

APPENDIX

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APPENDIX A

OPINION OF THE U.S. COURT OF APPEALS FOR
THE SECOND CIRCUIT

United States Court of Appeals,
Second Circuit

DETRINA SOLOMON, on behalf of herself and all
others similarly situated, Plaintiff-Appellant,

v.

FLIPPS MEDIA, INC., dba FITE, dba FITE TV,
Defendant-Appellee.

Docket No. 23-7597-cv

August Term 2023

Argued: May 13, 2024

Decided: May 1, 2025

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF NEW YORK

Before: RAGGI, CHIN, and NARDINI, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Azrack, *J.*), dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), plaintiff-appellant's complaint alleging violations of the Video Privacy Protection Act, 18 U.S.C. § 2710, and denying her

leave to amend. Defendant-appellee—a video streaming platform—disclosed certain information about plaintiff-appellant’s streaming history to Facebook, Inc. (now Meta Platforms, Inc). Because plaintiff-appellant failed to plausibly allege an impermissible disclosure of her “personally identifiable information” under the statute, we conclude that the district court correctly dismissed her claims and denied leave to amend.

Attorneys and Law Firms

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Opinion

Chin, Circuit Judge:

In 1987, a newspaper published an article that identified 146 films that a Supreme Court nominee and his family had rented from a local video store. Although the rental information disclosed in the article was “not at all salacious,”¹ the invasion of privacy prompted Congress to enact the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (the “VPPA”), to protect the privacy of consumers who rented or purchased “video cassette tapes” and “similar audio visual materials.” 18 U.S.C. § 2710(a)(4).

¹ Elizabeth Gemdjian, *The Extraordinary Extension of the Video Privacy Protection Act: Why the “Ordinary Course of Business” of an Analog Era is Anything but Ordinary in the Digital World*, 90 Brook. L. Rev. 553, 558 (2025).

In this case, plaintiff-appellant Detrina Solomon, a subscriber to a digital video streaming service, contends that her rights under the VPPA were violated when the service, operated by defendant-appellee Flipps Media, Inc., dba FITE, dba FITE TV (“FITE”),² sent certain information to Facebook, Inc. (“Facebook”)³ each time she streamed a video. The information consisted of (1) a sequence of characters, letters, and numbers that, if correctly interpreted, would identify the title and URL (uniform resource locator, or web address) of the video, and (2) her “Facebook ID” (“FID”), a unique sequence of numbers linked to her Facebook profile.

The district court granted FITE’s motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, holding that Solomon did not plausibly allege that FITE disclosed her “personally identifiable information” as prohibited by the VPPA. *Solomon v. Flipps Media, Inc.*, No. 22CV5508, 2023 WL 6390055, at *2-3 (E.D.N.Y. Sept. 30, 2023).⁴ The district court also denied Solomon’s request for leave to amend because Solomon sought to amend only with “a footnote on the final page of her brief” and had “multiple opportunities to propose amendments” but “simply elected not to do so.” *Id.* at *5-6.

We agree in both respects and, accordingly, we affirm.

STATEMENT OF THE CASE

I. Statutory Background

² FITE has been rebranded as Triller TV.

³ Facebook has been rebranded as Meta Platforms, Inc.

⁴ The district court also held that Solomon did not plausibly allege that she accessed prerecorded videos as required under the VPPA. We need not and do not reach this issue.

The VPPA was enacted to “preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials.” S. Rep. No. 100-599, at 1 (1988) (Judiciary Committee); *see Wilson v. Triller, Inc.*, 598 F. Supp. 3d 82, 90 (S.D.N.Y. 2022). To that end, it provides that:

[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person

....

To state a claim under the VPPA, a plaintiff must plausibly allege that (1) a video tape service provider (2) knowingly disclosed to any person (3) personally identifiable information concerning her use of the service. *See* 18 U.S.C. § 2710(b)(1); *In re Nickelodeon*, 827 F.3d at 279. Violators are subject to awards of actual damages (no less than \$2,500), punitive damages, attorneys’ fees and costs, and equitable relief. 18 U.S.C. § 2710(c)(2).

The VPPA defines several key terms:

(1) the term “consumer” means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

...

(3) the term “personally identifiable information” includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and

(4) the term “video tape service provider” means any person, engaged in the business, in

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or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

18 U.S.C. § 2710(a)(1), (3), (4).

The VPPA does not ban all disclosure of personally identifiable information. A video tape service provider may disclose personally identifiable information in six circumstances: (1) to the consumers themselves; (2) to any person with the informed written consent of the consumer; (3) to a law enforcement agency pursuant to a valid warrant, subpoena, or court order; (4) to any person if the disclosure is solely of the names and addresses of consumers and if the video tape service provider has provided the consumer with the opportunity to *45 prohibit such disclosure; (5) if the disclosure is incident to the ordinary course of business of the video tape service provider; and (6) pursuant to a court order in a civil proceeding, upon a compelling showing of need and after the consumer is given reasonable notice and an opportunity to contest the claim. *See* 18 U.S.C. § 2710(b)(2)(A)-(F); S. Rep. No. 100-599, at 12-15.

