UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 19-cv-81189-RKA

JAMES TRACY,

Plaintiff,

vs.

RICKEY LEON BETHEL, JR., AMY GRANDE, TRACY CLARK HAYNIE and GIA SHAW,

Defendants.
_____/

**DEFENDANTS', MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW**

Defendants, RICKEY BETHEL, JR., AMY GRANDE, TRACY CLARK HAYNIE and GIA SHAW (hereinafter, as "Defendants"), by and through their undersigned counsel, Whitelock & Associates, P.A., and pursuant to Fed. R. Civ. P. 12(b)(1)(6) and S.D. Fla. L. R. 7.1(a)(1), file this Motion to Dismiss Plaintiff's Second Amended Complaint and Incorporated Memorandum of Law, as follows:

## INTRODUCTION

The Plaintiff in this matter is a disgruntled ex-employee of the Florida Atlantic University ("FAU"), who unsuccessfully sued FAU (case number 9:16-cv-80655), alleging that he was terminated in violation of his First Amendment rights.[1] After FAU prevailed at trial, on

[1] According to Plaintiff's Second Amended Complaint in case number 9:16-cv-80655, "Professor Tracy has questioned whether anyone actually died in Sandy Hook and other mass casualty events as reported by CNN and other 'maintstream' media." Plaintiff alleged that he was terminated for speaking about these views in his blog. On

August 23, 2019, the Plaintiff filed four (4) separate lawsuits against FAU Police Department employees RICKEY BETHEL, JR. (Case No.: 19-CV-81189), GIA SHAW (Case No.: 19-CV-81193); TRACY CLARK HAYNIE (Case No.: 19-cv-81190); and AMY GRANDE (Case No.: 19-cv-81191), alleging violations of the Driver's Privacy Protection Act (18 U.S.C. Section 2721, *et seq.*) (hereinafter referred to as the "DPPA"). *See* Complaints, attached hereto as Composite Exhibit "A." Despite attaching the same exhibits and containing practically identical averments, the Plaintiff elected to file these actions separately in this District. *Id.* On September 20, 2019, the Plaintiff's lawsuits were consolidated (*see* D.E.(s) 6, 13, and 14), and on September 23, 2019, the Plaintiff filed a Second Amended Complaint with the previous separated claims and actions as a single pleading against all four (4) Defendants. D.E. 17.

As set forth *infra*, the Second Amended Complaint fails to state a claim as a matter of law. First, the Second Amendment Complaint fails to comply with F.R.C.P. Rule 8 by not setting forth sufficient facts to establish a claim under the DPPA. Second, the Defendants are entitled to qualified immunity as the Plaintiff's conclusory claims fail to establish a violation of clearly established law .

## FACTUAL ALLEGATIONS

In the Second Amended Complaint, the Plaintiff alleges that the Defendants were at all times material employed by the Florida Atlantic University Police Department. D.E. 17 at ¶¶ 6-9. It is alleged that the Defendants, as law enforcement personnel, "were given access to a statewide electronic information system known as the State of Florida's Driver and Vehicle Information Database, also known as 'DAVID.'" *Id.* at ¶ 13. The Plaintiff alleges only generally that the Defendants were "trained on the prohibitions of 18 U.S.C. §§ 2721 through 2725, as well

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December 11, 2017, however, a jury found that Plaintiff's blog speech was not a motivating factor in FAU's decision to discharge him from employment.

as on similar Florida prohibitions against wrongful use of the data systems to access personal information." *Id.* at ¶ 13. The Plaintiff, however, does not specifically allege any "Florida prohibitions," nor a specific practice that was somehow prohibited by each individual Defendant. *See generally* D.E. 17.

The Plaintiff in his consolidated amended pleading also alleges that, "[s]uspecting his personal information and records had been illegally accessed," he submitted a public records request and received a report indicating that the Defendants made "unwarranted and illegal inquiries." *Id.* at ¶¶ 17-21. The summary allegations in Plaintiff Complaint, however, do not set forth the actual information accessed, the motivations behind the Defendants' alleged inquiries, or any other specific facts regarding how or why each Defendant then accessed the unspecified information. *See generally* D.E. 17. Rather than set forth any facts about any alleged individual behavior that violated the DPPA, the Plaintiff merely asserts vague and conclusory allegations that the Defendants accessed the information "for no lawful purpose" and "upon information and belief" with the "intent to harm, injure, harass, and/or invade the privacy of Plaintiff," which are devoid of any factual allegations. *Id.* at 31. Contrary to these allegations, however, Plaintiff attached a document to his Complaint, purportedly from the Driver of Highway Safety & Motor Vehicles, that identifies all of the DAVID inquiries related to the Plaintiff. *Id.* at Ex. A.[2] In direct contravention to the Plaintiff's conclusory allegations, the attached document actually indicates that the alleged searches for the information were conducted as part of law enforcement functions, such as, a background investigation, the verification of identify, and a driver's license/motor vehicle check. *Id.* Consequently, in attaching this document, Plaintiff has only presented facts of the permissible law enforcement functions for which the individual Defendants

[2] The inquiries were purportedly ran in 2015, yet the report was requested and generated in 2019 after the Plaintiff lost his trial against FAU.

accessed the DAVID information. There are no specific facts set forth in the Second Amended Complaint that contradict these otherwise lawful purposes.

