UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

THOMAS O. FLOCK, et al. Plaintiffs, v. UNITED STATES DEPARTMENT OF TRANSPORTATION, et al., Defendants.	CIV. NO. 14-13040-FDS **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO:

DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

A. Statement of the Case

Plaintiffs are professional commercial vehicle operators (drivers) whose driving activities are subject to federal safety standards. Reports of safety enforcement action taken against drivers are stored in a federal database maintained by Defendant Federal Motor Carrier Safety Administration (FMCSA). For convenience, Defendants' are occasionally referred to collectively as FMCSA. By statute, FMCSA is authorized to make available to potential employers of drivers three categories of reports: "(1) Commercial motor vehicle accident reports, (2) Inspection reports that contain no driver-related safety violations and (3) Serious driver-related safety violation inspection reports." 49 U.S.C. § 31150(a).

Plaintiff Drivers allege that FMCSA exceeds its authority under Section 31150 and violates the Privacy Act (5 U.S.C. § 552a(e)(1),(6)) when it releases to potential employers reports of driver-related violations not determined by the Secretary to be reports of "serious" violations. Complaint ¶ ¶ 15, 16, 65. In its Motion to Dismiss, FMCSA takes the position that it has broad statutory authority to establish programs promoting highway safety and that the Court must afford deference to what it characterizes as a reasonable interpretation of Section 31150. Def. Br. at 2. Defendants also challenge driver standing to file this suit and they assert separately that drivers have consented to the dissemination of their inspection reports.

B. Statutory and Regulatory Background

The activities of commercial motor vehicle operators (drivers) are subject to federal safety regulations promulgated by the FMCSA. These Federal Motor Carrier Safety Regulations (FMCSRs) are codified in 49 C.F.R., Parts 350-399. The FMCSRs are enforced primarily by individual states which, in exchange for federal grants under the Motor Carrier Safety Assistance

Program (MCSAP) (See 49 U.S.C. § 31102; 49 C.F.R., Part 350), incorporate the federal standards into state law. States participating in MCSAP are required to report enforcement actions to FMCSA. 49 U.S.C. § 31102(b)(Q). Reports of such state enforcement actions are maintained by FMCSA in a database known as the Motor Carrier Management Information System (MCMIS). The MCMIS database contains reports of all enforcement actions submitted by the states without regard to the relative seriousness of the infractions involved. MCMIS data is shared with a number of FMCSA systems concerned with motor carrier and driver safety including the Preemployment Screening Program (PSP) at issue here. *See* FMCSA System of Records Notice (MCMIS), 74 Fed. Reg. 66391-04 (December 15, 2009).

FMCSA is authorized under 49 U.S.C. § 31150(a) to provide persons conducting preemployment screening services for the motor carrier industry with electronic access to "serious driver-related safety violation inspection reports." Section 31150(d) defines a serious driver-related violation to mean "a violation by an operator of a commercial motor vehicle that the Secretary determines will result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected." The Secretary has not promulgated regulations or issued any rulings or orders that identify serious violations for the purpose of Section 31150.

Information released under the PSP program must comply with the provisions of the Privacy Act, 5 U.S.C. § 552a, *et seq.*, and other federal statutes. Section 31150(b)(1). Information may not be released without the driver's written consent, Section 31150(b)(2), and then only in connection with preemployment screening of drivers. Section 31150(b)(3).

The Privacy Act focuses its attention on agency records from which information is retrieved by the name of an individual, or by some identifying number or symbol assigned to the

individual. A group of such records is known as a "system of records." 5 U.S.C. § 552a(5). When a system of records is established or created, the agency maintaining such records must publish in the Federal Register a System of Records Notice or "SORN." 5 U.S.C. § 552a(e)(4)(A)-(I). A SORN describes with some particularity the name and location of the system of records, the categories of records and individuals covered, routine uses of the records, agency procedures governing the handling of the records, etc. FMCSA has published two SORNs covering the PSP program: FMCSA System of Records Notice (PSP), March 8, 2010, 75 Fed. Reg. 10554-02; FMCSA System of Records Notice (PSP), July 19, 2012, 77 Fed. Reg. 42548-03. Privacy Impact Assessments (PIA's) are required under Section 208 of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 codified at 44 U.S.C. § 3501(8).

Defendants have attached to their Rule 12(b)(6) motion a Driver Consent Form which they contend demonstrates consent for the release of reports of non-serious driver-related violations. The Driver Consent form was actually published by FMCSA on the internet as part of a document entitled, "Monthly Account Holder Agreement – Pre-Employment Screening Program (PSP)." The Monthly Account Holder Agreement is the contract signed by motor carriers and others who wish to purchase PSP reports from NICT, FMCSA's contractor. In the interest of completeness, the Court is entitled to see the entire document from which the Driver Consent Form was taken. *See* Anna Nikolayeva Declaration (hereinafter "Nikolayeva Decl."), Exhibit A. The Nikolayeva Declaration also authenticates several documents published by Defendants which have not appeared in the Federal Register. The Court is asked to take judicial notice of these documents.

SUMMARY OF ARGUMENT

In 2005, Congress, for the first and only time, authorized FMCSA to disseminate to potential employers a limited subset of records of driver-related safety enforcement violations. 49

U.S.C. § 31150(a). The purpose of this PSP program is to encourage motor carriers to avoid applicants with less favorable safety records when hiring drivers. The wisdom of this approach to improving highway safety is not an issue here. Congress has approved this approach. In doing so, however, Congress placed clear and unambiguous limitations on FMCSA's authority. The statute provides that access to such information under the PSP program "shall be designed to assist the motor carrier industry in assessing an individual operator's crash and *serious* safety violation inspection history as a preemployment condition." *Id.* at (c). When FMCSA operates beyond its statutory authority by disseminating records other than crash records or records of *serious* driver-related violations, its actions are neither relevant nor necessary to accomplish the goals established in Section 31150(c). Such actions violate the Privacy Act. 5 U.S.C. § 552a(e)(1),(6).