In recent years, the VPPA has generated extensive litigation, as numerous class actions have been filed against a wide variety of entities alleging that they impermissibly disclosed to third parties the personally

identifiable information and video-viewing histories of their consumers.⁵

II. The Facts⁶

FITE is a digital streaming company that provides subscribers with an array of sports, entertainment, and music video content through its website and applications. It offers video content, pay-per-view events, and live streaming events.

Facebook is an unrelated third party that, among other things, creates and sells products such as the Facebook Pixel (the “Pixel” to operators of websites.⁷ The Pixel is a

⁵ See Gemdjian, *supra* note 1, at 553 (including such entities as the “AARP, Hulu, General Mills, the NBA, PBS”); Ryan Joe & Lara O’Reilly, *A Blockbuster-Era Video Law Is Being Used to Ding Big-Name Brands Like General Mills, Geico, and Chick-Fil-A With Privacy Lawsuits*, Bus. Insider (Sept. 7, 2023, 12:23 PM), <https://www.businessinsider.com/vppa-privacy-legal-threat-major-brands-2023-9> [<https://perma.cc/DU3K-SQJX>]; Eriq Gardner, *How Entertainment Companies Are Fighting Lawsuits over Disclosures of Who’s Watching*, Hollywood Rep. (Oct. 21, 2014, 1:18 PM), <https://www.hollywoodreporter.com/business/business-news/how-entertainment-companies-are-fighting-742131/> [<https://perma.cc/K55P-GMEK>].

⁶ The facts are drawn from Solomon’s complaint (the “Complaint”), which we construe liberally, accepting all factual allegations as true, and drawing all reasonable inferences in Solomon’s favor. *Herrera v. Comme des Garçons, Ltd.*, 84 F.4th 110, 113 (2d Cir. 2023) (quoting *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 121 (2d Cir. 2020)).

⁷ Although the VPPA applies to “consumers” of “video tape service providers,” the parties do not dispute on appeal that Solomon fits within the definition of “consumer” and FITE fits within the definition of a “video tape service provider.” See *Salazar v. Nat’l Basketball Ass’n*, 118 F.4th 533, 545 (2d Cir. 2024). FITE does, however, argue

“unique string of code” that can be used to collect information about subscribers’ interactions on websites. Joint App’x 17 ¶ 50. In other words, the Pixel is a tool that can be used to relay certain information to websites about the websites’ consumers, including whether consumers initiate purchases, what items they view, and the content consumers access on a particular webpage.

“PageView” is an optional feature that allows the Pixel to capture the URL and title of each video that a user accesses on a provider’s website, along with that user’s FID, which identifies the individual more precisely than a name or email address. A user’s FID is associated with a small text file that stores information, also known as a Facebook “c_user cookie” or “cookie.” Because these c_user cookies are created and placed by Facebook on the Facebook users’ browsers, only Facebook’s servers can access them.

During the installation process, FITE configured the Pixel on its website to include PageView. Since the implementation of the Pixel, every time a FITE consumer accesses a video on a FITE application or website, FITE, through the Pixel’s PageView, sends Facebook certain information about the user and her viewing history. The following is an “exemplar screenshot” depicting the transmission that FITE sends Facebook via the Pixel’s PageView.

on alternate grounds that Solomon does not plausibly allege a “disclosure” within the meaning of the VPPA. But in light of our holding that Solomon does not plausibly allege that the disclosed information constitutes personally identifiable information, we do not address the merits of FITE’s alternative argument.

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[illegible]

Joint App'x at 20.

The underlined code following the word GET (also known as a GET request) in Box A is generated when a hypothetical user requests a certain video on FITE’s website. Within the GET request in Box A, the string of characters includes the specific title of the video that the user accesses. In Box B (which starts in the lower right and continues in the lower left), the phrase “c_user=” is followed on the next line by a partially redacted string of numbers—the user’s FID.

The Pixel relays this information to Facebook regardless of whether the site's users are logged onto Facebook and even after they clear their browser histories. Facebook then uses this information to build detailed profiles about FITE's consumers, which enables FITE to present those same consumers with targeted advertisements. FITE does not disclose or discuss the Pixel specifically in its Terms of Use, Privacy Policy, or any other material provided to subscribers, nor does FITE provide an opportunity for its consumers to decline or withdraw consent to FITE's use of the Pixel.

Entering “facebook.com/[an individual’s FID]” into any web browser provides access to a specific individual’s

Facebook profile. This basic method of accessing a person's Facebook profile is "generally and widely known among the public." Joint App'x at 10, 21.

Solomon was a Facebook user and subscriber of FITE's TrillerVerzPass digital video streaming service during the two years before the Complaint was filed in 2022. The Complaint uses a hypothetical Facebook profile to illustrate Solomon's claims but does not depict Solomon's personal Facebook profile or specify any identifiable information that exists in her profile.

