised with regard to the applicability of sovereign immunity and exemptions applicable to a state agency under the DPPA. The City also, for purposes of this motion, no longer is pursuing the argument that a municipality cannot be held liable under the DPPA. Therefore, the undersigned proceeds to evaluate the remaining argument presented by both Defendants--whether Plaintiff has sufficiently alleged facts to demonstrate vicarious liability on the part of the City and BSO for the actions of its officers. In other words, the undersigned must determine whether Plaintiff has alleged that the City and BSO employees acted at least in part with the purpose of furthering their employer's business or interests.

"[W]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citing *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999)). "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously

liable for acts of their agents or employees in the scope of their authority or employment." *Id.* Defendants argue that Plaintiff has failed to state a claim upon which relief may be granted because Plaintiff has not pled sufficient facts from which it can be determined that the officers in question were acting within the scope of their employment when these alleged violations occurred, such that the Defendants could be vicariously liable for their conduct if the conduct does not fall within any of the exceptions of the DPPA.

"An employee's conduct is considered to be within the scope of employment if it (1) is of the kind he or she is employed to perform, (2) occurs substantially within the authorized time and space limits of the workplace, and (3) is actuated, at least in part, by a purpose to serve the employer." *Santarlas v. Minner*, 2015 WL 5896243, at *2 (citing S*parks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 n.5 (11th Cir. 1987)); *see also Watts v. City of Hollywood,* 2015 WL 7709671, at *4 (S.D. Fla. Nov. 17, 2015). The mere fact that the officers had access to DAVID through their employment, standing alone, would be "insufficient to establish that the conduct was actuated by a purpose to serve the employer." *Id.* At oral argument, Defendants conceded that (1) the use of the DAVID system is the kind of activity that the officers are employed to perform and that (2) the access that was conducted occurred within the authorized time and space limits of the workplace. Therefore, both Defendants agree that these first two elements are satisfied. Defendants instead focus their arguments on the third element, that is, whether the actions alleged were "actuated, at least in part, by a purpose to serve the employer."

"The Restatement defines conduct, including an intentional tort, to be within the scope of employment when 'actuated, at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (alteration in original) (citing Restatement §§ 228(1) (c), 230); *see also Santarlas*, 2015 WL 3852981, at *4 ("An employee is acting within the scope of his or her employment when the 'employee's purpose, however misguided, is wholly or in part to further the master's business.'" (quoting *Burlington*, 524 U.S. at 756)). "To state a claim under the DPPA, a plaintiff must allege that (1) a defendant knowingly obtained, disclosed or used personal information; (2) from a motor vehicle record; (3) for purposes not permitted." *Loeffler*, 79 F. Supp. 3d at 995. In order for liability to attach, the City and BSO must have knowingly obtained, disclosed or used Plaintiff's information and known that it was for an improper purpose or knowingly allowed these actions to occur. *Id.; see also Watts v. City of Hollywood,* 2015 WL 7709671, at *2.

Plaintiff alternatively alleges that these officers acted with the actual or apparent authority to do so and that such authority was granted to them by the Defendants. ECF No. 7 at 24, 29, 34, 48, 49. Defendants argue that apparent authority is irrelevant and that the officers had actual authority. *See Watts v. City of Hollywood*, 2015 WL 7709671, at *6. Plaintiff argues that apparent authority is a relevant standard as well since apparent authority has been used by other district courts to evaluate liability under the DPPA. *See, e.g., Margan v. Niles*, 250 F. Supp. 2d 63, 75 (N.D..N.Y. 2003); *see also Schierts v. City of Brookfield*, 868 F. Supp. 2d 818, 822 (E.D. Wisc. 2012). Defendants concede that Plaintiff may plead these theories alternatively in her Complaint but argue that the standard of apparent authority is improper. The

undersigned finds that Plaintiff alleges both apparent and actual authority and is entitled to do so in her Complaint, especially in light of the cases that have addressed this issue differently and the fact that this is a new and emerging area of law which the Eleventh Circuit has not yet addressed. Therefore, the undersigned finds it premature at this time to address the propriety of which standard applies until discovery can be directed to this issue.

The undersigned is aware that with the exception of misuse, the DPPA's legislative history indicates a desire to preserve broad discretion for law enforcement agents to retrieve information in the course of their duties. *Smythe v. City of Onamia*, 2013 WL 2443849, at *6 (D. Minn. June 5, 2013). The question this Court must address is whether the alleged actions of the officers fell within the scope of their job-related duties, not whether they were allowed to engage in the particular unlawful conduct. *Watts v. City of Hollywood,* 2015 WL 7709671, at *6. The inquiry is whether the officers' actions were in some way taken in furtherance of the City's or BSO's interests, even if the actions were excessive or misguided. *Id.*

Plaintiff's information was allegedly retrieved from the DAVID system in response to either a deposition or trial subpoena being issued to these officers. Although this access was allegedly impermissible under the statute, the undersigned finds that the allegation that the searches were performed in response to required, job-related testimony leads to the plausible inference that the officers could have believed that they would be better prepared for their testimony because of the accessed information. This plausible inference is sufficient to satisfy the pleading requirement that the actions must be somehow motivated to benefit the employer, even if that motivation is eventually

proven to be misguided. In light of the allegations addressed above in the factual background section and evaluated herein, the undersigned finds that Plaintiff has satisfied her burden by presenting allegations that the officers obtained Plaintiff's motor vehicle record in response to "job-related testimony." ECF No. 30 at 10. *See* ECF No. 7 at 26, 27, 32, 33.