FMCSA claims that it has broad authority to act in the name of highway safety and that its decision to so act is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). There is no ambiguity in the language of Section 31150(a)-(d) supporting FMCSA's claim to *Chevron* deference. The Agency's vague references to broad authority under "other" statutes fails for the same reason. Further, no amount of *Chevron* deference to actions taken under Title 49, U.S. Code can insulate FMCSA from its responsibilities under Title 5, U.S. Code, the Privacy Act. Section 31150(b)(1) confirms Congressional intent to subject implementation of the PSP program to federal privacy statutes and FMCSA does not contend otherwise.

The Secretary of Transportation has never issued a formal order or rule determining which violations are *serious* driver-related violations within the meaning of Section 31150(d). FMCSA has issued PSP reports covering Plaintiff Drivers that identify numerous reports of driver-related violations that under no circumstances constitute serious driver-related violations within the

meaning of Section 31150(d). Plaintiffs are entitled to offer proof of these well-pleaded allegations at trial.

The use of safety records as an instrumentality to discourage employment of certain drivers over others is designed to have, and has had, adverse economic consequences on drivers. The very nature of the PSP program is designed to reduce the economic value of driver services. This process encourages the market to favor some drivers over others. But Congress put strict limitations on how far FMCSA could go in influencing market behavior. When FMCSA releases reports of violations which it has no authority to release, the market imposes, and drivers experience, economic or pecuniary harm. Jobs providing good compensation become more difficult to obtain. Complaint at ¶¶ 42-53. This economic harm constitutes actual damages even though the precise dollar value may be difficult to calculate. At the pleading stage, the civil rules only require Plaintiffs to allege actual economic harm, not a calculation of the precise dollar value of that economic harm. Further, drivers are required to pay $10.00 each time they want to view a current version of their PSP reports. Complaint at ¶¶ 44-45. This economic burden also constitutes actual damages. Plaintiff drivers have standing because they have been adversely affected by FMCSA conduct. Plaintiff drivers have also alleged economic harm sufficient to support their claims for damages.

FMCSA's affirmative defense that drivers consent to the dissemination of records of non-serious violations by signing FMCSA's mandatory driver consent form is an improper submission under a Rule (12)(b)(6) motion. First, the unauthenticated and incomplete document presented to the Court raises factual issues inappropriate for resolution in a motion to dismiss. Second, even if the Court were inclined to entertain Defendant's submission, the defense fails as a matter of law. PSP data constitutes a separate and independent system of records under the Privacy Act. Section

31150(a) and (c), FMCSA's 2010 and 2012 System of Records Notices (SORNs) and its 2010 and 2012 Privacy Impact Assessments (PIA's) each specifically link the contents of the PSP system of records only to the reports identified in Section 31150(a). FMCSA has announced publicly that the data extracted from the MCMIS database for inclusion in the PSP system of records will be limited to data from records identified in Section 31150(a)(1)-(3). That excludes records of violations not determined to be serious. The mandatory consent form does not make specific reference to records of non-serious violations. A driver cannot be viewed as consenting to the dissemination of records from a system of records when such records cannot be lawfully contained in such system of records. Further, a driver cannot be deemed to have consented to the dissemination of records that the agency has represented would not be extracted from the MCMIS database for inclusion in the separate PSP system of records. The simple answer is that FMCSA's mandatory consent form cannot be read as establishing informed consent by drivers to FMCSA's unauthorized dissemination of records of non-serious driver-related violations.

ARGUMENT

I. FMCSA IS NOT AUTHORIZED TO DISSEMINATE REPORTS OF VIOLATIONS NOT DETERMINED BY THE SECRETARY TO BE SERIOUS

49 U.S.C. § 31150(a) specifically authorizes the dissemination of only three kinds of records under the PSP program – crash reports, reports that contain no driver-related safety violations and reports of serious driver-related violations. FMCSA argues, however, that nothing in Section 31150 precludes dissemination of reports of non-serious violations. Def. Br. at 14-15. FMCSA's position must be rejected for two reasons. First, Plaintiff Drivers specifically allege that FMCSA's actions violate the Privacy Act. 5 U.S.C. § 552a(e)(1),(6). Complaint at ¶¶ 15, 16 and 65. Nowhere in FMCSA's motion does it address the deficiencies alleged under the Privacy Act. Second, FMCSA claims broad authority to disseminate under Section 31150 and other

"related" statutes and that its decision to do so is entitled to deference under *Chevron.* Def. Br. at 2, 14-15. Absent ambiguity in those statutes, *Chevron* deference is not available to FMCSA. Even if ambiguity was found, *Chevron* deference would not allow FMCSA to broaden its authority under Section 31150 when that would result in avoiding its obligations under 5 U.S.C. § 552a(e)(1) and (6).

A. FMCSA's Actions Violate the Plaintiff Drivers' Rights Under the Privacy Act

FMCSA argues that nothing in Section 31150 precludes the Secretary from releasing reports of non-serious violations. Although pled by Plaintiff Drivers with specificity, Complaint at ¶¶ 15, 16 and 65, Defendants do not address the limitations placed on their discretion by the Privacy Act. FMCSA's more expansive interpretation of Section 31150(a) is clearly foreclosed by the Privacy Act.

The Privacy Act strictly limits the kind of information that may be contained in a system of records. 5 U.S.C. § 552a(e)(1) provides that each agency that maintains a system of records "(1) maintain in its records *only such information* about an individual *as is relevant and necessary* to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President…." (Emphasis added). An agency is also required to ensure that records intended for dissemination are "relevant for agency purposes." Section 552a(e)(6). FMCSA has by regulation embraced this requirement. 49 C.F.R. § 10.3. Section 31150(c) provides that the "process for providing access to the Motor Carrier Management Information System under subsection (a) shall be *designed* to assist the motor carrier industry in assessing an individual operator's *crash and serious safety violation inspection history* as a preemployment condition." (Emphasis added). This design goal does not contemplate providing potential motor carrier employers with reports on drivers other than crash reports and reports identifying serious driver-

related violations. Documents beyond those described in Section 31150(a) are neither relevant nor necessary to accomplish the agency's purpose as disclosed in Section 31150(c). SORNs and Privacy Impact Assessments (PIA's) published by FMCSA establish the link mandated by 5 U.S.C. § 552a(e)(1) and (6) between documents to be included within the PSP system of records and the reports identified in Section 31150(a).