III. Proceedings Below

On September 14, 2022, Solomon brought this consumer privacy class action on behalf of subscribers and purchasers of FITE's video streaming services who (1) obtained specific video materials from FITE's website and applications, and (2) had a Facebook account during the time that FITE used the Facebook Pixel.⁸ The Complaint alleged that FITE violated the VPPA by disclosing its users' personally identifiable information to Facebook, an unrelated third party, and sought statutory damages of \$2,500 per violation.

On November 14, 2022, FITE submitted to the district court a pre-motion letter identifying numerous purported defects in the Complaint, including that the Complaint did not identify what information on Solomon's Facebook page would lead anyone to connect data in the alleged transmissions to her. Solomon did not offer to amend the

⁸ Although the Pixel was first introduced in 2013, Solomon does not specifically allege when FITE began using the Pixel. Solomon does, however, purport to be a consumer of FITE during the two years before this action was filed and defines the class period in the Complaint as "from September 14, 2020 to the present." Joint App'x at 28-29.

Complaint upon receipt of FITE's pre-motion letter, nor did she amend of right as permitted under Fed. R. Civ. P. 15(a).

On February 7, 2023, FITE moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). Solomon filed a memorandum in opposition the same day. In a footnote, she noted that "[she] should be granted leave to amend the Complaint to remedy any perceived deficiencies." Joint App'x at 94.

On September 30, 2023, the district court granted FITE's motion to dismiss and denied Solomon leave to amend. *Solomon*, 2023 U.S. Dist. LEXIS 176480, 2023 WL 6390055, at *1, *6. The district court held that Solomon did not plausibly allege that her public Facebook profile page contained personally identifiable information or that Solomon accessed prerecorded videos within the meaning of the VPPA. *Id.* at *2-5. The district court also denied Solomon's request for leave to amend the Complaint because she had addressed the issue only in "a conclusory footnote" and had failed to take advantage of "multiple opportunities to propose amendments." *Id.* at *6. The district court entered judgment in favor of FITE on October 3, 2023.

This appeal followed.

DISCUSSION

Two issues are presented: first, whether the district court erred in holding that the Complaint failed to plausibly allege that FITE disclosed "personally identifiable information" to Facebook in violation of the VPPA, and, second, whether the district court abused its discretion in denying Solomon leave to amend the Complaint.

We review a district court’s grant of a motion to dismiss pursuant to Rule 12(b)(6) “*de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff.” *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144, 150 (2d Cir. 2024) (quoting *Melendez v. Sirius XM Radio, Inc.*, 50 F.4th 294, 298 (2d Cir. 2022)). “We review a district court’s denial of leave to amend for abuse of discretion, unless the denial was based on an interpretation of law, such as futility, in which case we review the legal conclusion *de novo*.” *Carroll v. Trump*, 88 F.4th 418, 430 (2d Cir. 2023) (quoting *Empire Merchs., LLC v. Reliable Churchill LLP*, 902 F.3d 132, 139 (2d Cir. 2018)).

I. The Motion to Dismiss

The principal question, with respect to the first issue, is what constitutes “personally identifiable information” for purposes of the VPPA. It is undisputed that FITE is a video service provider that knowingly disclosed certain information about Solomon to Facebook—namely, computer code that denoted the titles and URLs of the videos Solomon accessed and her FID. If that information constitutes “personally identifiable information,” then Solomon would have plausibly alleged a violation of the VPPA.

A. Applicable Law

The VPPA does not specifically define “personally identifiable information,” providing only that it “includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.” 18 U.S.C. § 2710(a)(3). Courts across the country, including lower courts in this circuit, have observed that the VPPA is “not well drafted,” *Wilson*, 598 F. Supp. 3d at 90 (quoting *Sterk v.*

Redbox Automated Retail, LLC, 672 F.3d 535, 538 (7th Cir. 2012)), and that its definition of personally identifiable information is “oblique[]” and not “clear,” *id.*; *see also In re Nickelodeon*, 827 F.3d at 281 (“As we shall see, what counts as personally identifiable information under the Act is not entirely clear.”); *Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 486 (1st Cir. 2016) (“The statutory term ‘personally identifiable information’ is awkward and unclear.”); Gemdjian, *supra* note 1, at 561 (“Of the VPPA’s key terms, the most ink has probably been spilled over the question of what constitutes [personally identifiable information].”).⁹

This Court has not defined personally identifiable information beyond the statutory definition,¹⁰ but other circuits have provided further explanation. The First, Third, and Ninth Circuits have held that personally identifiable information constitutes more than just information that identifies an individual, but also information that can be *used* to identify an individual. *See Yershov*, 820 F.3d at 485-86; *In re Nickelodeon*, 827 F.3d

⁹ *See also* Marc Chase McAllister, *Modernizing the Video Privacy Protection Act*, 25 Geo. Mason L. Rev. 102, 145-46 (2017); Yarden Z. Kakon, Note, “Hello, My Name Is User #101”: *Defining PII Under the VPPA*, 33 Berkeley Tech. L.J. 1251, 1252 (2018); Daniel L. Macioce Jr., Comment, *PII in Context: Video Privacy and a Factor-Based Test for Assessing Personal Information*, 45 Pepp. L. Rev. 331, 401-02 (2018).

