

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
PHILADELPHIA, PENNSYLVANIA

ELIZABETH PICHLER; *et al.*, On behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

UNITE (UNION OF NEEDLETRADES,
INDUSTRIAL & TEXTILE EMPLOYEES) (a New
York unincorporated association), *et al.*,

Defendants.

CIVIL ACTION No. 04-cv-02841

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC., TO MODIFY
PROTECTIVE ORDER**

The National Right to Work Legal Defense Foundation, Inc. ("Foundation"), respectfully moves to modify the Protective Order issued on 10 January 2005 (Clerk's Docket No. 38) ("Protective Order"), to inform individuals that Defendant UNITE searched their motor vehicle records. This Court's decision in *Pichler v. UNITE*, 446 F. Supp. 2d 353, 361 (E.D.PA. 2006) ("*Pichler*") shows that UNITE searched the motor vehicle records of thousands of individuals who are not in the Plaintiff Class. These individuals are likely to be unaware that their privacy was invaded in this manner.

The Foundation respectfully requests that the Protective Order be modified **solely** to permit it to mail one letter to each individual whose motor vehicle record was searched by UNITE that states that this conduct occurred and that it may have violated their legal rights. The Foundation does *not* seek to disclose to the public the identities of individuals whose motor vehicle records UNITE searched, or even to retain this information for itself.

"Good cause" does not exist to prevent individuals from learning that UNITE obtained

their personal information from their motor vehicle records. There is no cognizable interest in keeping citizens unaware that their privacy was invaded and their legal rights violated.

Moreover, the Court's justification for entering the Protective Order — to prevent Cintas from obtaining information about UNITE's internal organizing strategies — is inapplicable here.

Finally, the Court should not grant the requested modification to the Protective Order if that modification would itself violate the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725. However, permitting individuals to learn that their own rights under the DPPA were violated cannot be a violation. The statute is not self-defeating.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Elizabeth Pichler *et al.* filed a class action suit against UNITE for violating the DPPA. The Court certified a Plaintiff Class of "[a]ll persons whose personal information from motor vehicle records was knowingly obtained, used, and/or disclosed, directly or indirectly, by UNITE or UNITE HERE between July 1, 2002 and October 13, 2004, as part of an effort to contact Cintas Corporation employees." *Pichler*, 446 F.Supp.2d at 365. On 30 August 2006, the Court granted Plaintiffs summary judgment, ruling that UNITE violated the DPPA by obtaining personal information about Cintas employees from their motor vehicle records. *Id.* at 373-74, **judgment modified**, 457 F.Supp.2d 524 (E.D.PA. 2006).

This Court's decision in *Pichler* notes that there are thousands of individuals whose motor vehicle records were searched by UNITE and who are not Cintas employees (and hence not members of the Plaintiff Class):

According to Westlaw's records, UNITE conducted about 13,700 motor vehicle searches on Westlaw from August of 2002 to October 13, 2004. Stip. Supp. ¶ 65. Some of these were duplicate searches of the same license plate number, and

some did not result in the retrieval of any information. *Id.* About 1,576 of UNITE's searches on Westlaw related to Cintas. *Id.* ¶ 66.

Id. at 361. Thus, there are "Westlaw[] records" that demonstrate that UNITE conducted 12,124 motor vehicle searches that were not related to Cintas (13,700 - 1,576 = 12,124). These 12,124 searches shall be referred to as the "Non-Cintas Searches," and the Westlaw records of these searches referred to as the "Search Records."

The Foundation seeks to inform the individuals whose motor vehicle records were searched in the Non-Cintas Searches that this conduct occurred. The Foundation is a non-profit organization that provides information and legal advice and aid to individual employees who have suffered violations of their rights as a result of compulsory unionism. See *Auto Workers v. National Right to Work Legal Defense Found., Inc.*, 781 F.2d 928, 934-35 (D.C.CIR. 1986) (Foundation is a "bona fide, independent legal aid organization"); *National Right to Work Legal Defense Found., Inc. v. United States*, 487 F.Supp. 801 (E.D.N.C. 1979) (Foundation a charitable organization under Internal Revenue Code § 501(c)(3)). An important part of the Foundation's program is educating individuals about their legal rights and potential violations of those rights.

