Case No. 08-2354

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ELIZABETH PICHLER, *et al.*,

Appellees / Plaintiffs,

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES), *et al.*,

Appellees / Defendants,

v.

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION,

Appellant / Intervenor

On Appeal from the District Court
for the Eastern District of Pennsylvania

REPLY BRIEF OF APPELLANT NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

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SUMMARY OF ARGUMENT

This Court has concluded that UNITE violated the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. § 2721, by obtaining personal information from individuals' motor vehicle records in connection with the union's organizing campaign against Cintas Corporation. *See Pichler v. UNITE*, ___ F.3d ___, Case Nos. 06-CV-4522, 06-CV-4721 (3d Cir., 9 Sept. 2008). Westlaw Records created in *Pichler* reveal that UNITE also conducted over twelve-thousand motor vehicle record searches unrelated to its Cintas campaign. In this action, the Foundation seeks permission to use the Westlaw Records to notify the individuals subject to those searches that their motor vehicle records were accessed by UNITE in violation of the DPPA.

UNITE's principal defense is that the Foundation will violate the DPPA if it uses the Westlaw Records to inform individuals that UNITE violated their DPPA rights. *See* UNITE Br., 24-33. Thus, UNITE seeks to conceal its violations of the DPPA with the DPPA itself. To characterize this defense as brazen would be an understatement.

UNITE's argument is untenable. The DPPA would be self-defeating if it protected a written log of thousands of DPPA violations (the Westlaw Records) and made it unlawful to inform individuals that their motor vehicle records were accessed in violation of the DPPA.

Specifically, the Foundation's use of the Westlaw Records is permissible because it will be "pursuant to an order of a Federal . . . court" under 18 U.S.C. § 2721(b)(4). In this case, the Foundation is requesting an order from a federal court that permits it to use the Westlaw Records to notify individuals that UNITE searched their motor vehicle records. *See* Foundation's Proposed Modification to Protective Order (JA 116-17). By definition, this use of the Westlaw Records will be "pursuant to an order of a Federal . . . court" under § 2721(b)(4) and lawful under the DPPA.

STATEMENT OF THE FACTS

I. UNITE's Complaints That the Westlaw Records May Not Be Perfectly Accurate Are Baseless and Irrelevant

UNITE alleges that the Westlaw Records are not a completely accurate record of its motor vehicle record searches because the Westlaw Records are a recreation of those searches. UNITE Br., 12-13,

44-45. The union further alleges that the records include some searches of non-motor vehicle databases. *Id.*[1]

UNITE's claims are belied by its *stipulation* that "West's records indicate that there were approximately 13,700 motor vehicle searches on Westlaw by UNITE from August 2002 to October 13, 2004." Stipulation, ¶ 66 (JA 123) (emphasis added). The District Court recited this stipulated fact in its published decision. *See* S.J. Order, 13 (JA 141), published at *Pichler v. UNITE*, 446 F. Supp. 2d 353, 361 (E.D. P.A. 2006). UNITE cannot now assert that the Westlaw Records do not list its searches of motor vehicle records.

UNITE's two specific complaints about the Westlaw Records are baseless. First, the Westlaw Records being recreations of UNITE's searches does not mean that the records are in any way inaccurate. West created the records by conducting in 2005 the exact same searches that UNITE conducted between July 2002 and October 2004.

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[1] UNITE offered no proof to support this allegation other than a conclusory statement from its counsel. *See* Affidavit of T. Kennedy, ¶ 16 (JA 20). Nor does UNITE state how many of the 13,700 searches listed on the Westlaw Records were not of motor vehicle databases.

UNITE's assertion that some information retrieved in the searches conducted by West in 2005 may differ from the information that UNITE retrieved between 2002-04, because of updates to the database, is both speculative and irrelevant. UNITE Br., 11-12, 44. It is speculative because UNITE has produced no evidence to support this allegation. Indeed, UNITE asserts that " an *unknown number* of names and addresses that appear on these lists were never produced to UNITE." *Id*. at 11 (emphasis added). Out of UNITE's approximately 13,700 motor vehicle record searches, the number of different results could be *de minimus*. In any event, UNITE's speculation is irrelevant because it does not change the fact that the Westlaw Records are an accurate replication of UNITE's motor vehicle record *searches*.