As an initial matter, FMCSA informs the public that the MCMIS system of records is a "separate and distinct system of records." 77 Fed. Reg. at 42549-3. The MCMIS system of records contains numerous reports of driver violations that are not "serious driver-related" violations within the meaning of Section 31150(a) and (d). FMCSA has represented to the public that only a narrow subset of records contained in the MCMIS database will be extracted and included in the separate PSP system of records. FMCSA's 2010 and 2012 Privacy Impact Assessments specifically written for the PSP program inform the public that the driver safety information extracted from the MCMIS database for inclusion in PSP reports is limited to the classes of information identified in Section 31150(a):

> In accordance with 49 U.S.C. § 31150(a), the CMV *driver safety information extracted from MCMIS* and made available for pre-employment screening *comes from the following reports*: commercial motor vehicle accident reports; inspection reports that contain no driver-related safety violations; and *serious driver-related safety violation inspection reports.*

2010 Privacy Impact Assessment at 2 (emphasis added); 2012 Privacy Impact Assessment at 4. *See* Nikolayeva Decl., Exhibit B and C.

FMCSA's published announcement that it will extract only a limited subset of records from the MCMIS system of records is entirely consistent with the unambiguous wording of Section 31150 and with FMCSA's separate disclosures in the PSP SORNs. Both FMCSA's 2010 and 2012 SORNs tie the purpose for which the PSP system of records was created directly to Section 31150.

"FMCSA designed PSP to satisfy the requirements of 49 U.S.C. § 31150…." 75 Fed. Reg. at 10555-1. The 2012 SORN reaffirmed the same link to Section 31150. 77 Fed. Reg. at 42549-2 (emphasis added). Case law supports this narrow interpretation of agency authority under the Privacy Act.

"[I]n order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary ... to regulate the collection, maintenance, use, and dissemination of information by such agencies." *Doe v. Chao,* 540 U.S. 614, 618 (2004) (quoting Privacy Act of 1974, § 2(a)(5), 88 Stat. 1896). The Privacy Act allows the Government to maintain records "about an individual" only to the extent the records are "relevant and necessary to accomplish" a purpose authorized by law. 5 U.S.C. § 552a(e)(1). *Nat'l Aeronautics & Space Admin. v. Nelson,*__U.S.__, 131 S.Ct. 746, 762 (2011) (quoting 5 U.S.C. § 552a(e)(1)). The Act gives "forceful recognition" to an individual's interest in maintaining the "confidentiality of sensitive information ... in his personnel files." *Id.*, citing *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 318, n.16 (1999). Under these Privacy Act limitations, the Secretary only has authority to disclose to employers personal data identified by and for the purpose described in the PSP statute. That PSP authorization does not extend to disclosure of non-serious driver-related safety violation inspection reports. Section 31150(c) directs that reports be designed to "assist the motor carrier industry in assessing an individual operator's crash and serious safety violation inspection history as a preemployment condition." Reports of other enforcement events are not relevant to accomplish the purposes of Section 31150(a) and (c) and therefore are not disclosable under the Privacy Act. Section 552a(e)(1) and (6).

B. FMCSA Has Never Been Given Authority To Disseminate Driver Information From MCMIS Outside Of The PSP Program.

FMCSA cites to no policy or practice to support its assertion that it had broad authority predating the PSP program to disseminate driver MCMIS information. FMCSA cites to no Systems of Records Notice under 5 U.S.C. § 552a(e)(3) or Routine Use under 5 U.S.C. § 552a(e)(3)(C) that describes the purpose for collecting information about individuals in MCMIS or the dissemination of that personal data. MCMIS was created solely to aid in motor carrier-level enforcement. Plaintiffs could only find references in FMCSA's administrative records that demonstrate that FMCSA (and Congress) has always recognized drivers' privacy interest in MCMIS data.

FMCSA currently maintains a multi-page website entitled, "MCMIS Catalog and Documentation", that provides the public with details about the MCMIS database. There, on the very first page, FMCSA clearly states: "Due to privacy restrictions, driver information is not included in any inspection files released to the public." *See* Nikolayeva Decl., Exhibit D.

Further evidence of this long-standing agency policy is contained in the administrative record of the rules cited to in the FMCSA's memorandum: 49 C.F.R. §§ 391.21 and 391.23, Safety Performance History of New Drivers rules. Def. Br. at 12. FMCSA cites these rules to assert that motor carriers always had access to the information it discloses on PSP reports. But those rules do nothing more than require motor carrier employers to gather certain background information *from driver/applicants and from those drivers/applicants' former employers.* The rules do not grant motor carriers direct access to the MCMIS database. During the promulgation of these rules, representatives of motor carrier employers who commented on the proposed rules (the American Trucking Associations, "ATA," and the Truckload Carriers Association, "TCA,") specifically asked FMCSA to give them direct access to the MCMIS database. FMCSA rejected those

requests. Final Rule, Safety Performance History of New Drivers, 69 Fed. Reg. 16684 at 16696, Col. 2-3 (March 30, 2004). The discussion in the publication of the Final Rule demonstrates that neither the motor carriers nor FMCSA believed that the public was entitled to access to the MCMIS database, as FMCSA now suggests. Def. Br. at 12.

It is a non-sequitur for FMCSA to suggest that an agency is relieved of its duties under the Privacy Act to protect the data it maintains about individuals if a person in the private-sector may be able to obtain similar information from another person in the private-sector. The Privacy Act is specifically intended to restrict the government's custody and use of information about individuals. It is a distinction that, until the creation of the PSP program, FMCSA has always recognized.

Congress first opened the door to the public to obtain certain MCMIS data about individuals in the PSP program. In the conference report accompanying legislation creating the PSP program, Congress recognized drivers' privacy interests in MCMIS data:

> This safety compliance and performance information is unique to MCMIS and, therefore, is not found in any other national database. Prohibiting the release of this driver safety information *unless expressly authorized* or required by law protects driver privacy.

H.R. Rep. No. 109-203, Sec. 4127 (Conf. Rep.). (Emphasis added). The PSP program is the only time FMCSA has been given authorization to disclose MCMIS data about individuals to the public. The strict procedural safeguards of the PSP program are intended to protect long-held privacy rights. It does not represent a new restriction on data that was previously available to the public.