On 30 July 2007, the undersigned counsel for the Foundation, William L. Messenger, sent a letter to Plaintiffs' counsel requesting the Search Records. (Messenger Decl., ¶ 2 & Ex. A). The letter stated that the Search Records would be not be disclosed or used for any purpose other than to send a letter to each individual whose motor vehicle records was accessed in the Non-Cintas Searches. *Id.* The Foundation would then return the Search Records to the Plaintiffs and destroy any information derived solely from those records. *Id.*

In a letter dated 6 August 2007, Plaintiffs' counsel responded that they would provide the requested information to the Foundation only if so doing were permissible under the Court's

protective order. (Messenger Decl., ¶ 3 & Ex. B). The Foundation's Motion to Intervene and this motion were filed soon thereafter.

II. REQUESTED MODIFICATION TO THE PROTECTIVE ORDER

The Foundation moves to have the Protective Order modified for one purpose: to allow the Foundation mail one letter to each individual whose motor vehicle record was searched by UNITE in the Non-Cintas Searches that this action occurred. Specifically, the Foundation seeks that the Court order the following modification of the Protective Order:

1. Plaintiffs Elizabeth Pichler *et al.*, and their counsel, shall be permitted to disclose to the Foundation, and the Foundation shall be permitted to obtain: (a) the Westlaw records of the motor vehicle records searches that UNITE conducted from August 2002 to October 13, 2004; and (b) documents indicating, or from which it may be determined, which of these searches were not related to Cintas Corporation. Hereinafter, these documents and all information derived from them are collectively referred to as the "Search Records."

2. The Search Records shall be CONFIDENTIAL, and the Foundation shall NOT DISCLOSE the Search Records to any person, entity, or institution except as permitted by this order.

3. The Foundation shall be permitted to use the Search Records for the sole purpose of producing and mailing one letter, the text of which is attached [to the Proposed Order], to each individual identified as not related to Cintas in the Search Records.

4. Solely for the purpose stated in ¶ 3, the Search Records may be disclosed to and used by: (a) the Foundation's staff attorneys and other Foundation employees working under their direction and control; and (b) a mailing and/or printing company, and employees thereof, engaged by the Foundation's attorney in this matter. In addition, information derived from the Search Records about an individual identified in the Search Records as not related to Cintas may be disclosed to that individual.

5. Within 14 days after the letters identified in ¶ 3 are deposited in the mail, the Foundation shall: (a) RETURN the Search Records provided by the Plaintiffs to the Plaintiffs' counsel; and (ii) DESTROY any and all copies of the Search Records and/or any records or other information derived solely from the

Search Records.

Proposed Order filed herewith.

Under this Proposed Order, **only** an individual whose motor vehicle record was searched in the Non-Cintas Searches will learn of this fact. The Foundation will use the Search Records solely to send a letter to these individuals, and then return the Search Records and destroy all information derived from the records. Neither the Foundation or any other party will gain any lasting knowledge of the identities of the individuals identified in the Search Records.

III. GROUNDS FOR MODIFYING THE PROTECTIVE ORDER

The test for determining whether a protective order should be modified is akin to the test for determining whether a protective order should be issued in the first instance: the existence of “good cause” under Rule 26(c), FED.R.CIV.P., to continue the protective order in effect. See *United States v. Wecht*, 484 F.3d 194, 211-12 (3D CIR. 2007); *Arnold v. Pennsylvania*, 477 F.3d 105, 106-13 (3D CIR. 2007); *Shingara v. Skiles*, 420 F.3d 301, 307 (3D CIR. 2005); *Pansy v. Borough of Stroudsborough*, 23 F.3d 772, 790 (3D CIR. 1994).

Of course, the “party seeking to modify the order of confidentiality must come forward with a reason to modify the order.” *Pansy*, 23 F.3d at 790. As established in Section A, *infra*, the Protective Order should be modified because individuals whose motor vehicle records were searched by UNITE have a cognizable and significant interest in learning this fact. Moreover, the Court’s reason for issuing the Protective Order — to shield UNITE’s internal organizing strategies from Cintas — is inapplicable to the requested disclosure.

