IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al.,

Plaintiffs,

v. Case No. 11-CV-1128

SCOTT WALKER, et al.,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION OF THE STIPULATED PROTECTIVE ORDER

Plaintiffs signed a protective order stating that confidential information shall not be used "for contacting or soliciting people whose contact information is contained in the Confidential Information."[1] Defendants turned over documents relying on that protection. Now that Plaintiffs have the documents, they seek permission to do exactly what the protective order prohibits.

Even if Plaintiffs could hypothetically overcome the protective order's restrictions, what they are asking is prohibited by state and federal law.[2] Plaintiffs may not use the order to evade laws prohibiting disclosure by DMV, or re-disclosure by an entity that receives information from a DMV.[3] For example, the Seventh Circuit has treated a village as potentially liable for re-disclosing information from the Illinois DMV.[4]

Plaintiffs argue that the order permits use of the information for "purposes of this litigation."[5] Their analysis misleadingly omits the very next sentence of the order, which lists the prohibited uses of the information:

> Information designated Confidential shall not be used for any business or competitive purpose, *for contacting or soliciting people whose contact information is contained in the Confidential Information*, to prepare mailing lists or phone-contact lists, or shared with any person or entity except as expressly describe[d] herein, or used for [] other purpose unrelated to this litigation.[6]

These restrictions, which protect the information, are the entire point of the protective order. The order also details exactly who Plaintiffs may disclose information to: attorneys, experts, employees of counsel assisting litigation, Defendants, and the court.[7] Witnesses and potential new clients are not on the list.

Plaintiffs argue that documents have not been "designated" confidential.[8] This is perplexing,

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[1] Murphy Decl. ¶ 3; Ex. A.
[2] *See e.g.* 18 U.S.C. § 2721; Wis. Stat §§ 85.103, 343.235, 343.50(8).
[3] 18 U.S.C. § 2721.
[4] *Senne v. Village of Palatine*, 695 F.3d 597, 602 (7th Cir. 2012)
[5] Plaintiffs' Expedited Non-dispositive Motion Under Local Rule 7(h) for Clarification of the Stipulated Protective Order, Dkt. 338:1–2. (Pls. Mot.)
[6] Murphy Decl. Ex. A ¶ 2 (emphasis added).
[7] *Id.*
[8] Dkt. 338:1.

because the exhibit they cite says the documents "contain confidential information that is subject to the protective order."[9] Other correspondences include the same designation.[10] Their quarrel seems to be that the word "designate" was not used, or that "each, individual document" was not designated.[11, 12] The order requires no such thing. Furthermore, Plaintiffs consider the information confidential, or they would not have filed the motion.

Plaintiffs vaguely reference contacting only people who have indicated they are willing to be contacted. This appears to be related to an option that lets people chose to not have their information disclosed in compilations of state data.[13] That is not, as Plaintiffs suggest, an indication that a person has consented to having her individual information used, or to be cold-called by Plaintiffs' attorneys, and it does not trump the statutory restrictions.[14]

Plaintiffs argue that only the order, and not state statutes, governs the confidentiality of the information.[15] Fundamentally, they forget that parties cannot contract around statutory requirements. And their quote from the order again omits a critical clause. The order says that the statues are silent as to litigation "*other than the circumstances described in those statutes.*"[16] The order is a protective supplement, not a replacement, to those restrictions.

The federal Driver Privacy Protection Act (DPPA) prohibits the "release and use of certain personal information from State motor vehicle records," and there is no applicable exception here.[17] Improper disclosure of such information carries monetary and criminal penalties.[18] The law does

[9] Declaration of Laurence J. Dupis, Ex. C. (Dkt. 338-4).
[10] Murphy Decl. ¶¶ 3–4; Exs. B and C.
[11] Dkt. 338:1, n. 1.
[12] Defendants have diligently produced over 118 gigabytes of data at Plaintiffs' request. For a sense of scale, that data volume is equal to over 2.6 million copies of Plaintiffs' motion on the protective order, docket 338, which would be over 15 million pages. The data also includes information about millions of people; a majority of Wisconsin residents. (Murphy Decl. ¶¶ 6–9.)
[13] Wis. Stat. § 85.103(2).
[14] *See* Wis. Stat. § 343.50.
[15] Dkt. 338:2
[16] Murphy Decl. Ex. A:1 (emphasis added).
[17] 18 U.S.C. § 2721.
[18] 18 U.S.C. § 2724.

not permit the solicitation of clients in connection with litigation, even for a lawsuit that is already filed, for a "specific legal dispute" or to "aggregate a class action."[19] The Supreme Court reached this conclusion because "to permit this highly personal information to be used in solicitation is so substantial an intrusion on privacy."[20] The Plaintiffs have described their intended action as "solicitation for litigation purposes," an endeavor clearly prohibited under the DPPA.[21]

Plaintiffs appeal to their general ability to contact potential class members.[22] This is a red herring. Plaintiffs may contact witnesses and class members identified by their own investigative efforts; they just may not use information that people gave DOT in confidence as a way to build a cold-call contact list.

Plaintiffs' cite *Williams*, but that case did not involve DOT information protected by state and federal law. [23], [24] And it was a challenge to the very entry of a protective order, unlike here where the Plaintiffs have agreed to the restrictions. Even then, the Seventh Circuit did not find the protective order impermissible. It remanded because "the district court did not develop a sufficient appellate record," which was "not to say that the district court was wrong."[25]

Plaintiffs agreed not to use confidential information to contact people when they signed the order prohibiting "contacting or soliciting people whose contact information is contained in the Confidential Information."[26] Their motion is an attempt to go back on that promise and would require both them and DOT to violate state and federal law. The motion should be DENIED.

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[19] *Maracich v. Spears*, 133 S. Ct. 2191, 2200-2202, 2206 (2013).
[20] *Id.* at 2202.
[21] Dkt. 338; Ex. A:6 (June 21, 2017 email from Ryan Wolf.)
[22] Dkt. 338:3
[23] *Williams v. Chartwell Fin. Services, Ltd.*, 204 F.3d 748 (7th Cir. 2000).
[24] *Id.* at 750, 752.
[25] *Id.* at 759.
[26] Murphy Decl. Ex. A ¶ 3.

Dated this 1st day of September, 2017.

Respectfully submitted,

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General Information

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