Second, UNITE's claim that the Westlaw records include searches of non-motor vehicle databases is refuted by its stipulation that " West's records indicate that there were approximately 13,700 *motor vehicle searches* on Westlaw by UNITE." Stipulation, ¶ 66 (emphasis added). Even if the Westlaw Records do include some searches of non-motor vehicle databases, these searches can be easily identified because:

(1) the database listed will not be a motor vehicle database; and (2) the search query will not be a license plate number. Any searches of non-motor vehicle databases included in the Westlaw Records can be easily filtered out from the relevant motor vehicle record searches.

Finally, even assuming *arguendo* that the Westlaw records are not perfectly accurate, the Protective Order should still be modified as requested by the Foundation. It is undisputed that Westlaw Records list " approximately 13,700 motor vehicle searches on Westlaw by UNITE," of which approximately 12,124 are not covered by the *Pichler* litigation. *Id*.[2] Even if the Westlaw Records do include a few false positives, this would not justify keeping up to twelve-thousand individuals in the dark about UNITE' s invasion of their privacy and violation of their DPPA rights.

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[2] Of the 13,700 searches conducted by UNITE, about 1,576 were related to the *Pichler* Plainitff Class. Stipulation, ¶¶ 66-67 (JA 123). Thus, UNITE conducted 12,124 motor vehicle searches that are unrelated to the *Pichler* Plaintiff Class. (13,700 - 1,576 = 12,124).

ARGUMENT

I. The Foundation Has Standing to Seek Modification of the Protective Order

UNITE concedes, as it must, that the Foundation has standing to seek modification of the Protective Order if it prevents the Foundation from obtaining information from another party. UNITE Br., 21; *cf.* Foundation Br., 16-19. The Foundation established in its opening brief that Plaintiffs willingness to provide the Westlaw Records to the Foundation but for the Protective Order establishes its standing under numerous Third Circuit precedents. *See* Foundation Br., 16-19.

UNITE's only rebuttal is that the Foundation cannot lawfully obtain the Westlaw Records from Plaintiffs to notify individuals that UNITE violated their DPPA rights because this would itself violate the DPPA. UNITE Br., 22-34.[3] This argument is untenable because it

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[3] UNITE hypothesizes about the Foundation's motives for not addressing the union's DPPA argument in its opening brief, even going so far as to cast the Foundation as Hamlet in an imaginary dialogue with itself over the issue. *See* UNITE Br., 31-33. The issue was not addressed in the Foundation's opening brief for a simple reason: the District Court did not rely upon the argument. The purpose of an opening brief is to establish why the order on appeal should be reversed, not to preemptively rebut arguments that could be raised by appellees.

would render the DPPA self-defeating and because the Foundation's action is permissible under 18 U.S.C. § 2721(b)(4) of the Act.

It is a "maxim of statutory construction that interpretations of statutes which lead to illogical or self-defeating results should not be imputed to the Legislature as the intended meaning of the statute." *Heuer v. U.S. Secretary of State,* 20 F.3d 424, 427 (11th Cir. 1994).[4] The DPPA would frustrate its own remedial purpose if it protected evidence of DPPA violations, such as the Westlaw Records.

It is also "[a] basic tenet of statutory construction . . . that courts should interpret a law to avoid absurd or bizarre results." *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006). UNITE's theory leads directly to an absurd result: the DPPA would bar victims of DPPA violations from learning of violations of their rights by prohibiting the use or disclosure of evidence of DPPA violations. "Whistle blowers" of DPPA violations would themselves violate the statute. For example,

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[4] *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993) (rejecting "a wholly circular and self-defeating interpretation" of a statute); *Chedad v. Gonzales*, 497 F.3d 57, 64 (1st Cir. 2007) (rejecting interpretation that leads to a "self-defeating result").

under UNITE's theory, the union could literally publish a document entitled "A Complete List of UNITE's Illegal Motor Vehicle Record Searches, 2002-2004," and it would be unlawful under the DPPA for anyone to use this document to inform others that they are listed in it.

Here, the Westlaw Records *are* a list of UNITE's illegal motor vehicle record searches between 2002-2004. It would be incongruous, to say the least, if UNITE could use the DPPA to hide its thousands of DPPA violations from its victims. UNITE's notion that the DPPA makes it unlawful to notify individuals that their DPPA rights were violated would turn the statute on its head.