As aptly demonstrated below, the Second Amended Complaint fails as a matter of law because (1) this type of pleading by the Plaintiff violates the standards under the *Twombly/Iqbal* standard,[3] and (2), the Plaintiff did not satisfy his burdens to pierce the Defendants' veils of qualified immunity under the law because this consolidated pleading fails to establish with *Twombly* requiste averements that each individual Defendant violated a law that was clearly established.

## MEMORANDUM OF LAW

### A. Legal Standard

To satisfy the pleading requirements of the Federal Rules of Civil Procedure, a complaint must contain a short and plain statement showing an entitlement to relief, and must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Bell Atlantic Corporation v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). To survive a motion to dismiss, a plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). This necessarily requires that a plaintiff include factual allegations for each essential element of his or her claim." *Georgia Carry.Org, Inc. v. Georgia,* 687 F.3d 1244, 1254 (11th Cir. 2012). Thus, minimum pleading standards "require [ ] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555.

[3] Citations are set forth *infra*.

As the Eleventh Circuit has explained, the *Twombly/Iqbal* principles require that a complaint's allegations be "enough to raise a right to relief above the speculative level." *Speaker v. U.S. Dep't of Health and Human Services Centers for Disease Control and Prevention,* 623 F. 3d 1371, 1380 (11th Cir. 2010). "[I]f allegations are indeed more conclusory than factual, then the court does not have to assume their truth." *Chaparro v. Carnival Corp.,* 693 F.3d 1333, 1337 (11th Cir. 2012). Thus, any legal conclusions without adequate factual support are not legally entitled to any assumption of truth. *Mamani v. Berzain,* 654 F.3d 1148, 1153 (11th Cir. 2011); *see also Jacobs v. Tempur-Pedic Int'l, Inc.,* 626 F.3d 1327, 1333 (11th Cir. 2010) (legal conclusions are not entitled to assumption of truth).

**B. <u>The Plaintiff's allegations violate *Twombly/Igbal* standard and the Defendants are otherwise entitled to qualified immunity as a matter of law</u>**

The DPPA, which serves as the legal basis for the Plaintiff's claims, "regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs)." *Reno v. Condon,* 528 U.S. 141, 143, 120 S.Ct. 666, 668, 145 L.Ed.2d 587 (2000). The DPPA identifies several permissible purposes to obtain DMV information such that "not all obtainment, disclosure, or use of personal information from motor vehicle records is wrongful." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107, 1109 (11th Cir. 2008). Under the DPAA, there are fourteen (14) express permissible purposes under the DPPA, which in pertinent part, include the following:

> (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
> ...
> (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

> ...
> (14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

18 USCA § 2721(b) (2019).

The requisite elements of a DPPA claim are that an officer "(1) knowingly obtained, disclosed or used personal information, (2) from a motor vehicle record, (3) for a purpose not permitted." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107, 1109 (11th Cir. 2008). It is well settled that the burden of proof for such a claim falls squarely on the plaintiff. *Id.* The Plaintiff also has the burden of piercing the veils of qualified immunity enjoyed by the Defendants. Specifically, qualified immunity protects "government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). This immunity balances the need for official accountability with the need to permit officials to engage in their discretionary duties without fear of personal liability or harassing litigation. *Pearson,* 555 U.S. at 231, 129 S.Ct. 808 (2009). In order for government officials to enjoy qualified immunity, they must first establish that they were acting within the scope of their discretionary authority when the alleged wrongful acts occurred. *Lee v. Ferraro,* 284 F.3d 1188, 1194 (11th Cir. 2002).

Once it has been determined that an official was acting with the scope of his discretionary authority, the burden shifts to the plaintiff to establish that qualified immunity is inappropriate. *Id.* This burden requires a plaintiff to first show that the official's alleged conduct violated a constitutionally protected right. Second, the plaintiff must then demonstrate that the right was clearly established at the time of the alleged misconduct. *Pearson,* 555 U.S. at 232, 129 S.Ct.