C. The MCMIS Database Was Created To Address Motor Carrier Enforcement, Not Driver Qualification Or Enforcement.

The regulatory record created by FMCSA and its predecessor agencies is barren of evidence of any pre-PSP authority or discretion to disclose MCMIS data about individuals

(drivers) to other members of the public. Nor do other statutes enlarge FMCSA's authority to make such disseminations. Congress has never granted the USDOT broad, unrestricted authority to collect and use state enforcement data concerning motor carriers and drivers. Congress did not specifically give USDOT the authority to establish an information system to collect and use the state inspection data until 1991. *See* Section 4003 of the Intermodal Surface Transportation Efficiency Act of 1991, ("ISTEA") Pub. L. No. 102–240 (1991) (currently codified at 49 U.S.C. § 31106). ISTEA authorized the Secretary to create an "information system which will serve as a clearinghouse and depository of information pertaining to State registration and licensing of commercial motor vehicles and the safety fitness of the registrants of such vehicles." *Id*. at Section 407(a)(2). The Act also requires the Secretary to establish standards to ensure "the availability and reliability of the information to the states and the Secretary." *Id.* at Section 407(a)(4). The statute gives no authority to disseminate data to the public.

Until the PSP program was established in 2005, the Secretary's use of inspection data was limited to assigning safety ratings to motor carriers, not drivers, and to identifying motor carriers deserving of greater enforcement scrutiny. *See* 49 C.F.R. Parts 385 and 386. In a recent Federal Register publication, FMCSA described how violations from roadside inspections are reported to FMCSA and then are accessible to state and federal users for a myriad of uses, none of which are related to enforcement actions related to individual drivers or to the disclosure of driver data to members of the public, except through the PSP program. Motor Carrier Management Information System (MCMIS) Changes to Improve Uniformity in the Treatment of Inspection Violation Data, 78 Fed. Reg. 72146 (December 2, 2013). A list and descriptions of the many databases other than the PSP program that use MCMIS inspection data can be found at

http://www.fmcsa.dot.gov/mission/information-systems/information-systems (specifically those systems that reference "MCMIS" or "inspections"). See Nikolayeva Decl., Exhibit E.

At no time prior to the PSP program did the Secretary have any duty, power, or function to use that information to perform any safety enforcement activity related to individual drivers. FMCSA can cite to no such authority. Under the Privacy Act, the Secretary may maintain personal records "about an individual" only to the extent the records are "relevant and necessary to accomplish" a purpose authorized by law. 5 U.S.C. § 552a(e)(1). Respondent does not cite to any statute (other than Section 31150) giving the Secretary general authority to disclose any personal information collected about drivers for any purpose.

D. FMCSA's Expansive View of Its Authority is Not Entitled to *Chevron* Deference

FMCSA points to the fact that while Section 31150(a) specifically authorized dissemination of three types of reports (including reports of serious driver-related violations) it does not specifically preclude dissemination of other reports (including reports of non-serious driver related violations). Def. Br. at 11. FMCSA contends that it has "broad discretion under Section 31150 and related statutes" and that the exercise of that discretion is only reviewable under "the familiar two-step analysis of *Chevron*." Def. Br. at 14.

The question of whether an agency's interpretation of a statute is entitled to *Chevron* deference involves a two-step analysis. First, it must be established that the statutory provision in question is ambiguous. If Congress has spoken directly to the precise question at issue, courts must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842. Second, if the statute is ambiguous, a court must ask whether the agency's interpretation is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843; *Santana v. Holder*, 731

F.3d 50, 55 (1st Cir. 2013). FMCSA's position does not satisfy either prong of the *Chevron* analysis.

1. Prong One

Section 31150 is unambiguous. FMCSA argues that while Congress specifically authorized the dissemination of three types of reports, it was silent and did not preclude distribution of other kinds of records. But Congress was not silent. In Section 31150(c), Congress specifically stated that access to records under subsection (a) "shall be designed to assist the motor carrier industry in assessing an individual operator's crash and serious safety violation inspection history as a precondition to employment." Permitting dissemination of other types of reports (including reports of violations not determined by the Secretary to be serious) would completely undercut the narrow design features mandated under Subsection (c). Further, Congress went to the trouble under Subsection (d) to define a "serious driver-related safety violation." The constraints imposed under the narrow and restrictive definition of "serious" can hardly be characterized as Congressional silence. *Chevron* deference is "called for only when the devices of judicial construction have been tried and found to yield no clear sense of Congressional intent." *Saysanna v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009), quoting *General Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 124 S. Ct. 1236, 1248 (2004). Here, Congress has given us a clear sense of its intent.

In *Santana v. Holder,* the First Circuit rejected a similar contention of ambiguity based upon claimed Congressional silence. By regulation, an individual subject to deportation was allowed to file one and only one motion to reopen the proceedings. By regulation, that right was extinguished following the individual's departure from the United States. Subsequently, Congress codified by statute the right to file a motion to reopen. 8 U.S.C. § 1229(c)(7)(A). The statute did not include a post-departure limitation on this right. 731 F.3d at 53-54. Regulations imposing the

post-departure bar on filing to reopen under the regulation remained unchanged. *Id.* Santana's post-departure motion to reopen was denied. On appeal the government argued that the lack of an express post-departure restraint in the statute should be construed as silence creating a statutory ambiguity that it should be allowed to resolve under *Chevron* deference. *Id.* The First Circuit rejected this position.

Under FMCSA's reasoning, the identification of three types of reports for dissemination, without more, opens the door to dissemination of potentially unlimited categories of reports as to which the statute was silent. The *Santana* court wisely rejected this reasoning:

> The government's proposed methodology also carries certain dangers. As the Third Circuit has pointed out, this method "manufactures an ambiguity from Congress' failure to specifically foreclose each exception that could possibly be conjured or imagined. That approach would create an 'ambiguity' in almost all statutes, necessitating deference to nearly all agency determinations." *Prestol Espinal,* 653 F.3d at 220.

731 F.3d at 58. The *Santana* court went on to note that "Congressional silence lacks persuadable significance, particularly where administrative regulations are inconsistent with the controlling statutes." *Santana*, 731 F.3d at 59, quoting *Brown v. Gardner*, 513 U.S. 115, 121 (1994). Under FMCSA's argument, identification of three types of reports provides authority to disclose all types of reports. This approach is not favored by the First Circuit.