Plaintiff also alleges that the officers may have accessed her information out of curiosity. ECF No. 7 at 5, 50. In *Smythe v. City of Onamia*, the District Court found that "[a]n officer who retrieves motor vehicle records has violated the DPPA *unless* he or she has done so for a permitted purpose, such as for a law enforcement function." *Smythe* at *6. The *Smythe* court explained that "[b]y way of illustration, a police officer might retrieve a celebrity's motor vehicle records out of curiosity . . . . By doing so, the officer has obtained a motor vehicle record under 2724(a), but has done so without one of the permitted purposes listed in §2721(b). As a result, this simple act of retrieval, without any further action, would violate the DPPA." *Id.*; *see also Watts v. City of Hollywood,* No. 15-61123-CIV-ALTONAGA (S.D. Fla. Jan. 11, 2016), ECF No. 61 at 6 (finding in an Order denying City's Motion to Dismiss that plaintiff can state a claim under the DPPA simply because her DAVID information was accessed, without having to prove whether or how it was later disclosed or used). A violation can therefore occur from the retrieval of the records even if the information is not misused, *Id.,* as long as the retrieval of the information itself is for an impermissible purpose. *Mitchell v. Aitkin County*, 2014 WL 835129 (D. Minn. March 4, 2014); *see also Bass v. Anoka County*, 998 F. Supp. 2d 813, 821 (D. Minn. 2014) (merely stating number of times Plaintiff's records were accessed was insufficient to show an improper purpose). But while

access of information purely out of curiosity could create a claim against the individual officer, as discussed above, in order for vicarious liability to attach to the City and BSO, the impermissible actions must somehow serve the interests of the employer.

In the instant case, Plaintiff specifically alleges that her records may have been impermissibly retrieved by the officers out of curiosity *after* having been subpoenaed by her. Such access would allegedly be in response to job-related testimony, however "misguided" that decision might be. *United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1271-72 (11th Cir. 2009); *see e.g., Santarlas*, 2015 WL 3852981, at *4, *6. The allegations presented and read as a whole do not suggest generalized curiosity on the part of the officers but rather allege curiosity aroused by job-related testimony. This Court finds this to be a reasonable inference from reading the allegations of the Complaint as a whole.

In sum, the undersigned finds that Plaintiff has alleged facts sufficient to show that the information retrievals were for an impermissible purpose, but within the scope of employment and in furtherance of the City's or BSO's interests, that is, the desire to be a better-prepared witness. *See Karasov v. Caplan Law Firm, P.A.,* 84 F. Supp. 3d 886, 900-901 (D. Minn. 2015) ("Plaintiff need not plead . . . the precise impermissible purpose for which her information was accessed"). All the parties agree that this Court may make reasonable inferences based on the allegations of the Complaint. *Watts v. City of Hollywood*, 2015 WL 7709671, at *2 ("To meet this plausibility standard, a plaintiff must plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.") (internal quotation marks omitted). The undersigned finds this inference to be plausible given the facts

alleged. In light of the allegations and analysis herein, the undersigned finds that the Complaint, taken in the light most favorable to Plaintiff, does support, with sufficient facts, a reasonable inference that the officers were acting impermissibly but within the course and scope of their employment.

To survive a motion to dismiss, Plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Ceant v. Aventura Limousine & Transportation Service,* 874 F. Supp. 2d 1373, 1376 (S.D. Fla. 2012) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). For the reasons stated above, the undersigned finds that Count I is sufficiently pled to survive Defendants' Motions to Dismiss.

RECOMMENDATION

The undersigned respectfully recommends that Defendants' Motions to Dismiss, ECF Nos. 12 and 25, be DENIED, with the exception of the agreed substitution of Broward Sheriff Scott Israel, in his official capacity for the Broward Sheriff's Office.

The Parties will have fourteen days after service of a copy of this Report and Recommendation within which to file written objections, if any, to the Honorable William J. Zloch, United States District Judge. *See* 28 U.S.C. § 636(b)(1) (providing procedure for review of magistrate judge's proposed findings and recommendations). Failure to timely file objections shall bar the parties from a de novo determination by Judge Zloch of any issue covered in the Report and from challenging, on appeal, the factual findings accepted or adopted by this Court, except on grounds of plain error or manifest injustice. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985) (holding that "a court of

appeals may exercise its supervisory powers to establish a rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment"); *Dupree v. Warden*, 715 F.3d 1295, 1300 (11th Cir. 2013) ("[U]nder our current rule, a party's failure to object to factual findings and legal conclusions in a magistrate judge's report and recommendation in civil cases has limited consequences. Despite a party's failure to object, we seem to consistently review unobjected-to factual findings for plain error, and we review the unobjected-to legal conclusions de novo."); *Smith v. Potter*, 310 F. App'x 307, 309 (11th Cir. 2009) ("This court has held that the failure of a party to object to the magistrate judge's report precludes review of findings of fact except on grounds of plain error or manifest injustice, but does not limit review of legal conclusions." (citing *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir.1993))).

DONE AND SUBMITTED at Fort Lauderdale, Florida this 15th day of March, 2016.

PATRICK M. HUNT
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

The Honorable William J. Zloch
All Counsel of Record