¹⁰ In *Salazar*, this Court construed the definition of “subscriber of goods or services” under the VPPA. 118 F.4th at 536. The facts of *Salazar* closely resemble this case, as a plaintiff was also alleging the disclosure of an FID to a third party via the Pixel. But we limited our holding in *Salazar* by noting that “while there may be breathing room in the statute to explore what exactly is ‘personally identifiable information’—we need not and do not explore that argument in this appeal.” *Id.* at 549 n.10.

at 290; *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 984 (9th Cir. 2017). Accordingly, to define personally identifiable information, circuits have endeavored to interpret what information Congress intended to cover as “capable of identifying an individual” under the VPPA. *Eichenberger*, 876 F.3d at 984. Two approaches have emerged: (1) the reasonable foreseeability standard and (2) the ordinary person standard. *Id.* at 985.

1. The Reasonable Foreseeability Standard

The First Circuit established the reasonable foreseeability standard in *Yershov*, holding that personally identifiable information is “not limited to information that explicitly names a person,” but also includes information disclosed to a third party that is “reasonably and foreseeably likely to reveal which . . . videos [the plaintiff] has obtained.” 820 F.3d at 486.

In *Yershov*, the defendant was an international media company that produced news and entertainment media, including the newspaper USA Today and the USA Today Mobile App (the “App”). *Id.* at 484. Every time a user viewed a video clip on the App, the defendant sent to Adobe Systems Incorporated (“Adobe”), an unrelated third party, “(1) the title of the video viewed, (2) the GPS coordinates of the device at the time the video was viewed, and (3) certain identifiers associated with the user’s device, such as its unique Android ID.” *Id.* With the Android ID, Adobe could find other personal information about its customers, such as “the user’s name and address, age and income, ‘household structure,’ and online navigation and transaction history.” *Id.* at 484-85.

The court first held that personally identifiable information includes information that can be used to identify a specific individual. The court reasoned that the

word “includes” in the text of the definition implies that personally identifiable information is not limited to information that explicitly names a person. *Id.* at 486. Indeed, the court cited the Senate Report, which expressly stated that the drafters’ aim was “to establish a minimum, but not exclusive, definition of personally identifiable information.” *Id.* (quoting S. Rep. No. 100-599, at 12 (1988)). Had Congress intended a narrow and simple construction, the court concluded, it would have had no reason “to fashion the more abstract formulation contained in the statute.” *Id.* The court also noted that many types of information, other than a name, can easily identify a person. “Revealing a person’s social security number to the government, for example, plainly identifies the person. Similarly, when a football referee announces a violation by ‘No. 12 on the offense,’ everyone with a game program knows the name of the player who was flagged.” *Id.*

The First Circuit subsequently established the reasonable foreseeability standard as the framework to determine what information can be used to identify an individual under the VPPA. The court concluded that the plaintiff in *Yershov* had plausibly alleged [**15] that the defendant impermissibly disclosed personally identifiable information when it supplied Adobe with information about the videos the plaintiff watched on the App, along with “GPS coordinates of the device at the time the video was viewed,” and “certain identifiers associated with the user’s device.” *Id.* at 484. The court explicitly relied on the allegation that the defendant knew that Adobe had the “game program,” or the mechanism necessary to “allow[] it to link the GPS address and device identifier information to a certain person by name, address, phone number, and more.” *Id.* at 486. The court concluded that

the plaintiff thus plausibly alleged that the defendant violated the VPPA because it was reasonably and foreseeably likely to the defendant that Adobe, a sophisticated technological company, would have the ability to identify the plaintiff's video-watching habits. *Id.*

2. The Ordinary Person Standard

In *In re Nickelodeon*, the Third Circuit took a different approach by holding that “the [VPPA’s] prohibition on the disclosure of personally identifiable information applies only to the kind of information that would readily permit an ordinary person to identify a specific individual’s video-watching behavior.” 827 F.3d at 267.

