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' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS 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 Reply in Support of Defendants' Motion to Dismiss, and state as follows:

The Plaintiff admits in his response that he does not "know why Defendants – four separate law enforcement officers … obtained Plaintiff's confidential personal information … or precisely what Defendants did with his protected information … or who the information was disclosed to … and other relevant information." D.E. 26 at 8. Thus, the Plaintiff and his counsel, who admit not knowing whether the Defendants' actions were unlawful, proceeded to file a Federal lawsuit against the Defendant officers alleging that the Defendants did, in fact, violate the DPPA. It is difficult to reconcile how filing this action under those circumstances is not, in

and of itself, a violation of F.R.C.P. Rule 11(b). Regardless, Plaintiff's concession emphasizes the importance of dismissing the Second Amended Complaint, as the Plaintiff has "doubled down" by essentially arguing that he should be able to file a "bare bones" complaint against four (4) separate defendants and not allege one *Twombly* fact other than that the Defendants conducted a D.A.V.I.D. inquiry on a date certain. If the Plaintiff's position prevails, then every individual who has ever been the subject of a D.A.V.I.D. inquiry could survive a motion to dismiss and commence discovery on a public official, which is contrary to the entire purpose of the qualified immunity statute. *See 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.").

Furthermore, the Plaintiff's entire Response is based upon case law that was decided prior to the Eleventh Circuit decisions relied upon by the Defendants, i.e., *Watts v. City of Miami*, 679 Fed.Appx 806, 810 (11th Cir. 2017) and *Barker v. Bay County Seriff's Office*, 632 Fed.Appx. 537, 539 (11th Cir. 2015). The Court in *Watts* specifically noted that the plaintiff had to "explicitly allege[]" and had the "burden to show, that the Defendants obtained the information for a purpose clearly not permitted by the DPPA." *Watts* at 807. In addition, the Court in *Barker* held that a DPPA claim could not be reliant on "sweeping statements," "conjecture," or "conclusory statements." *Barker* at 539. Rather than address these cases, the Plaintiff ignored them, and instead relies on *Collier v. Dickinson*, 477 F.3d 1306 (11th Cir. 2007), a predecessor case, in which it was alleged that government officials accessed private citizens' motor vehicle records and sold the information to mass marketers without consent. The *Collier* Court specifically held that the "statutory right to privacy in motor vehicle record information was clearly established at the time of Defendant's alleged conduct, giving them fair

notice that their alleged conduct violated federal law." *Id.* at1312. Subsequent district cases, also cited by the Plaintiff, such as *Welch v. Theodorides-Bustle,* 677 F.Supp.2d 1283, 1286 (N.D. Fla. 2010), wrongly interpreted *Collier* to have established a bright-line rule that a plaintiff merely need allege that information was accessed for a purpose not permitted under the DPPA, in order to survive a motion to dismiss. However, the Eleventh Circuit in *Watts* has made clear that *Collier* has been misapplied, and distinguished the case as follows:

> We are compelled to conclude that the district court erred. *Collier* is not sufficiently similar to the facts at issue in this case as to constitute "relevant case law" that put the officers on notice, nor did it lay down a general rule that violations of the DPPA are always violations of clearly established law. This Court in *Collier* addressed a situation in which executive-level DHSMV officials were selling driver records to third-party mass marketers without the consent of the drivers. Id. at 1307. We concluded that this was a violation of clearly established law, because "[t]he language of Sections 2721(b)(11)–(13) unambiguously requires the consent of individuals before their motor vehicle record information may be released" for sale to marketers. Id. at 1310–11. This is very different from the Defendant's behavior in this case, where the officers obtained information about Watts for their own use.
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> Moreover, *Collier* does not stand for the principle that all DPPA violations are so obviously clear that qualified immunity can never protect an official from suit under the DPPA. Rather, *Collier* represents the more common sense judgment that where a violation is readily apparent from the plain language of an act, the plaintiff need not point to any particular case addressing the obvious import of the statute. This Court found it clear from the DPPA's text that consent was required for information released to marketers. Id. at 1310 ("[T]he protections offered by the statute are clear and specific."). But as we've said before, "[o]bvious clarity cases are 'rare' and present a 'narrow exception' to the general rule of qualified immunity." *Gilmore v. Hodges*, 738 F.3d 266, 279 (11th Cir. 2013) (quotation and citation omitted). To fall into this category, a prohibition must be so clear that "no reasonable officer could have believed that [the Defendants'] actions were legal." *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002).

Watts v. City of Miami, 679 Fed.Appx 806, 809 (11th Cir. 2017)

It is important to emphasize that the Court in *Watts* distinguished *Collier* by noting that the plaintiff in *Collier* affirmatively alleged sufficient facts such that the case fell within the "rare" and "narrow exception" of an "obvious clarity" case. *Id.* As explained therein, the plaintiff in *Collier* affirmatively alleged that the defendants accessed the plaintiff's records and *sold the information to mass marketers without consent*, which the Court held was clearly impermissible under the DPPA. *Id.* In the case at bar, however, the Plaintiff does not allege any facts that would bring this case within the "obvious clarity" exception, or otherwise establish a clear violation as required in *Watts*. In fact, the Plaintiff concedes this fatal point.