If anything, the Foundation notifying individuals that their motor vehicle records were wrongfully accessed by UNITE *advances* the privacy interests that the DPPA protects. This notification will permit individuals to exercise their legal rights under the statute. Absent such notification, up to twelve-thousand individuals may never learn that UNITE invaded their privacy and violated their DPPA rights.

The Foundation's request to use the Westlaw Records is also permitted by § 2721(b)(4) of the DPPA for three reasons. This section permits disclosure of information obtained from motor vehicle records:

> 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.

18 U.S.C. § 2721(b)(4).

First, the Westlaw Records will be used " pursuant to an order of a Federal . . . court" under § 2721(b)(4). In this action, the Foundation is expressly requesting that a federal court enter an order that permits it to use the Westlaw Records to send notices to the victims of UNITE's motor vehicle record searches. *See* Foundation's Proposed Modification to Protective Order (JA 116-17). By definition, this use of the Westlaw Records will be " pursuant to an order of a Federal . . . court" and permissible under § 2721(b)(4).[5]

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[5] It is for this reason that modification of the Protective Order will itself satisfy Plaintiffs' demand for assurance that providing the Westlaw Records to the Foundation will not violate the DPPA. *See* Letter from Plaintiffs to Foundation (6 August 2007) (JA 111-12).

Second, the Foundation's use of the Westlaw Records will be "in connection with any civil . . . proceeding in any Federal . . . court" under § 2721(b)(4). Specifically, the use will be in connection with the *Pichler* litigation. In *Pichler*, evidence was uncovered that UNITE violated the rights of thousands of individuals in same manner that UNITE violated the rights of the *Pichler* Plaintiffs and Plaintiff Class. Using evidence of wrongdoing revealed in *Pichler* to inform similarly situated victims is an action "in connection with" the *Pichler* case.

Third, the Foundation's use of the Weslaw Records will be pursuant to an "investigation in anticipation of litigation" under § 2721(b)(4) because the Foundation intends to provide free legal aid to employees who contact it upon learning that UNITE violated their DPPA rights. *See* Proposed Notification (JA 118-19). In *Pichler*, this Court held that UNITE's use of information from motor vehicle records did not qualify for this exception because UNITE also acted for a non-permissible purpose (organizing) in addition to investigating claims. *See Pichler*, slip. op. at 22-23. Here, by contrast, the Foundation is not acting for dual purposes. The Foundation seeks solely to notify individuals about

UNITE's violation of their privacy rights under the DPPA.

Moreover, the Foundation using evidence of UNITE's DPPA violations to notify individuals about this violation of their legal rights is nothing like UNITE's indiscriminate claim trolling found unlawful in *Pichler*. UNITE accessed the motor vehicle records of Cintas employees to drum up any claims it could find against the company. *See* S.J. Order, 15-19 (JA 143-47). Importantly, UNITE did not know if the people it located through their license plate numbers even had any legal claims. *Id.*; *see also id.* at 15 ("UNITE representatives testified that before contacting someone they did not know whether that person was aware of any possible legal issues") (JA 143).

Here, by contrast, the Foundation is not blindly fishing for legal claims. It is *known* that UNITE violated the DPPA rights of most of the individuals listed in the Westlaw Records. The Foundation notifying these individuals about a specific and actionable claim that they have under the DPPA, and with respect to which the Foundation will provide free legal aid, is an action pursuant to an "investigation in anticipation

of litigation" within the plain meaning of that phrase.[6]

In short, the DPPA does not make it unlawful for the Foundation to use the Westlaw Records to notify individuals that UNITE violated their DPPA rights. Contrary to UNITE's assertions, the statute is not self-defeating and does not frustrate its own enforcement.

II. The District Court Erred By Not Modifying the Protective Order to Permit the Foundation to Inform Individuals That UNITE Searched Their Motor Vehicle Records

UNITE does not dispute that individuals whose motor vehicle records were searched by UNITE have an interest in learning about this invasion of their privacy. Nor could UNITE plausibly claim that thousands of citizens have no interest in knowing about a violation of their DPPA rights. Thus, the Foundation has clearly established a basis for modifying the Protective Order. *See* Foundation Br., 22-23.