In that case, the plaintiffs (children under thirteen) brought a putative class action alleging that Viacom disclosed information to Google that effectively revealed the videos they had watched on Nickelodeon’s websites. *Id.* at 279. The plaintiffs argued that static digital identifiers (such as internet protocol (“IP”) addresses, browser fingerprints, and unique device identifiers) were personally identifiable information that enabled Google to link those videos to their real-world identities. *Id.*

The Third Circuit rejected the argument that succeeded in *Yershov* -- that it was reasonably foreseeable that Google, given its business model as a data aggregator, could use the disclosed information to identify the plaintiffs. *Id.* at 289-90. Although the court agreed with the First Circuit on the preliminary issue -- that “Congress’s use of the word ‘includes’ could suggest that Congress intended for future courts to read contemporary norms about privacy into the statute’s original text,” *id.* at 286 -- the court did not believe that “a law from 1988 can be fairly read to incorporate such a contemporary understanding of

Internet privacy,” *id.* at 290. The court reasoned that the plaintiffs’ argument would mean that “the disclosure of an IP address to *any* Internet company with registered users might trigger liability under the [VPPA]” and that “the use of third-party cookies on any website that streams video content [would be] presumptively illegal.” *Id.*

The Third Circuit thus did not adopt *Yershov*’s reasonable foreseeability standard, concluding that the VPPA did not “sweep[] quite so broadly.” *Id.*¹¹ Instead, the court adopted the ordinary person standard—holding that static digital identifiers were not personally identifiable information protected from disclosure by the VPPA because an ordinary person, as opposed to a sophisticated internet company such as Google, could not use the static digital identifiers to identify a specific individual’s video-watching habits. *Id.* at 289-90.

In *Eichenberger*, the Ninth Circuit also adopted the ordinary person standard, concluding that it “better informs video service providers of their obligations under the VPPA.” 876 F.3d at 985. In that case, defendant ESPN produced sports-related news and entertainment programming through its television channel and application, which were available on the Roku digital streaming device. *Id.* at 981. Every time a consumer

¹¹The Third Circuit distinguished *Yershov* as “merely demonstrat[ing] that GPS coordinates contain more power to identify a *specific person* than, in our view, an IP address, a device identifier, or a browser fingerprint.” 827 F.3d at 289. The court further explained: “*Yershov* itself acknowledges that ‘there is certainly a point at which the linkage of information to identity becomes too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable detective work’ to trigger liability under this statute. We believe the information allegedly disclosed here is on that side of the divide.” *Id.* (quoting *Yershov*, 820 F.3d at 486).

watched a video, ESPN knowingly disclosed to Adobe Analytics (“Analytics”) the consumer’s Roku device serial number and the identity of the video that he watched. *Id.* Analytics also obtained email addresses, account information, Facebook profile information, photos, and usernames, from sources other than ESPN. *Id.* Analytics could identify the consumer by connecting both sources of information with other data already in Analytics’ profile of the consumer. *Id.* Analytics then gave that compiled information back to ESPN, which used it to provide advertisers with information about its user demographics. *Id.*

The Ninth Circuit agreed that the word “include” signifies that the definition of personally identifiable information must encompass “more information than that which, by itself, identifies an individual as having watched certain videos.” *Id.* at 984. Instead of just explicitly identifying information, the court reasoned, the statute’s use of the word “identifiable,” where “the suffix ‘able’ means ‘capable of,’” reinforces that the definition of PII also “covers some information that *can be used* to identify an individual.” *Id.* at 979, 984.

The Ninth Circuit declined, however, to adopt *Yershov*’s reasonable foreseeability standard because “the advent of the Internet did not change the disclosing-party focus of the [VPPA].” *Id.* at 985. The court was “not persuaded that the 1988 Congress intended for the VPPA to cover circumstances so different from the ones that motivated its passage.” *Id.*¹² Instead, the court reasoned

¹²The Ninth Circuit explained that although its decision “adopts a different test [it] does not necessarily conflict with *Yershov*” because *Yershov* was narrowly tailored to the disclosure of GPS coordinates,

that the ordinary person standard was more appropriate because the VPPA “views disclosure from the perspective of the disclosing party” and “looks to what information a video service provider discloses, not to what the recipient of that information decides to do with it.” *Id.*

Accordingly, the court held that the plaintiff did not plausibly allege that the information that ESPN disclosed to Analytics constituted personally identifiable information under the ordinary person standard because the information disclosed “cannot identify an individual unless it is combined with other data in [Analytics]’ possession.” *Id.* at 986 (emphasis omitted).

B. Application

Although she did not advocate for a particular standard in the district court, Solomon now argues that this Court should adopt a variation of *Yershov*’s reasonable foreseeability standard and hold that “personally identifiable information under the VPPA encompasses specific information about a consumer, disclosed by a video tape service provider to a particular recipient, that the provider knows the recipient can use to personally identify that consumer.” Brief of Plaintiff-Appellant at 13-14. FITE contends that if this Court reaches the question, we should adopt the Third and Ninth Circuits’ ordinary person standard. Both parties contend that, regardless of the standard to be applied, they should prevail -- Solomon argues that the Complaint states a plausible claim and FITE argues that it does not.

which “would enable *most people* to identify an individual’s home and work addresses.” *Eichenberger*, 876 F.3d at 986 (quoting *Yershov*, 820 F.3d at 486) (alterations adopted).