The Plaintiff continues in his Response by citing to other district level cases for the proposition that the Plaintiff does not need to allege additional facts under *Twombly*. D.E. 26 at 4. Not only are these cases based on the same misapplication of *Collier*, but they are also distinguishable from the instant matter. For example, all of the cases cited by Plaintiff test the sufficiency of pleadings that are more factually detailed than the Second Amended Complaint. The Plaintiff initially cites to *Welch v. Theodorides-Bustle*, 677 F.Supp.2d 1283, 1287 (N.D. Fla. 2010), which also contained multiple defendants. Notably, the Court explained that the defendants could have argued that the complaint failed to distinguish between the various defendants as to their specific conduct. *Id.* However, the Court did not fully address the issue as it was not raised by the defendants in their motion to dismiss. *Id.* In the instant matter, however, the Defendants indeed raise the lack of allegations as to each defendant as a grounds for dismissal. Second, as one court noted, the complaint in *Welch* "specified more facts than Plaintiff's complaint regarding an alleged impermissible purpose." *Kost v. Hunt*, 2013 WL 5566045 (D. Minn. 2013). The court continued, "[i]n *Welch*, the complaint indicated that the plaintiff's personal information had been made available on the internet and that any internet

user could access it for no reason or on a whim." *Id.* Here, the Plaintiff only vaguely alleges "upon information and belief" that the Plaintiff intended to "harm, injure, and/or invade the privacy of Plaintiff." D.E. 17 at Paragraph 31. This allegation alone is insufficient as a matter of law, especially in light of *Watts*.

The Plaintiff's reliance on *Santarlas v. Atchley*, 2015 WL 2452301, 2 (M.D. Fla. 2015), is equally misplaced. In *Santarlas* (which, again, was before *Watts*), the Court noted that the plaintiff alleged several facts, including 1) at the time of the D.A.V.I.D. inquiry, the plaintiff was not the subject of any law enforcement investigation nor was he in contact with the defendant in a manner that would have given rise to a legitimate search; 2) the plaintiff was a law enforcement officer and a candidate for public office; and 3) the plaintiff was a "public figure subject to the curiosity and interest of the public and his political opponents." *Id.* Whereas the Court in *Santarlas* held that the above allegations were tantamount to the plaintiff affirmatively alleging that the defendant officers conducted an inquiry impermissibly out of pure curiosity, there are no allegations in the instant matter that would give rise to such an inference.

The Plaintiff's Response lastly points to the various *Watts* cases without ever directly addressing the seminal Eleventh Circuit *Watts* decision cited *supra*.[1] However, once again, the various complaints in the *Watts* cases contained vastly more detailed allegations than here. For instance, the Court in *Watts v. City of Miami*, 2016 WL 8939143, 1 (S.D. Fla. 2016), summarized the plaintiff's allegations as follows:

> On October 11, 2011, the Plaintiff–a trooper with the Florida Highway Patrol–pulled over an off-duty City of Miami police officer and cited him for reckless driving. (*See* Compl. ¶ 19, ECF No. 1.) The citation was "highly publicized throughout the state" and many law enforcement officers and officials reacted negatively. (*Id.* at ¶ 20.) As a result of the incident, the Plaintiff was threatened

[1] The plaintiff in *Watts*, Donna Watts, filed many separate actions against over eighty (80) police officers and several municipalities.

> and harassed, which included online threats, receiving numerous hang-up telephone calls on her unlisted home and cellular phones, and having pizzas she never ordered delivered to her home. (*Id.* at ¶¶ 21-22.)
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> The Plaintiff knew that her unlisted phone numbers and home address were accessible to Florida law enforcement officers through the Driver and Vehicle Information Database ("DAVID"). (*Id.* at ¶ 24.) .... On April 3, 2012, the DHSMV informed the Plaintiff that between October 2011 and January 2012, "over 88 law enforcement officers from 25 different agencies ... had viewed her private driver's license information more than 200 times." (*Id.* at ¶¶ 25-26.) The individual defendants–Pablo Camacho, Michelle Marshall, Roshan Milligan, Jesus Pedraza, Jamie Ramirez, and David Ciserno[1]–were among the officers who "obtained, disclosed, and/or used [the Plaintiff's] personal information from a motor vehicle record on the DAVID system...." (*Id.* at ¶¶ 27-38.)

Id.

In short, the Plaintiff cannot cite to one DPPA case in which a Court tested the sufficiency of a pleading that was so lacking in factual details as his Second Amended Complaint. The Plaintiff certainly cannot cite to such a case since *Watts* and obviously ignored *Watts* for that reason. Thus, the Plaintiff's motivations in this matter could not be more transparent. The Plaintiff, who admittedly does not know whether the Defendants violated the DPPA, wishes for the Court to blindly accept the Plaintiff's "bare bones" allegations, and hopes that he can formulate a viable legal theory after having "the opportunity to explore during discovery." D.E. 26 at 7. This brazen strategy of "shoot first and ask questions later" not only runs afoul of *Twombly*, but additionally fails against the backdrop of qualified immunity and *Watts*. The Plaintiff, in order to maintain this action, must have alleged an improper purpose under the DPPA, and, at minimum, plead facts sufficient to infer that the Defendants' alleged violation was clearly established at the time of the inquiry. The Plaintiff has failed to do so, and based on his Response, conceded that he cannot do so. As the Plaintiff cannot genuinely make

such allegations in compliance with *Twombly* or Fed.R.Civ.P. Rule 11(b), the Plaintiff's Second Amended Complaint should be dismissed with prejudice as a matter of law.

WHEREFORE, the Defendants respectfully request that the Court grant the Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 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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