2. Prong Two

Absent ambiguity, it is neither necessary nor appropriate to consider the agency's contrary reading under Prong 2. But, even if this court were to find a hint of ambiguity in Section 31150, FMCSA's position in this litigation would not satisfy *Chevron*'s second prong. FMCSA's current position that it is free to disseminate reports of non-serious driver-related violations is nothing more than a post-hoc rationalization by counsel for the purposes of this litigation rather than a consistently held interpretation by the agency.

First, in January 2010, comments filed by driver representatives in response to first SORN informed FMCSA of the limitations imposed upon its authority to disseminate reports under the PSP program. Complaint at ¶ 33. Thereafter, FMCSA published its 2010 PIA wherein it represented that records extracted from the MCMIS database for inclusion in the PSP System of Records would be limited to records identified in Section 31150(a). Complaint at ¶ 38. As noted above, both of FMCSA's SORNs published for the PSP program linked creation of the System of Records to Section 31150(a). In addition, DOT's own regulation, 49 C.F.R. § 10.3 establishes the Agency's policy to limit disclosure to "that necessary to accomplish the stated uses of the system." The form contract approved by FMCSA between motor carriers and the contractor responsible for dissemination (discussed below) contains the same limitations on the kinds of reports available for dissemination. FMCSA had quietly abandoned these published declarations of intent and has included records of non-serious violations in the PSP System of Records. Its assertions of *Chevron* deference come only after it was challenged in court on the differences between its stated policy and its actual practice. The inconsistency between FMCSA's stated policy and its actual practice does not provide a solid foundation for *Chevron* deference. Indeed, the First Circuit has held that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *Succar v. Ashcroft,* 394 F.3d 8, 36 (1st Cir. 2005), quoting *INS. v. Cardoza-Fonseca,* 480 U.S. 412, 446. n. 30 (1987).

Further, the question of whether FMCSA has offered a reasonable interpretation of its authority under Section 31150 cannot be determined in isolation from its responsibilities under the Privacy Act. FMCSA does not offer a reasonable interpretation of its authority to act under Section 31150 where its interpretation is in conflict with the restrictions placed upon its actions under the

Privacy Act. The analysis of this question presented above by Plaintiff Drivers shows that FMCSA's position on Section 31150 is an unreasonable interpretation of the statute even under *Chevron. See Nigg v. U.S. Postal Service,* 555 F.3d 781, 786 (9th Cir. 2009) (holding that the Postal Service's interpretation of a postal wage statute, 39 U.S.C. § 1003(c), was not "reasonable" under *Chevron* where the "Postal Service's interpretation of Section 1003(c) conflicts with the clear meaning of the FLSA."). So too here where FMCSA's interpretation of Section 31150 conflicts with its responsibilities under the Privacy Act.

E. Dissemination of PSP Reports Containing Non-Serious Violations is Not Covered by the Routine Use Exemption

FMCSA contends that it is free to disclose all records of driver safety inspections pursuant to the routine use exemption of 5 U.S.C. § 552(a)(b)(3). But the routine use of records in the PSP system of records is a concept that can only apply to records that are properly part of the PSP System of Records – crash reports and reports of serious driver related violations. Section 552(a)(4)(D) makes it clear that each identified "routine use" applies only to "records maintained in the system." "Routine use" cannot be applied to documents that are not properly part of the PSP system of records. Recall that FMCSA has represented in its SORNs that only a small subset of the documents contained in MCMIS would be extracted for incorporation in the separate PSP system of records.

The routine use exemption set forth in Section 552a(b)(3) of the Privacy Act serves to exempt certain kinds of records from the written consent requirement set forth in the first paragraph of Section 552a(b). This exemption does not apply to the separate written consent requirement set forth in 49 U.S.C. § 31150(b)(2). The 2012 SORN informs us that the written consent of the driver is necessary even where release of records is considered a routine use.

> In addition to those disclosures generally permitted under Section (b) of the Privacy Act, 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system may be disclosed outside of DOT as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:
>
> 1. To authorized industry service providers and motor carriers as part of the operator-applicant's PSP record; authorized industry service providers and motor carriers may use PSP records only for purposes of pre-employment safety screening of operator-applicants *and must have the operator-applicant's consent to access the PSP record.*

77 Fed. Reg. at 42550-2 (emphasis added). Thus, under FMCSA's own interpretation, records may not be distributed under the routine use exemption unless there is a written consent by the driver. As we shall now demonstrate, no such consent has ever been given.

II. PLAINTIFF DRIVERS HAVE NOT CONSENTED TO DISSEMINATION OF REPORTS OF NON-SERIOUS VIOLATIONS

Subject to several exceptions, the Privacy Act prohibits an agency to "disclose any record which is contained in a system of records by any means…except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains…." 5 U.S.C. § 552a(b). 49 U.S.C. § 31150(b)(2) contains an additional requirement for the written consent of a driver before a motor carrier may conduct a PSP screening.

A. FMCSA's Affirmative Defense Is Improper Under Rule 12(b)(6).

FMCSA contends, by way of what is obviously an affirmative defense, that Plaintiff Drivers have consented to the release of all PSP reports, including reports of non-serious violations, by signing a mandatory PSP Driver Consent Form which it attaches to its Motion. Def. Br. at 7, 15-16. FMCSA's argument fails for several reasons. As a threshold matter, FMCSA fails to satisfy the rigorous standard necessary to dismiss Plaintiffs' action on a Rule 12(b)(6) motion based on an affirmative defense. It is "well settled that, for dismissal to be allowed on the basis of an affirmative defense, the facts establishing the defense must be clear 'on the face of the plaintiff's pleadings.'" *Blackstone Realty LLC v. F.D.I.C.*, 224 F.3d 193, 197 (1st Cir. 2001), quoting

Aldahonda-Rivera v. Parke Davis & Co., 882 F.2d 590, 591 (1st Cir. 1989). For example, a dismissal on a statute of frauds defense was appropriate where the fact that the agreement was oral was apparent "from the face of the complaint." *See Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 820 (1st Cir. 1948). FMCSA's affirmative defense of consent here is *not* apparent from the face of Plaintiffs' complaint. FMCSA bases its affirmative defense entirely on an unauthenticated, unsigned "PSP Driver Consent Form."