However, UNITE ultimately **bears the burden** of proving that “good cause” exists to preclude disclosure of the Search Records for the limited purpose requested here. See *Wecht*,

484 F.3d at 211-12 (“the party seeking to prevent disclosure bears the burden of demonstrating good cause”); *Shingara*, 420 F.3d at 307 (similar).¹ In order to demonstrate “good cause,” UNITE must prove “that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.” *Pansy*, 23 F.3d at 786 (citation and internal quotation marks omitted); *accord Wecht*, 484 F.3d at 211.

Whether UNITE demonstrates “good cause” is determined by balancing seven factors:

(1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3D CIR. 1995); *accord Shingara*, 420 F.3d at 307; *see Pansy*, 23 F.3d at 787-91.

As established in Section B, *infra*, UNITE cannot meet its burden because disclosing to individuals that their own motor vehicle records were searched will not cause a “clearly defined and serious injury” to UNITE or anyone else. *Wecht*, 484 F.3d at 211. All seven of the factors identified above either support modifying the protective order or are inapplicable. Accordingly,

¹ As the Third Circuit explained in *Cipollone v. Liggett Group, Inc.*, “the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order.” 785 F.2d 1108, 1122 (3D CIR.1986); *accord Wecht*, 484 F.3d at 211. This reasoning “**applies with equal force** when a non-party moves to intervene in a pending or settled lawsuit for the limited purpose of modifying a protective order.” *Leucadia, Inc. v. Applied Extrusion Technologies*, 998 F.2d 157, 166 (3D CIR. 1993) (emphasis added); *accord Wecht*, 484 F.3d at 211.

the Protective Order should be modified as requested.

A. The Protective Order Should Be Modified Because Individuals Have A Cognizable and Significant Interest in Learning That UNITE Obtained Personal Information About Them From Their Motor Vehicle Records

The Foundation seeks to modify the Protective Order for the sole purpose of informing individuals that their own motor vehicle records were searched by UNITE, and that this search may have violated their rights under the DPPA. These individuals are likely unaware that their personnel records were accessed in this manner and that their legal rights were violated.

Individuals whose motor vehicle records UNITE searched have a clear and significant interest in learning that their personal information was obtained by UNITE in that manner. They also have a cognizable interest in learning that UNITE's actions may have violated their legal rights under the DPPA, as they may have a cause of action for monetary damages and other relief. For these reasons, the Protective Order should be modified as requested.

The Court's reason for originally granting the Protective Order is inapplicable here. The Court found that discovery could reveal information about UNITE's organizing strategies against Cintas, and that Cintas could obtain this information to thwart the union's organizing efforts. See Protective Order, at * 2-3 (Clerk's Docket No. 38).

The Search Records at issue here do not discuss or detail UNITE's organizing strategies and tactics. The records are not even internal union documents, but rather records created by a third-party (Westlaw).

Moreover, informing individuals that UNITE searched their motor vehicle records will reveal nothing about UNITE's organizing tactics, other than the union's proclivity for searching motor vehicle records to support its organizing campaigns. That UNITE uses this tactic is

already information in the public domain, as it was discussed at length in this Court’s decisions in *Pichler*. Accordingly, any interest UNITE may have in shielding documents regarding its internal organizing strategies from disclosure cannot justify keeping individuals “in the dark” about the fact that the union searched their motor vehicle records.

B. UNITE Cannot Meet Its Burden of Proving That “Good Cause” Exists for Preventing Individuals from Learning Information About Their Own Motor Vehicle Records Were Searched

UNITE has the burden of proving that the limited disclosure requested here will result in a “clearly defined and serious injury.” *Wecht*, 484 F.3d at 211; *accord Shingara*, 420 F.3d at 307. It is difficult to envision how UNITE can satisfy that burden. Informing individuals that their own motor vehicle records were searched will not result in a wrongful injury to UNITE or anyone else. The seven factors identified in *Pansy* and its progeny support modifying the Protective Order.