UNITE has failed to satisfy its burden of proving that modification of the Protective Order will cause a " clearly defined and serious injury." *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007); *see* Foundation

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[6] The permissible uses listed in § 2721(b)(4) are written in the disjunctive. Thus, the Foundation's use of the Westlaw Records is lawful if permissible for any of the three reasons stated above.

Br., 23-29. UNITE offers only inapposite arguments that would be irrelevant even if true. Indeed, most of UNITE's contentions were refuted in the Foundation's opening brief. UNITE's arguments will be addressed in the order in which they were made.

Public Right of Access. UNITE argues at length that there is no public right of access to the Westlaw Records. UNITE Br., 34-37. The Foundation has never argued to the contrary. The Foundation's access to the records is through Plaintiffs. UNITE is refuting a straw-man argument made only by itself.

Union Organizing Strategy. UNITE claims that its confidential organizing strategies are the equivalent of trade secrets. UNITE Br., 38-37. Even if this were true in some circumstances, it is irrelevant here because the Westlaw Records: (1) do not describe any confidential UNITE organizing strategies; (2) are not internal union documents, but were created by a third party at the behest of Plaintiffs; (3) are a log of DPPA violations, and thus not entitled to protection from disclosure even if UNITE's illegal practice of searching motor vehicle records were considered a union trade secret; and (4) will not be disclosed or

retained by the Foundation in any event, but will be used solely to send one letter that notifies individuals that their motor vehicle records were searched by UNITE. *See* Foundation Br., 30-32.

UNITE's only counter-argument to these points is that notifying individuals that it searched their motor vehicle records will also alert the individuals that they " were the target of UNITE organizers." UNITE Br., 40. But there is no legitimate interest in ensuring that citizens remain oblivious to the fact that they were " targets of UNITE organizers," particularly when those organizers used means illegal under the DPPA to target them. *Id*. Any advantage that UNITE gains in surprising its prey during organizing campaigns is not a trade secret and cannot justify concealing its violations of the DPPA.

Efficiency. UNITE avers that modifying the Protective Order will not promote efficiency because Foundation attorneys do not currently represent clients with DPPA claims against UNITE. UNITE Br., 40-42. But the purpose of this action is to inform thousands of individuals *who are unaware* that UNITE accessed their motor vehicle records. UNITE does not dispute that the most efficient and comprehensive way

to notify this large number of affected individuals is to mail a notice to each person. *See* Foundation Br., 27-28.

Privacy Interests. The most jaw-dropping argument raised by UNITE is that " [t]he modification sought by NRTW inherently violates the privacy interests of the private individuals NRTW seeks to contact." UNITE Br., 45, 42-25. Thus, UNITE argues that *informing* a person that UNITE invaded their privacy itself violates the person's privacy. This counter-intuitive notion is baseless. *See* Foundation Br., 23-25.[7]

UNITE's theory would require accepting that individuals have a privacy interest in *remaining ignorant* as to invasions of their own privacy. Under this logic, it would serve a woman's privacy interests to not tell her that she is the object of attention of a peeping tom, because the act of informing her would invade her privacy.

In reality, notifying individuals about invasions of their privacy only *advances* their privacy interests. It is for this reason that the Protective Order should be modified: so that up to twelve-thousand citizens can

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[7] Again, the Foundation will not itself retain any information about individuals derived from the Westlaw Records under the Proposed Modification to the Protective Order (JA 116).

learn that UNITE accessed their private motor vehicle records.

It is said that " chutzpah" is defined as killing your parents, and then pleading for mercy from the court because you are an orphan. Here, UNITE invaded the privacy of thousands of individuals by obtaining personal information from their motor vehicle records in violation of the DPPA. UNITE's plea to this Court that its transgressions never be revealed to these individuals because *that* would intrude upon their privacy fits the definition of chutzpah well.[8]

Public Person. UNITE claims that it is not a public person because it is not a government agency. UNITE Br., 46-48. The Foundation never claimed that UNITE was an arm of the state. UNITE is a private entity with a high public profile and that is subject to numerous public disclosure requirements. *See* Foundation Br., 28. This high public profile would diminish any claim to privacy that UNITE asserted on its own behalf. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 783-84

[8] Particularly rich is UNITE's assertion that individuals " are entitled to their privacy unmolested by NRTW." UNITE Br., 42. This from the union that searched the private motor vehicle records of up to 13,700 people in knowing violation of the DPPA.