First, we do reach the question of which standard applies, and we adopt the Third and Ninth Circuits' ordinary person standard. Second, applying that standard, we conclude that the Complaint fails to state a claim for violation of the VPPA.

1. The Applicable Standard

"When interpreting a statutory provision, we begin with the words of the statute." *Soliman v. Subway Franchisee Advert. Fund Tr., LTD.*, 101 F.4th 176, 181 (2d Cir. 2024). If the words are clear, we construe the statute according to their plain meaning. *Id.* If the words are not clear, we may consider legislative history and the tools of statutory construction. *Id.*; accord *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998). We assess plain meaning "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Zepeda-Lopez v. Garland*, 38 F.4th 315, 320 (2d Cir. 2022) (citation omitted).

As an initial matter, and as the parties appear to agree, we conclude that Congress intended the VPPA to cover not just information that, by itself, identifies a consumer's video-viewing history, but also information *capable* of being used to do so. The VPPA states that "the term 'personally identifiable information' includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." 18 U.S.C. § 2710(a)(3). The words "include[]" and "identifiable" suggest that personally identifiable information includes information that *can be used* to identify a person, as well as information that, standing alone, identifies a person. The Senate Report also supports this result, as it states that the drafters' aim

was “to establish a minimum, but not exclusive, definition of personally identifiable information.” S. Rep. No. 100-599, at 12 (1988). The circuit courts that have addressed the issue have reached the same conclusion, even where they disagreed in other respects. *See Eichenberger*, 876 F.3d at 984 (“[P]ersonally identifiable information’ covers some information that *can be used* to identify an individual.”); *Yershov*, 820 F.3d at 486 (“[T]he language reasonably conveys the point that PII is not limited to information that explicitly names a person.”); *In re Nickelodeon*, 827 F.3d at 290 (“Congress’s use of the word ‘includes’ could suggest that Congress intended for future courts to read contemporary norms about privacy into the statute’s original text.”).

In addition, based on the words of the statute, the specific context in which the language is used, and the broader context of the statute as a whole, we conclude that “personally identifiable information” encompasses information that would allow an ordinary person to identify a consumer’s video-watching habits, but not information that only a sophisticated technology company could use to do so.

First, the words of the definition surely can be read to refer to the “kind of information that would readily permit an ordinary person to identify a specific individual’s video-watching behavior.” *In re Nickelodeon*, 827 F.3d at 290. The definition provides that “‘personally identifiable information’ includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider.” 18 U.S.C. § 2710(a)(3). We acknowledge that these words could also be read to encompass computer code and digital identifiers decipherable only by a technologically sophisticated third party. But even though the words are

not without some ambiguity, they are more naturally read as referring to information that would permit an ordinary person to learn another individual's video-watching history.

Second, the specific context in which those words are used suggests that the definition encompasses information that would permit an ordinary person to identify a specific individual's video-watching behavior, as opposed to information that only a technologically sophisticated third party could use to identify specific consumers. The VPPA imposes liability on a "video tape service provider" that "*knowingly* discloses" a consumer's information to a third party. 18 U.S.C. § 2710(b)(1) (emphasis added). "In other words, the statute views disclosure from the perspective of the disclosing party. It looks to what information a video service provider discloses, not to what the recipient of that information decides to do with it." *Eichenberger*, 876 F.3d at 985. It does not make sense that a video tape service provider's liability would turn on circumstances outside of its control and the level of sophistication of the third party. The ordinary person standard is a more suitable framework to determine what constitutes personally identifiable information because it "better informs video service providers of their obligations under the VPPA," while not impermissibly broadening its scope to include the disclosure of technological data to sophisticated third parties. *See id.*; *see also* S. Rep. No. 100-599, at 12 (1988) ("[P]ersonally identifiable information is intended to be transaction-oriented. It is information that identifies a particular person as having engaged in a specific transaction with a video tape service provider.").

Finally, the broader context of the statute as a whole squarely supports the conclusion that liability under the VPPA should be limited to the disclosure of information

that would permit an ordinary person to learn a specific individual's video-watching history. The VPPA was enacted in 1988, when "the Internet had not yet transformed the way that individuals and companies use consumer data -- at least not to the extent that it has today." *Eichenberger*, 876 F.3d at 985; accord *In re Nickelodeon*, 827 F.3d at 284 ("We do not think that, when Congress passed the [VPPA], it intended for the law to cover factual circumstances far removed from those that motivated its passage."); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S. Ct. 2040, 45 L. Ed. 2d 84 (1975) ("When technological change has rendered its literal terms ambiguous, the [statute] must be construed in light of [its] basic purpose.") (interpreting Copyright Act).