"Furthermore, review of the complaint, together with any other documents appropriately considered under Fed. R. Civ. P. 12(b)(6), must 'leave no doubt' that the plaintiff's action is barred by the asserted defense." *Blackstone*, 244 F.3d at 197, quoting *LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 508 (1st Cir. 1998). FMCSA's affirmative defense of consent here is *not* apparent from the face of Plaintiffs' complaint. Here, the complaint, together with FMCSA's mandatory consent form, leaves *considerable* doubt that Plaintiffs' action is barred by its affirmative defense.

The consent form offered by FMCSA was actually published by FMCSA on the internet as part of a 15-page document entitled, "Monthly Account Holder Agreement – Pre-Employment Screening Program (PSP)." *See* Nikolayeva Decl., Exhibit A. As detailed below, the 15-page document, read in its entirety, contradicts FMCSA's claim that Plaintiffs consented to the dissemination of their non-serious violations. Because Plaintiffs challenge the completeness of the consent form, the Court cannot consider the form as a basis to dismiss Plaintiffs' complaint. *See Coffin v. Bowater Inc.*, 224 F.R.D. 289, 292 (D. Maine 2004) ("Because the completeness of the document is challenged and the issue cannot be decided on this record, the Court cannot properly consider the SEC filing with the attached agreement in connection with Defendants' Motion to Dismiss.").

The Monthly Account Holder Agreement is a form contract approved by FMCSA to be signed by motor carriers and others who wish to purchase PSP reports from NICT, FMCSA's contractor. On page four of this document, the parties identify the reports whose disclosure is sought by motor carriers and for which driver consent will be required.

> **IDENTIFICATION OF SERVICES DESIRED:**
>
> **Department of Transportation – Pre-Employment Screening Program ('PSP') report consisting of (a) commercial motor vehicle FMCSA-reportable crash reports, if any; (b) inspection reports without driver-related safety violations, if any; (c) inspection reports with serious driver-related safety violations, if any; or (d) a "null" report, indicating no record for the driver information searched.** NICT is the exclusive agent for online access to Federal Motor Carrier Safety Administration Pre-Employment Screening Program records. (*Emphasis in original*).

Notably, the services described in this portion of the document are clearly limited to purchases of reports identified in Section 31150(a). There is no mention of reports of non-serious driver-related violations. Thus, references to disclosure of "inspection history for the three previous years," contained in numbered paragraph 2 of the Driver Consent Form (Nikolayeva Decl., Exhibit A, last page), cannot be fairly read to include reports not identified by motor carriers in their contract to purchase PSP reports from FMCSA's contractor.

FMCSA's reliance on the consent form raises additional factual issues which preclude granting Defendants' motion to dismiss. Given the opportunity to respond, Plaintiffs will contend that the consent form is coercive, thus invalidating any purported consent to disseminate non-serious violations. Indeed, the consent form itself states that the form is "mandatory" meaning that Plaintiffs had no ability to bargain over the language in the form. Def. Br. at 16. Drivers have no choice but to sign the consent form if they wish to be considered for employment with a motor carrier. In *Tierney v. Schweiker*, 718 F.2d 449, 456 (D.C. Cir. 1983), the D.C. Circuit found that the government's consent form was invalid, in part, because "[t]he language of the form was thus

likely to coerce individuals, who depended on social security for their subsistence, into giving up their right to confidentiality." Much like the plaintiffs in *Tierney*, the Plaintiff Drivers here depend on employment by motor carriers for their subsistence. Thus, Plaintiffs should be allowed to raise the factual issues that the consent form is coercive. The Court should reject Defendants' consent defense as a basis for granting their motion to dismiss.

B. The Driver Consent Form Does Not Authorize Disclosure of Records Improperly Included in the PSP System of Records

Even if the Court were to consider the consent defense, this defense fails as a matter of law. As noted above, FMCSA's 2010 and 2012 SORNs state that the PSP is a separate "system of records" under the Privacy Act. Under 5 U.S.C. § 552a(e)(1), the PSP system of records may only contain records that are relevant and necessary to accomplish the purposes set forth in Section 31150(c), limited to crash reports, inspection reports without driver-related safety violations, and reports of violations determined by the Secretary to be "***serious***" violations. As noted above, FMCSA has affirmatively represented in the 2010 and 2012 Privacy Impact Assessments that it will only extract reports from the MCMIS database that are identified in Section 31150 when creating the PSP System of Records. As a result, the PSP system of records cannot lawfully include records of "non-serious" violations. The language of the consent form is ambiguous and fails to specify whether it applies to all driver-related violations or only to serious driver-related violations. In the face of this ambiguity, the consent form cannot be read to authorize dissemination of records from the PSP system of records which FMCSA represents would not be extracted from the MCMIS database for inclusion in the separate PSP system of records.

Similarly, the plain language of the PSP statute itself limits the information that may be disseminated through the driver's consent. Section 31150(a) states that motor carriers may have access to only three "reports;" *i.e.* accident reports, inspection reports that contain no driver-related

safety violations, and ***serious*** driver-related safety violation inspection reports. The next subsection, 31150(b) provides that, before providing a person access to the information "***under subsection (a)***," FMCSA must ensure that the motor carrier has "the owner-applicant's written consent." (Emphasis added). Driver consent under Section 31150(b)(2) is clearly tied to the disclosure of the kinds of records identified in Section 31150(a). Thus, the plain language of the statute does not contemplate consent to the dissemination of non-serious violations under the PSP program. FMCSA's consent form is invalid to the extent it exceeds the limits of the consent articulated in the statute. *See Tierney*, 718 F.2d at 455 (holding that "notice-and-consent form" sent by Social Security to SSI recipients purporting to allow the agency access to tax filings with IRS was invalid because the consent form exceeded the agency's statutory authority).

III. PLAINTIFF DRIVERS HAVE SUSTAINED INJURY SUFFICIENT TO SUPPORT BOTH THEIR STANDING TO SUE AND AN AWARD OF ACTUAL DAMAGES

FMCSA contends that the Complaint fails to establish this Court's subject matter jurisdiction because the Complaint does not allege an injury which is quantifiable in terms of an impact on an individual driver's ability to "earn a living." FMCSA confuses the allegations of concrete injury necessary to establish standing (and thus to open the courthouse doors) with allegations of actual damages required to state a claim for damages on the merits of a statutory violation of the Privacy Act. Def. Br. at 2, 19-21. The Complaint satisfies both standards.