(3d Cir 1994) (" privacy interests are diminished when the party seeking protection is a public person"). But since UNITE makes no cognizable claim to any " privacy" interest in preventing individuals from learning that it searched their motor vehicle records, whether UNITE has a diminished expectation of privacy because it is a public person is irrelevant.

Alternative Means. UNITE claims that the Foundation has alternate means to reach individuals whose motor vehicle records were searched by UNITE because those individuals could contact the Foundation in response to articles on its website. UNITE Br., 48-49. This ignores that the purpose of this action is to notify individuals *who are unaware* that UNITE accessed their motor vehicle records. Individuals who do not know that UNITE specifically accessed *their* motor vehicle records obviously cannot contact the Foundation about this violation of their rights. *See* Foundation Br., 32-33.

The vast majority of individuals whose motor vehicle records were accessed by UNITE likely have no idea that their privacy was invaded in this manner. Absent unusual circumstances, individuals would have

no way to know that UNITE obtained their address or telephone number from their motor vehicle records. It is certainly unlikely that UNITE's organizers admitted to people that the union hunted them down by running their license plate numbers.[9]

Merely publicizing UNITE's general practice of searching motor vehicle records will not notify or aid the specific victims of UNITE's surreptitious practice. Only a notice that informs each individual that *their* motor vehicle records were searched by UNITE can accomplish this task. The Foundation can only send such a notice if the Protective Order is modified to permit use of the Westlaw Records.

Reliance. UNITE claims that it relied on the Protective Order because, but for the order, it would have objected to West's production of the Westlaw Records. UNITE Br., 50. Tellingly, UNITE never

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[9] For example, a former Plaintiff in *Pichler* (Kathleen Kelly) was alerted to UNITE's practice because " she drives a car that her boyfriend and housemate, Russell Christian, owns," and that " [w]hen the organizer came to their home, he asked to speak to Christian." *Pichler v. UNITE*, 228 F.R.D. 230, 237 n.14 (E.D. Pa. 2005). Absent the happenstance of the organizer asking for Mr. Christian, Ms. Kelly would have no reason to suspect that the UNITE obtained her home address from a search of motor vehicle records.

identifies the grounds for such an objection. The likely reason is that UNITE had no grounds to object to Plaintiffs obtaining this information from a third-party (West).[10]

UNITE did not rely on the Protective Order with respect to the Westlaw Records because UNITE did not produce the records. In any case, any reliance by UNITE on the Protective Order cannot justify covering up evidence that UNITE violated the DPPA rights of up to twelve-thousand individuals. *See* Foundation Br., 33-35.

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In summary, UNITE has not provided any basis for not modifying the Protective Order to permit the Foundation to notify individuals that UNITE searched their motor vehicle records. These individuals have a significant interest in learning that UNITE violated their privacy and legal rights. UNITE has failed to prove that notifying these individuals will inflict a " clearly defined and serious injury" on UNITE or anyone

[10] UNITE's allegations that the Westlaw Records are not accurate would not be grounds for objecting to the production of the records. That complaint would merely go to the value of the evidence, not to whether it can be produced or whether it is admissible.

else. *Wecht*, 484 F.3d at 211. As such, the Protective Order should be modified as requested by the Foundation.

CONCLUSION

For the foregoing reasons, the District Court's Orders Denying the Foundation's Motion to Modify the Protective Order and Motion for Reconsideration should be REVERSED and the case remanded with instructions to modify the Protective Order as the Foundation requests.

Respectfully submitted this 10th day of September 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that: the foregoing brief complies with the type limitations of Federal Rule App. Procedure 32(a)(7)(B); the brief contains 3,775 words in 14-point New Century Schoolbook proportional type; the word processing program used to prepare this brief is Word Perfect 11 for Windows XP; the electronic brief is identical to the paper briefs; the virus protection program run on the electronic version of the brief was Sophos Anti-Virus, Version 7.3.3; and that I am a member of the bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on 10 September 2008, two copies of Appellants' Reply Brief were served by First Class U.S. mail, postage pre-paid, to the following:

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