(1) Disclosure Will Not Violate Any Privacy Interests: A citizen’s interest in personal privacy is an important factor in protective orders. *See, e.g., Arnold*, 477 F.3d at 109; *Pansy*, 23 F.3d at 787. Here, the privacy interests of individuals whose motor vehicle records were searched by UNITE *support* modifying the Protective Order. An inherent component of privacy is knowing whether one’s privacy has been respected or invaded.

There is certainly no privacy interest in preventing individuals from learning information about themselves.² By definition, privacy is an interest in preventing disclosure of information about oneself to **others**. *See* Black’s Law Dictionary, 1233 (8th Ed.) (“informational privacy”

² The information at issue here is that UNITE searched individuals’ motor vehicle records. There is no privacy interest in not learning that one’s own privacy has been invaded.

defined as “[a] private person’s right to choose to determine whether, how, and to what extent information about oneself is **communicated to others**”) (emphasis added); see also *id.* (“privacy” defined in relevant part as “[t]he condition or state of being free from **public attention**”) (emphasis added). There is no privacy interest in self-ignorance.

This Court recognized that privacy interests warrant preventing disclosure of personal information to the *public* when it declined to unseal portions of the summary judgment record that contained personal information about individuals. See Mem. Re Unsealing of Records at 6-10 (Clerk’s Docket No. 227, 4 Dec. 2006).³ There the Court said:

Privacy interests are at the heart of this litigation. We agree with UNITE that the release of personal information could result in ‘clearly defined and serious injury’ by needlessly *exposing to the public* precisely the type of personal information that Congress protected through the DPPA.... In light of these facts, and the absence of a legitimate *public interest* in this information, we find that the type of personal information UNITE seeks to protect merits continued sealing.

Id. at 7 (emphasis added).⁴

Here, the Foundation does not seek to disclose any information to the public. Instead, the Foundation seeks only to inform individuals that their *own* motor vehicle records were searched by UNITE. The requested modification to the Protective Order is carefully tailored to ensure that identities of these individuals are not disclosed to anyone else. The Foundation itself will not

³ The Search Records were not at issue in that decision, as Plaintiffs’ motion requested that documents **filed with the Court** be unsealed. The Search Records were not filed with the Court, as the *Pichler* decision references to certain “Stipulations of Fact.” 446 F.Supp.2d at 361. Moreover, the issue presented in the Memorandum Re Unsealing of Records was whether information should be released to the general public, and not whether information should be released to individuals whose motor vehicle records were searched.

⁴ See also Memorandum Re Unsealing of Records at 9 (redacting certain information because “[e]ach of these redactions involves personal information about someone, and **the public** has either no legitimate interest therein or a minimal interest that is outweighed by important privacy concerns) (emphasis added).

retain any information derived from the Search Records after the letter is mailed to the affected individuals. At end of the day, the only individuals who will learn that their motor vehicle records were searched are the individuals whose records were searched.

Accordingly, privacy interests support allowing individuals to learn that UNITE obtained their personal information from their motor vehicle records. There is no privacy interest precluding individuals from learning that their own privacy was invaded.

(2) The Information Is Being Sought for a Legitimate Purpose: The Search Records are being sought solely for the legitimate purpose of informing individuals that their motor vehicle records were searched by UNITE and that this action may have violated the DPPA. A public interest legal aid organization like the Foundation has a legitimate interest in informing individuals that their privacy and legal rights may have been violated. Similarly, individuals have a legitimate interest in learning that their personal information was obtained by UNITE in this manner and that their legal rights may have been violated. This factor strongly favors modifying the Protective Order.

(3) Disclosure of the Information Will Not Cause a Party Embarrassment: Modifying the Protective Order will not subject individuals whose motor vehicle records were searched to embarrassment because only those individuals will learn of this fact. The information will not be disclosed to the public.

Informing individuals that UNITE searched their motor vehicle records will also not subject the union to additional embarrassment, because the *Pichler* decision has already made it public knowledge that UNITE uses this unlawful tactic. Individuals learning that they were the specific victims of UNITE's tactic is not the type of "serious" embarrassment that can justify maintaining a protective order. See *Pansy*, 23 F.3d at 787.