A. Plaintiff Drivers Have Alleged Injury In Fact Supporting Standing

The Privacy Act allows an individual a civil right of action where an agency fails to comply with the provisions of the Act "in such a way as to have an ***adverse effect*** on an individual." 5 U.S.C. § 552a(g)(1)(D) (emphasis added). Courts addressing suits under this section have distinguished between allegations sufficient to establish constitutional standing and the specific

allegations of pecuniary harm necessary to state a claim to recover actual damages under the statute. *Doe v. Chao,* 540 U.S. 614, 624 (2004); *Speaker v. U.S. Dept. of Health and Human Services,* 623 F.3d 1371, 1382 (11th Cir. 2010); *Orekoya v. Mooney,* 330 F.3d 1, 8 (1st Cir. 2003).

The Supreme Court explained the independent meaning of language recognizing a civil right of action under the Privacy Act from language requiring allegations of pecuniary harm necessary for recovery of damages under the Act:

> Nor does our view deprive the language recognizing a civil action by an adversely affected person of any independent effect, for it may readily be understood as having a limited but specific function: the reference in § 552a(g)(1)(D) to "adverse effect" acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue.

Id., Chao, 540 U.S. at 624 citing *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995) ("The phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision"). Thus, the Court in *Chao* concluded "an individual subject to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act." 540 U.S. at 624-25.

Article III standing "is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Ass'n of Data Processing Serv. Orgs. v. Camp,* 397 U.S. 150, 151-152 (1970). Constitutional standing requires three elements -- injury, causation, and redressability. *Vt. Agency of Natural Resources v. U.S. ex rel Stevens,* 529 U.S. 765, 771 (2000). The injury required by Article III need not be pecuniary, but may depend solely on the invasion of a legal right. *Warth v. Seldin,* 422 U.S. 490, 500 (1975). The standing determination is made by asking whether the

provision of the constitution or statute on which the claim rests grants an individual a right to relief. *Id.*

The allegations in the Complaint satisfy these requirements. Plaintiffs have alleged that FMCSA has no authority to disseminate through the PSP program their individual driver inspection records collected in the MCMIS database beyond disclosure of "serious driver related safety violations." The Complaint alleges injury to Plaintiffs directly caused by Defendants violation of the Privacy Act -- impermissible dissemination of the driver inspection records to potential employers diminishes the economic value of services offered by the Plaintiff Drivers. The Complaint further alleges that publication of the driver records has caused each Plaintiff Driver economic injury which is redressible by the award of actual or statutory damages available under the Privacy Act. More specifically, the Complaint alleges:

- The limited statutory authority granted the FMCSA to collect and disseminate driver related safety records and information. Complaint ¶¶ 10-16;
- For each individual Plaintiff Driver, a detailed statement of the safety violations recorded on the driver's PSP report; Complaint ¶¶ 23A, 24A, 25A, 26A, 27A, 28A;
- That each individual PSP Report has been prepared and disseminated is available for dissemination to prospective motor carrier employers through a PSP records request. *Id.*, ¶¶ 23F, 24F, 25F, 26F, 27F, 28F, 38, 46, 50.
- That the unauthorized dissemination of non-serious safety violations has disparaged each Plaintiff Driver's qualifications for employment and resulted for each Plaintiff Driver in a negative economic or pecuniary impact on his ability to earn a living as a commercial motor vehicle driver. ¶¶ 23D and E, 24D and E, 25D and E, 26D and E, 27D and E, 28D and E.
- The Complaint details the economic impact of Defendants conduct in violation of the Privacy Act and the resulting economic and pecuniary injury suffered by Plaintiff Drivers. ¶¶ 42-53.

The Complaint has established that because of Defendants' conduct, Plaintiff Drivers have suffered injury-in-fact which is redressible through damages in satisfaction of the requirements for

Article III standing. FMCSA raises standing here reflexively as it has done routinely in other matters involving drivers. FMCSA's standing argument should be rejected here as it was by the Seventh Circuit in *OOIDA v. FMSCA,* 656 F.3d 580, 585-86 (7th Cir. 2011).

B. Plaintiff Drivers Have Alleged Actual Damages Supporting Relief Under the Privacy Act

FMCSA contends that Plaintiffs have failed to allege facts supporting the pecuniary harm necessary to state a claim under the Privacy Act. Contrary to FMCSA's mischaracterization of the harm alleged, Plaintiffs' claim of disparagement is not an unspecified reference to some vague emotional harm. Nor are the allegations of pecuniary harm resulting from the $10 fee disconnected from Defendants' wrongful dissemination of non-serious safety violations. The Complaint alleges specific facts related to individual Plaintiff Drivers which plausibly demonstrate that a motor carrier would de-value the driving services offered based upon the report of non-serious violations resulting in pecuniary harm to the driver. That, after all, is the way the preemployment "screening" program is designed to work. The Complaint further alleges facts which reasonably support the conclusion that a driver monitoring his record must view the PSP reports available and disseminated to motor carriers, at a cost of $10 per report, in order to be apprised of the version of his "record" which will be used by the motor carrier to evaluate his suitability for employment. This expense also supports a claim of actual damages.

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009), citing *Bell Atlantic v. Twombly,* 550 U.S. 544, 570 (2007). "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. *Id.*

Applying these standards, the Court in *Hill v. U.S. Dept. of Defense,* ___ F. Supp. 3d ___, 2014 WL 4803922 (D.D.C. September 29, 2014), held that a simple allegation of lost employment opportunities due to improper disclosure of personnel records was sufficient to show the pecuniary harm necessary to a claim under the Privacy Act. *Id.* at *4-5. "Loss of an employment opportunity is also a pecuniary harm." *Id. See also, Speaker v. U.S. Dept. of Health and Human Services,* 623 F.3d 1371, 1383 (11th Cir. 2010) (allegations that CDC disclosures had a substantial economic and noneconomic impact upon plaintiff's livelihood including loss of prospective clients as an attorney and considerable economic and non-economic damage to his personal and professional reputation were sufficient to state claim for pecuniary harm under Privacy Act). Similarly, the court in *Makowski v. United States,* ___ F. Supp.2d ___, 2014 WL 1089119 *7 (N.D. Ill. March 18, 2014) found that loss of economic opportunity due to an unlawful immigration detainer is pecuniary harm. The Court explained: "It is reasonable to infer that the seventy days of unnecessary incarceration cost Makowski prospective employment opportunities." *Id.*

As to causation, the Court in *Hill* found that detail such as an application for a particular job, that the job asked for an employment reference, or an inability to obtain a reference because of the alleged improper disclosures, was not required at the pleading stage of a case. 2014 WL 4803922 at *5. The plaintiff must only "plausibly allege proximate causation." *Id.* "To plead proximate cause, plaintiff must allege some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." *Id.* (citations omitted). The Court concluded that "it is plausible that specific employment opportunities required references of a supervisor, which Hill would have been able to obtain but for the alleged disclosures, resulting in her being disqualified from the position or positions." *Id.* In *Makowski*, the Court rejected the DHS's argument that it was not its violation of the Privacy Act that caused Makowski's damages.