808, *Grider v. City of Auburn,* 618 F.3d 1240, 1254 (11th Cir. 2010). A plaintiff must satisfy both prongs of the analysis to overcome a defense of qualified immunity. *Grider,* 618 F.3d at 1254. In order for the law to be clearly established, "case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates a federal law." *Priester v. City of Riviera Beach,* 208 F.3d 919 (11th Cir. 2000). The Court looks to the binding precedent set forth in the decisions of the Supreme Court, the Eleventh Circuit, or the highest court of the state to decide whether a right is clearly established. *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1184 (11th Cir. 2009).

In the context of the DPPA, to overcome a defendant's qualified immunity, the Plaintiff must allege facts that would ultimately prove that it was obviously clear that an officer should not have obtained the information. *Watts v. City of Miami*, 679 Fed.Appx 806, 810 (11th Cir. 2017) (holding that Defendant officers were entitled to qualified immunity because the officers, though possibly mistaken, could have reasonably believed that their DAVID accesses were permitted uses related to public safety).[4] In other words, the Plaintiff is required "to show that no reasonable officer in the Defendants' position could have believed that he was accessing [his] DAVID information for a permissible use under the DPPA." *Id.* It is insufficient for a plaintiff to merely disagree with the purported purpose of the Officers' inquiries. Rather, the Plaintiff must set forth specific facts rather than "sweeping statements," "conjecture," or "conclusory statements."*Barker v. Bay County Seriff's Office*, 632 Fed.Appx. 537, 539 (11th Cir. 2015).

In *Watts*, the plaintiff (Watts), a state trooper, pulled over an off-duty Miami police officer, and pulled her gun on the off-duty officer in the process. *Watts v. City of Miami*, 679

[4] Although the procedural posture of *Watts* was based on a motion for summary judgment, the Court noted that the plaintiff must "explicitly allege … that the Defendants obtained the information for a purpose clearly not permitted by the DPPA." *Watts v. City of Miami*, 679 Fed.Appx 806, 810 (11th Cir. 2017).

Fed.Appx 806, 807 (11th Cir. 2017). This highly publicized event was allegedly followed by over eighty (80) DAVID inquiries made by Miami police officers (and others), as well as "online threats, numerous hang-up telephone calls on her unlisted home and cellular phones, and other forms of harassment." *Id.* The officers who made the inquiries stated that, "because Watts had pulled her weapon on a police officer, they wanted to be able to identify her for their own safety, and so needed to see her DAVID picture."[5] *Id.* The Eleventh Circuit held as follows:

> On appeal, Watts has only argued that "officer safety" was not the true purpose of the officers' DAVID accesses. Importantly, however, **she has not explicitly alleged**, much less carried her burden to show, that the Defendants obtained the information for a purpose clearly not permitted by the DPPA. See *Thomas*, 525 F.3d at 1111–12 (A plaintiff must show "that a defendant (1) knowingly obtained, disclosed or used personal information, (2) from a motor vehicle record, (3) for a purpose not permitted." ... [The plaintiff] argues that the permissible uses ... function as statutory exceptions and, therefore, the defendants should carry the burden of proof to secure entitlement of such exceptions. ''We disagree."); Gilmore, 738 F.3d at 272 (explaining that once the defendant has established that he was acting within the scope of his discretionary authority, the burden shifts to the plaintiff to show a violation of a clearly established right). In short, "[i]n the absence of [any] case law to the contrary, [the Defendants], though [possibly] mistaken, could have reasonably believed" that their DAVID accesses were permitted uses under the DPPA. Dukes v. Deaton, 852 F.3d 1035, 1043–44, 2017 WL 370854, *5 (11th Cir., Jan. 26,2017).

*Id.*

Here, it is alleged that the Defendants were employed as law enforcement personnel by FAU when they conducted the searches, and therefore, the Defendants were clearly within the scope of their discretionary duties. D.E. 17 at ¶¶ 6-9, 13. Thus, in order to overcome the Defendants' qualified immunity, the Plaintiff has the burden of demonstrating that the Defendants violated the Plaintiff's rights in violation of the DPPA, and that these alleged violations were also clearly established at the time. *Watts v. City of Miami*, 679 Fed.Appx 806, 810 (11th Cir. 2017).