(4) Whether Confidentiality Is Being Sought over Information Important to Public

Health and Safety: This factor is neutral, and does not weigh for or against the Protective Order.

(5) Sharing Information among Litigants Will Promote Fairness and Efficiency:

This factor favors modification of the Protective Order. The *Pichler* lawsuit has uncovered evidence that UNITE violated the DPPA rights of thousands of individuals who are not members of the Plaintiff Class and not entitled to any class wide relief awarded in *Pichler*.⁵ These individuals have a significant cognizable interest in learning that UNITE invaded their privacy in this manner and that they may have legal recourse under the DPPA.

The most efficient means for informing individuals that their motor vehicle records were searched by UNITE is to permit the Foundation to send a letter to each individual with this information.⁶ If this or a similar action is not permitted to occur, it is likely that these individuals will never learn that their privacy was invaded in this manner. It would be grossly unfair to keep these individuals “in the dark” about this potential abridgement of their legal rights.

(6) Whether the Party Benefitting from the Order of Confidentiality Is a Public

Entity or Official: Although UNITE is not an arm of the state, it is an entity with a high public profile. In the union’s campaign against Cintas alone, UNITE visited thousands of homes and sent thousands of letters to individuals. See *Pichler*, 446 F.Supp.2d at 361-64. The union

⁵ Of the 13,700 searches conducted by UNITE, only 1,576 were related to the Plaintiffs or Plaintiffs Class. *Pichler*, 446 F.Supp.2d at 361. Thus, UNITE conducted approximately 12,124 motor vehicle searches that are not covered by the *Pichler* litigation.

⁶ *Cf. Wilk v. American Medical Ass’n*, 635 F.2d 1295, 1299 (7TH CIR. 1980) (presumption that pre-trial discovery must take place in public “should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.”)

maintains a public website that contains detailed information about its activities.⁷ As a labor organization, UNITE is also subject to numerous public disclosure requirements. See, e.g., 29 U.S.C. § 431. In short, UNITE is not an unknown entity seeking to remain out of the “public eye.”

The Third Circuit in *Pansy* stated that the interests in non-disclosure are “diminished when the party seeking protection is a public person subject to legitimate public scrutiny.” 23 F.3d at 787. UNITE is just such an entity, and is the legitimate subject of public scrutiny. Accordingly, any interest UNITE may have in stopping individuals from learning that the union searched their motor vehicle records is not grounds for maintaining the Protective Order.

Moreover, that UNITE searched motor vehicle records to support its organizing campaigns is information already in the public domain through this Court’s reported decisions in this case. The potential that disclosing to individuals that UNITE searched *their* motor vehicle records may invite more scrutiny of the union’s conduct cannot justify concealing from these individuals that this occurred.

(7) The Case Involves Issues Important to the Public: The information at issue here is important to the intended recipients of the disclosure: the individuals whose motor vehicle records were searched by UNITE.⁸ These individuals obviously have an interest in learning that their privacy was invaded in this manner. They also have a significant cognizable interest in

⁷ See <http://www.unitehere.org>.

⁸ Because the Foundation does not seek to disclose information from the Search Records to the public, but rather only to individuals whose motor vehicle records UNITE searched, the proper issue is whether the disclosure is important to these individuals, not the general public.

knowing that their legal rights under the DPPA may have been violated. Accordingly, this factor strongly favors the requested modification to the Protective Order

In conclusion, all relevant factors support modification of the Protective Order. UNITE cannot meet its burden of proving a “clearly defined and serious injury” that could justify preventing individuals from learning that UNITE searched their motor vehicle records. See *Wecht*, 484 F.3d at 211. The Protective Order should be modified as requested.

IV. THE MODIFICATION WILL NOT VIOLATE THE DPPA

In considering this Motion, the Court must necessarily determine whether allowing the Foundation to use the Search Records to inform individuals that their motor vehicle records were searched by UNITE would violate the DPPA. That cannot be the case, for then the DPPA would be self-defeating and permit UNITE to use the DPPA to hide its violations of that very statute.