The evolution of the VPPA provides additional insights into its purpose. In 2013, some twenty-five years after its inception, Congress amended the VPPA in recognition that "the Internet ha[d] revolutionized the way that American consumers rent and watch movies and television programs." *Salazar*, 118 F.4th at 545 (quoting S. Rep. No. 112-258, at 2 (2012)).¹³ Congress, however, declined to amend the definition of personally identifiable information, even in the face of testimony asking for an expansion of the definition to include IP addresses. See *In re Nickelodeon*, 827 F.3d at 288 ("Despite this recognition [that the Internet has revolutionized the way that Americans rent and watch movies and television programs], Congress did not update the definition of personally identifiable information in the statute.").

¹³ Although Congress did not pass the law until January 2013, it is titled the "Video Privacy Protection Act Amendments Act of 2012." *In re Nickelodeon*, 827 F.3d at 287 n.164.

The decision to not amend the VPPA suggests that Congress believed that the VPPA “serves different purposes, and protects different constituencies, than other, broader privacy laws.” *Id.* This is especially notable when we compare the VPPA to other, later privacy statutes that included a more expansive definition of personally identifiable information or related terms. For example, in 1998, ten years after the VPPA was enacted, Congress passed the Children’s Online Privacy Protection Act (“COPPA”), and defined “personal information” to include:

- (A) a first and last name;
- (B) a home or other physical address . . .;
- (C) an e-mail address;
- (D) a telephone number;
- (E) a Social Security number;
- (F) any other identifier that the [Federal Trade Commission] determines permits the physical or online contacting of a specific individual; or
- (G) information concerning the child or the parents of that child that the website collects online from the child and combines with an identifier described in this paragraph.

15 U.S.C. § 6501(8); *see In re Nickelodeon*, 827 F.3d at 286-87 & n.158. When Congress amended the VPPA in 2013, it could have expanded its definition of “personally identifiable information,” but it did not -- even though it was urged to do so.

We decline to adopt *Yershov*’s reasonable foreseeability standard because it focuses on what a

recipient can or cannot reasonably do when given personal information. 820 F.3d at 486. The “classic example” of the “1988 paradigm” is “a video clerk leaking an individual customer’s video rental history,” and the VPPA was not intended to create liability where a third party is able to “assemble otherwise anonymous pieces of data to unmask the identity of individual [users].” *In re Nickelodeon*, 827 F.3d at 290; *see also Eichenberger*, 876 F.3d at 985 (“‘[P]ersonally identifiable information’ must have the same meaning without regard to its recipient’s capabilities. Holding otherwise would make ‘the lawfulness of a disclosure depend on circumstances outside of a video service provider’s control.’” (quoting *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1066 (9th Cir. 2015) (alterations adopted))).

2. FITE’s Use of the Pixel

Turning to the facts of this case, we consider whether the Complaint plausibly alleges that FITE’s disclosure of Solomon’s FID and video titles “would, with little or no extra effort, permit an ordinary recipient to identify [Solomon’s] video-watching habits.” *In re Nickelodeon*, 827 F.3d at 284. We conclude it does not.

The information transmitted by FITE to Facebook via the Pixel’s PageView is set forth in the “exemplar screenshot” reproduced in the Complaint. *See* page 9 *supra*; Joint App’x at 20. The exemplar depicts some twenty-nine lines of computer code, and the video title is indeed contained in Box A following the GET request. The words of the title, however, are interspersed with many characters, numbers, and letters. It is implausible that an ordinary person would look at the phrase “title% 22% 3A% 22-% E2% 96% B7% 20The% 20Roast% 20of%-20Ric% 20Flair”—particularly if the highlighting in Box A is

removed—and understand it to be a video title.¹⁴ It is also implausible that an ordinary person would understand, “with little or no extra effort,” the highlighted portion to be a video title as opposed to any of the other combinations of words within the code, such as, for example, “% 9C% 93% 20In% 20the% 20last% 20weekend% 20of% 20-July% 2C.” *Id.*; Joint App’x at 20.

Nor does the Complaint plausibly allege that an ordinary person could identify Solomon through her FID. Because the redacted sequence of numbers in the second line of Box B is not labeled, the FID would be just one phrase embedded in many other lines of code. And if the numbers in the exemplar were not redacted, what an individual would see is, for example, a phrase such as “c_user=123456” or “c_user=00000000.” Although a section of the code in Box A does state “[h]ost: www.facebook.com,” it is not plausible that an ordinary person, without the annotation of Box B, would see the “c_user” phrase on FITE’s servers and conclude that the phrase was a person’s FID.