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[5] The officers were internally disciplined for an unlawful DAVID inquiry. *Id.*

The Plaintiff and his counsel are clearly aware that the burdens to establish that these individuals violated a constitutional law that was clearly established at the time of these alleged DAVID searches has not been satisfied. Lacking any factual basis for these claims, and in a transparent attempt to circumvent *Watts*, the Plaintiff claims in his pleading that each individual defendant "[u]pon information and belief … retrieved and accessed [the information] for the purpose and intent to harm, injure, harass and/or invade the privacy of Planitiff." *Id.* at ¶¶ 31-32. The Plaintiff's shotgun allegation appears to be reliant on a footnote in *Watts*, in which the Court noted that "harassment" could possibly have been argued as an impermissible purpose under the "clearly established" analysis. *Id.* n. 1. However, even the Court was skeptical of this argument by continuing to explain "*Watts* only notes that she 'cannot rule out whether … the information [was] accessed … to further stalk or otherwise threaten or harass her.'" *Id.* Even if allegations of harassment presents a clearly established impermissible purpose at the time of these alleged DAVID inquires, this does not carry the day as to the Plaintiff's qualified immunity burdens to each individual Defendant. To presumably sue these individuals and satisfy his qualified immunity burdens, the Plaintiff's naked "upon information and belief" assertions, with no other supporting factual details, are not sufficient under Rule 8 and the *Twombly* standard. In this District, factually unsupported allegations in a pleading based "on information and belief" assertions are not entitled any assumption of truth by the Court. *See e.g. Scott v. Experian Info. Sols., Inc.*, 2018 WL 3360754 at 6 (S.D. Fla. June 29, 2018) ("Conclusory allegations made upon information and belief are not entitled to a presumption of truth, and allegations stated upon information and belief that do not contain any factual support fail to meet the *Twombly* standard."). Consequently, there is no assumption of truth to these conclusory allegations by the Plaintiff as to each individual Defendant.

Consequently, and after extracting these impermissible assertions, what is left of this consolidated pleading are exactly the type of claims prohibited by *Twombly/Igbal* and barred by the qualified immunity doctrine. Specifically, the Plaintiff has failed to properly plead any factual allegations in accordance with *Twombly* and Rule 8 as to any individual Defendant. Here, the Second Amended Complaint is devoid of any Rule 8 facts of any purported and alleged injury, harm, harassment and/or invasion upon the Plaintiff by any of the Defendants. These pleadings are likewise lacking any Rule 8 factual averments about any of the Defendants' individual conduct with the intent and the subsequent alleged process of then harming the Plaintiff that somehow complies with the *Twombly* pleading standard and rises to the level of a clearly established law on the date of each DAVID inquiry.

Further, and as set forth above, the Plaintiff attaches the same, identical DAVID report as to each claim which contains the purpose codes that clearly identify the permissible law enforcement functions for each inquiry, such as, "background investigation," "verification of identify," and a "driver's license/motor vehicle check." *Id.* at Ex. A. The Plaintiff fails to allege any specific facts to contradict the report, aside from the Defendant's conclusory and sweeping statements that the inquires were intended to "harm, injure, harass, and/or invade the Plaintiff's privacy," which an impermissible averment under *Twombly/Igbal.* *Id.* at ¶¶ 31-32; *See also Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1205, 1206 (11th Cir. 2007) ("Where "the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern."). In short, these "bare bones" allegations are insufficient to overcome the Plaintiff's heightened burden to set forth allegations establishing that the inquiries were clearly unreasonable.

Lastly it is critical to analyze these amended claims by the Plaintiff within the qualified immunity purpose to shield government officials from suit, discovery, and not just immunity at

trial. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *see also Ashcroft v. Iqbal*, 123 S.Ct. 1937 (2009) ("the basic thrust the qualified immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery."). Here, there are no specific averments as to any individual Defendant, particularly, where this Plaintiff and his lawyers elected to file individual suits, initially claiming individual harm by individual acts which presumably indicates that there was no conspiracy by, nor is one alleged against, the individual Defendants. Consequently, did the Defendants all separately decided to conduct DAVID searches to then harm the Plaintiff? The Plaintiff intentionally refuses to say so after he was forced to file a single amended pleading and again failed provide a single Rule 8 fact as to how and why each individual Defendant conducted the searches, along with what was the alleged harassment, harm and/or injury then suffered by the Plaintiff as to each individual Defendant. The problem for the Planitiff is that no such set of facts exist as to any individual Defendant -- or they would have obviously been asserted in these amended claims. Because these facts do not exist, the Plaintiff has desperately attempted to sneak in these amended claims against individual law enforcement personnel with formulaic, or simply stated, boilerplate language to create the appearance of a violation of clearly established law where none exists, to then subject these individual to, *inter alia*, harassing litigation and intrusive discovery. This is precisely why these claims are subject to dismissal under *Twombly/Igbal* and barred by the doctrine of Qualified Immunity.

## CONCLUSION

Based upon the foregoing, the Defendants respectfully request that this Court grant Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint, and for any other relief that this Court deems is just and proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2019, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CMECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Filing.

s/Christopher J. Whitelock
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