It would be unusual (to say the least) if the DPPA prevented individuals from learning that personal information *about themselves* was wrongfully obtained from their *own* motor vehicle records. The DPPA’s purpose is to prevent others from obtaining personal information about individuals from their motor vehicle records. Individuals are provided with a private cause of action to protect their rights under the statute. 18 U.S.C. § 2724.

For the DPPA to preclude individuals from learning that their privacy rights under the DPPA were violated would turn the statute on its head. The DPPA would effectively prevent individuals from exercising their rights under the DPPA.

If anything, permitting a party to inform individuals whose personal information was obtained from motor vehicle records that their personal information was obtained from their motor vehicle records *advances* the privacy interests the DPPA protects. This type of disclosure

enables individuals to protect their legal rights under the statute. In this case, without such disclosure, the vast majority of those whose federal privacy rights were violated by UNITE will never learn that their privacy was invaded.

Moreover, the Foundation's proposed use of the information requested pursuant to a modification of the Protective Order by this Court is permissible under DPPA § 2721(b)(4): "Personal information referred to in subsection (a) ... may be disclosed ... [f]or use in connection with any civil ... proceeding in any Federal ... court ... , including ... investigation in anticipation of litigation, ... or pursuant to an order of a federal ... court." 18 U.S.C. § 2721(b)(4).

First, the requested use would be "in connection with any civil ... proceeding in any Federal ... court," *id.*, as the information would be disseminated in connection with this case. This case — the *Pichler* litigation — has uncovered evidence that UNITE violated the rights of thousands of other individuals in same manner that it violated the rights of the *Pichler* Plaintiffs and Plaintiff Class. Informing the non-Cintas victims that their rights may have also been violated is closely related to this litigation.

Second, the Foundation is seeking to use the information requested in an "investigation in anticipation of litigation," 18 U.S.C. § 2721(b)(4). The Foundation, which provides free legal aid to employees, anticipates initiating litigation against UNITE for violating the DPPA rights of individuals whose personal information was obtained in the Non-Cintas Searches if one or more of those individuals request the Foundation's assistance.

The Foundation's proposed use is wholly unlike the "claim trolling" by UNITE that the Court rejected in *Pichler*. 446 F.Supp.2d at 370; see *id.* at 368-70. Here, the Foundation is not fishing to discover what possible "claims" of any kind that individuals may have against UNITE. Instead, the Foundation seeks to inform individuals victimized by UNITE that they likely have a

specific, concrete claim under a specific statute: the DPPA itself.

Finally, the requested use would be a permissible use under DPPA, because it would be “pursuant to an order of a Federal ... court,” 18 U.S.C. § 2721(b)(4), *i.e.*, this Court’s order modifying the Protective Order in the interest of advancing the non-Cintas workers’ privacy rights under the statute.

V. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Protective Order be modified as requested herein.

DATED: 18 September 2007

Respectfully submitted,

/s/ W. James Young

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ATTORNEYS FOR THE NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC.

* Motion for Admission *Pro Hac Vice* filed by mail simultaneously herewith.

CERTIFICATE OF SERVICE

I, W. James Young, counsel for Prospective Intervenor, hereby certify that I served the foregoing **Memorandum of Points and Authorities In Support of Motion of the National Right to Work Legal Defense Foundation, Inc., To Modify Protective Order**, by causing true and correct copies thereof to be sent by United States Mail, postage prepaid, to the following:

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this 18th day of September, 2007.

/s/ W. James Young

W. JAMES YOUNG

IN THE UNITED STATES DISTRICT COURT FOR THE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
PHILADELPHIA, PENNSYLVANIA

ELIZABETH PICHLER *et. al.*, On behalf of
themselves and all others similarly situated

Plaintiffs,

v.

UNITE (UNION OF NEEDLETRADES,
INDUSTRIAL & TEXTILE EMPLOYEES),
a N.Y. unincorporated association), *et al.*,

Defendants.

Civil Action No. 04-CV-02841

**DECLARATION OF WILLIAM L.
MESSENGER**

I, William L. Messenger, pursuant to Section 1746 of the Judicial Code, 28 U.S.C.