2014 WL 1089119 *7-8. The Court recognized the unbroken chain of events beginning with DHS's failure to maintain accurate records leading to his detainer and resulting prevention of his seeking employment. *Id.* The Court concluded that "drawing all reasonable inferences in Makowski's favor, the impact of the immigration detainer on Makowski's incarceration was reasonably foreseeable. . . . Although the causal chain contains several links, Makowski has plausibly alleged that DHS's violation of the Privacy Act caused him actual damages." *Id.* at *8.

Here, Plaintiffs allege that the economic value of services provided by Plaintiff Drivers as commercial motor vehicle operators has been diminished by the actions of FMCSA in unlawfully disseminating driver inspection records not authorized for dissemination under the PSP program. Complaint ¶¶ 4, 46-53. The Complaint includes detailed allegations of the violations impermissibly disclosed to prospective motor carrier employers for each Plaintiff Driver. Complaint ¶¶ 23A, 24A, 25A, 26A, 27A, 28A. The Complaint alleges that the unauthorized dissemination of non-serious violations deters motor carriers from consideration of such drivers, and favors drivers with no such violations on their PSP reports. Complaint ¶¶ 47, 49, 50. PSP reports of driver-related safety violations have a negative impact on the ability of individual driver candidates to command good compensation and benefits when they are hired. *Id.* The Complaint alleges that individuals with reports of driver-related safety violations on their PSPs are discouraged from seeking out better employment opportunities, diminishing their prospects for higher rates of compensation. Complaint ¶¶ 51-52. The Complaint further alleges that each individual Plaintiff Driver has suffered economic and pecuniary harm from their disparaged driving records due to the inclusion of specific unauthorized safety violations on their PSP reports. Complaint ¶¶ 23D and E, 24D and E, 25D and E, 26D and E, 27D and E, 28D and E.

It is certainly plausible that the appearance of violations (not identified as either serious or non-serious by the Secretary) would be viewed negatively by a prospective motor carrier employer and that the motor carrier would choose to hire a driver with a clean record over drivers with reported violations. It is reasonable to infer that a motor carrier willing to give a driver with violations on his record a chance by employing him, may offer him a compensation rate less than that offered to a driver with a perfect record. Just like the circumstances found sufficient in *Hill* and *Makowski*, the alleged loss of employment opportunities or the de-valuation of driving services is pecuniary harm of the kind required by the Privacy Act.

Plaintiffs here further allege that the $10 fee paid to obtain their PSP reports is pecuniary harm sufficient to state a claim under the Privacy Act. Complaint ¶¶ 23F, 24F, 25F, 26F, 27F, 28F. The plaintiff in *Hill* alleged that that he paid for medical services to address the trauma associated with the wrongful disclosures and paid for transportation to and from the medical services. *Id.* at *4. The Court found that "[d]irect out-of-pocket expenses, such as payment for medical services, are the very definition of pecuniary losses." *Id.*, citing *FAA v. Cooper*, 132 S. Ct. 1441, 1451 (2012). *See also, Beaven v. U.S. Dept. of Justice*, 622 F.3d 540, 558 (6th Cir. 2010) (remanding to the district court for factual findings because "[t]he additional 'lost time' damages sought by Plaintiffs may qualify as 'out-of-pocket losses'.").

Plaintiff Drivers were required to pay the $10 fee, and incur that out-of-pocket expense, to obtain the record at issue in this lawsuit. The claims in this case arise from FMCSA's impermissible disclosure of driver records in contravention of the limited statutory authority granted under 49 U.S.C. § 31150. It is the PSP dissemination protocol that is at issue in this case, not the collection of information in MCMIS. It was necessary for drivers to view the violations recorded on the PSP report because it is that record that the motor carrier is reviewing in evaluating

the driver's suitability for employment. Disclosure under FOIA is not equivalent to receiving an actual copy of a PSP report. Plaintiff Drivers allege that FMCSA officially disclaims the accuracy and completeness of FOIA reports from the MCMIS database. Complaint at ¶ 45. The relative benefit of FOIA reports over PSP reports is a fact issue inappropriate for resolution here. In this context, Defendants' argument is wholly immaterial that Plaintiff Drivers voluntarily incurred the $10 fee. Regardless of whether a driver could secure some questionable representation of his record through FOIA, or whether the driver would have independent knowledge that he had gotten a speeding ticket, he would still need to secure his PSP report to be informed as to the precise information a motor carrier employer would view in considering the driver for a job. FMCSA characterizes its $10.00 fee to drivers as a "nominal charge." Def. Br. at 21. In fact, under FMCSA regulations none of the Plaintiff Drivers would have been required to pay more than 40¢ for their reports. 49 C.F.R. § 10.75(a). That could be considered a nominal charge. But a 25x multiple of the charge authorized by FMCSA's own regulation is not. The $10 fee required to obtain the PSP report is an out-of-pocket expense which qualifies as pecuniary harm sufficient to state a claim under the Privacy Act.

Plaintiffs have alleged facts from which this Court may draw a reasonable inference of pecuniary loss necessary to state a claim under the Privacy Act.

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and (6), FRCP, should be denied in its entirety.

Respectfully submitted,

DATE: December 2, 2014

/s/ *Paul D. Cullen, Sr.*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing will be filed through the electronic filing system of the Court, which system will serve electronically all counsel of record, on this 2nd day of December 2014.

/s/ *Paul D. Cullen, Sr.*
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