§ 1746, declare as follows:

1. I am acting as counsel for the National Right to Work Legal Defense Foundation (“Foundation”), which seeks to intervene in the above captioned matter, and make this declaration in support of the Foundation’s Motion to Intervene and Motion to Modify the Protective Order. I have personal knowledge of the facts stated herein.
2. Attached hereto as Exhibit A is a true and correct copy of the 30 July 2007 letter that I sent, on behalf of the Foundation, to David B. Picker, Esq., counsel for Plaintiffs.
3. Attached hereto as Exhibit B is a true and correct copy of the 6 August 2007 letter that I received from David B. Picker, Esq., counsel for Plaintiffs.
4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17 day of September, 2007


William L. Messenger

EXHIBIT A
to
DECLARATION OF WILLIAM L. MESSENGER



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July 30, 2007

Re: Request for Information in *Pichler v. UNITE*, 446 F. Supp. 2d 353 (E.D. P.A. 2006).

Dear Mr. Picker:

My name is Bill Messenger. I am a Staff Attorney with the National Right to Work Legal Defense Foundation. The Foundation is a non-profit, legal aid organization that provides legal advice and assistance to employees who have suffered violations of their rights as a result of compulsory unionism. (See www.nrtw.org).

I understand that you represent Plaintiffs Elizabeth Pichler, Russell Christian, Seth Nye, Holly Marston, Kevin Quinn, Jose L. Sabastro, Thomas Riley, Amy Riley, and Russell Daubert, and members of a Plaintiff Class, in *Pichler v. UNITE*, Case No. 04-CV-02841 (E.D. P.A.).¹ I write to you in your capacity as counsel for Plaintiffs.

The decision in *Pichler* states that UNITE searched the motor vehicle records of thousands of individuals in violation of the Driver's Privacy Protection Act of 1994 ("DPPA"):

According to Westlaw's records, UNITE conducted about 13,700 motor vehicle searches on Westlaw from August of 2002 to October 13, 2004. *Stip. Supp.* ¶ 65. Some of these were duplicate searches of the same license plate number, and some did not result in the retrieval of any information. *Id.* About 1,576 of UNITE's searches on Westlaw related to Cintas. *Id.* ¶ 66. For the Cintas-related searches, plaintiffs calculate that 223 had permitted use indications, and defendants calculate that 148 did. *Id.* ¶ 67.

446 F. Supp. 2d at 361. This means that evidence exists that UNITE conducted 12,124 motor vehicle searches that were unrelated to Cintas, and hence involved individuals other than the Plaintiffs and members of the Plaintiff Class (13,700 - 1,576 = 12,124).

¹ As reported, a class was certified of "[a]ll persons whose personal information from motor vehicle records was knowingly obtained, used, and/or disclosed, directly or indirectly, by UNITE or UNITE HERE between July 1, 2002 and October 13, 2004, as part of an effort to contact Cintas Corporation employees." *Pichler*, 446 F. Supp. 2d at 365.

David B. Picker, Esq.
July 30, 2007
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The Foundation wishes to inform individuals whose motor vehicle records were searched by UNITE, and who are not Plaintiffs or members of the Plaintiff Class, that their motor vehicle records were searched by UNITE. These individuals likely have no idea their privacy was invaded in this manner, and certainly have an interest in learning that this action occurred.

Indeed, based on the Court's decision in *Pichler*, it appears that UNITE violated the legal rights of these individuals under the DPPA. However, they are not eligible for any class wide relief awarded in *Pichler*. Worse, they have no way of protecting their own legal rights because they are probably unaware that their federal privacy rights were violated.

In anticipation of litigation, the Foundation wants to send a letter to each individual whose motor vehicle record was searched by UNITE and who is not a member of the Plaintiff Class. This letter will inform each individual that their motor vehicle records were searched by UNITE, that this search may have violated their rights under DPPA, and that the Foundation is willing to offer free legal assistance to employees to support claims against UNITE for violating the DPPA.

For this litigation purpose only, the Foundation requests copies of information in your possession, including "Westlaw's records," concerning the "motor vehicle searches on Westlaw from August of 2002 to October 13, 2004," conducted by UNITE that were *not* "related to Cintas," *Pichler*, 446 F. Supp. 2d at 361. The Foundation is willing to pay reasonable costs for copying and delivery to us of these documents.

The Foundation is sensitive to protecting the privacy of individuals whose motor vehicle records were searched by UNITE. The Foundation seeks only to inform each individual that their *own* motor vehicle records were searched. The Foundation does not seek to make the identities of these victims known to the public or anyone other than the specific individuals themselves.

To protect the privacy and identity of individuals whose motor vehicle records were searched by UNITE, the Foundation is willing to enter into a written agreement stating that all records and other information you provide to us about individuals whose motor vehicle records were searched by UNITE:

- (1) will be used only for the purpose of sending one letter to each individual whose motor vehicle records were searched by UNITE;
- (2) will not be disclosed or used for any purpose other than for said letter; and
- (3) will be returned to you, and all information derived from the records destroyed, after the letter is mailed.

If your clients are willing to provide the Foundation with the requested information, I am confident that we can come to an agreement on this issue.

The information that we request is likely subject to the umbrella protective order issued in *Pichler*. If this is the case, the Foundation is willing to intervene in *Pichler* and move the Court

David B. Picker, Esq.
July 30, 2007
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to modify the protective order to allow for the aforementioned letters to be sent to the affected individuals. *See Pansy v. Borough of Stroudsborough*, 23 F.3d 772, 778 (3d Cir. 1994) (third-party intervened to modify protective order). However, I must know if your clients are willing to provide the Foundation with the requested information before the Foundation can intervene in the action and move to modify the protective order.


An Order from the Court permitting your clients to provide the requested information to the Foundation, and permitting the Foundation to notify the affected individuals that their rights under the DPPA have been violated, will also have the benefit of removing any doubt that this action will not itself violate the DPPA. Disclosure made "in connection with any civil . . . proceeding in any Federal . . . court" is permissible under § 2721(b)(4) of the DPPA.

Moreover, I am confident that this course of action also falls under the "investigation in anticipation of litigation" exception of § 2721(b)(4). As described above, the Foundation requests the Westlaw records in anticipation of litigating a case against UNITE for the victims to remedy UNITE's violations of their federal privacy rights under the DPPA.

Surely, the DPPA does not prohibit individuals from learning that their *own* motor vehicle records were obtained and disclosed in violation of the DPPA. The DPPA would be self-defeating if it precluded individuals from learning that their own vehicle records were wrongfully accessed and that their own rights under the DPPA were violated.

Please let me know at your convenience if your clients are amenable to the Foundation's informing other victims of UNITE's motor vehicle searches that their privacy was invaded in this manner. My phone number is (703) 321-8510. Thank you for your consideration.

Sincerely yours,



William L. Messenger

EXHIBIT B
to
DECLARATION OF WILLIAM L. MESSENGER

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DAVID B. PICKER

August 6, 2007

E-MAIL
dpicker@lawsgr.com

DIRECT DIAL NUMBER
[215] 241-8897

BY FAX (703- 321-9319)) and MAIL

Bill Messenger, Esquire
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160

**Re: Request For Information in
Elizabeth Pichler, et al. v. UNITE, et al.
Civil Action No. 04-CV-2841**

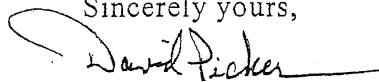
Dear Mr. Messenger:

We represent the Plaintiffs in this action, and write in response to your letter, dated July 30, 2007, requesting copies of documents and other information received from West in response to a subpoena we served on them in this case.

We and our clients have no objection to providing you with this information, at your expense, *provided* that we are assured that doing so will not violate any obligations we may have to maintain the confidentiality of that information, whether pursuant to the Court's protective order or under the DPPA. In this regard we would accept your proposal that you intervene in this case to seek an order permitting our disclosure of this information to you. We would consent to your motion to intervene, but not take a position as to the merits of your effort to obtain the information.

You may call if you have any questions or need any further information.

Sincerely yours,



David B. Picker

cc: Paul R. Rosen, Esquire