Notably, the Complaint lacks any details about how an ordinary person might access the information on the Pixel’s PageView. But even assuming, *arguendo*, that an ordinary person could somehow gain access to the Pixel’s PageView, the Complaint is also devoid of any details about *how* an ordinary person would use an FID to identify Solomon. The Complaint merely states that entering “facebook.com/[Solomon’s FID]” into any web browser would result in Solomon’s personal Facebook profile, and that “[t]his basic method of accessing a person’s Facebook profile is generally and

¹⁴ This screenshot also shows only a portion of the PageView that the Pixel produces.

widely known among the public.” Joint App’x at 21. *But see In re Nickelodeon*, 827 F.3d at 283 (“To an average person, an IP address or a digital code in a cookie file would likely be of little help in trying to identify an actual person.”). Accordingly, we are not persuaded that an FID is “vastly different,” Appellant Br. at 29, from the unique device identifiers in *Nickelodeon*, 827 F.3d at 262, or the Roku device serial numbers in *Eichenberger*, 876 F.3d at 979.¹⁵

Accordingly, we hold that Solomon failed to plausibly allege that FITE disclosed “personally identifiable information” in violation of the VPPA and we therefore affirm the district court’s dismissal of the Complaint.

II. Leave to Amend

We find no abuse of discretion in the district court’s decision to deny Solomon leave to amend the Complaint. Although FITE sent Solomon a premotion letter advising her of the deficiencies in the Complaint, she waited until her opposition to the motion to dismiss to request leave,

¹⁵ FITE also argues that the Complaint fails to allege any harm suffered by Solomon herself because the exemplar screenshots of code “appear to have been taken from an unidentified person’s web browser,” and Solomon’s demonstrative Facebook profile uses a hypothetical profile rather than her own. Appellee Br. at 8. FITE argues that these generalized claims are insufficient to support a plausible cause of action. *See, e.g., Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (“[E]ven named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.” (internal quotation marks omitted)); *see also In re Nickelodeon*, 827 F.3d at 285 (“[W]e think that legislators’ initial focus on both libraries and video stores indicates that the [VPPA] was meant to prevent disclosures of information capable of identifying an *actual person’s* reading or video-watching habits.”). We do not reach this argument, in light of our holding above.

and she did so only in a single footnote on the final page of her brief, stating that “[i]f the Court grants Defendant’s motion in any respect, Solomon should be granted leave to amend the Complaint to remedy any perceived deficiencies.” Joint App’x at 94 n.4. In denying Solomon leave to amend, the district court observed that Solomon “has had more than ample opportunity to address the deficiencies identified [in the Complaint], but has not identified any proposed amendments.” *Solomon*, 2023 U.S. Dist. LEXIS 176480, 2023 WL 6390055, at *5.

In light of these facts, the district court acted wholly within its discretion in denying leave to amend. *See, e.g., Noto v. 22nd Century Grp., Inc.*, 35 F.4th 95, 107 (2d Cir. 2022) (denial of leave to amend is proper “where the request gives no clue as to how the complaint’s defects would be cured” (internal quotation marks omitted)); *Porat v. Lincoln Towers Cmty. Ass’n*, 464 F.3d 274, 276 (2d Cir. 2006) (holding that the district court did not abuse its discretion in denying leave to amend where the request was made only in a footnote and with no explanation as to how the complaint’s defects would be cured).

Solomon relies on this Court’s decision in *Mandala v. NTT Data, Inc.* to argue that the district court abused its discretion in denying her leave. 88 F.4th 353 (2d Cir. 2023). The reliance is misplaced. In *Mandala*, this Court held that a district court abused its discretion in denying a motion to vacate a judgment of dismissal pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, noting that:

[Mandala] is one of the exceptional cases necessitating relief from judgment: Plaintiffs have yet to be afforded a single opportunity to amend their pleading; the original dismissal of the Complaint was premised on grounds

subject to reasonable, actual, and vigorous debate; Plaintiffs diligently prosecuted their case at all times; and Plaintiffs' proposed amendments address the sole pleading deficiency identified by the district court.

Id. at 365.

Mandala is distinguishable and of no help to Solomon. First, *Mandala* involved a motion to vacate a judgment of dismissal, rather than a request for leave to amend a complaint. Second, the plaintiffs there actually made a motion and did not rely solely on a footnote. Third, the plaintiffs in *Mandala* were not “afforded a single opportunity to amend their pleadings,” *id.*, while here Solomon was put on notice of the deficiencies in the Complaint and had “ample opportunity” to address them. Joint App'x at 124. Finally, we concluded that *Mandala* was “one of the exceptional cases necessitating relief from judgment,” 88 F.4th at 365, and the instant case does not present similar exceptional circumstances.

Accordingly, we hold that the district court did not abuse its discretion in denying Solomon's request for leave to amend the Complaint.

CONCLUSION

For the reasons set forth above, the judgment of the district court is AFFIRMED.

APPENDIX B**MEMORANDUM AND ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK**No. 22-cv-5508 (JMA) (JMW)

AZRACK, United States District Judge:

Plaintiff Detrina Solomon filed this putative class action against Defendant Flipp Media, Inc., alleging that Defendant has violated the Video Privacy Protection Act, 18 U.S.C. § 2710 (the “VPPA”). Plaintiff’s claims are premised on Defendant’s installation and use of a tracking product on its website and apps called the “Pixel.” The Pixel code was developed by and promoted by Facebook, Inc. (“Facebook”). (Compl. ¶ 43.)

The instant suit is one of numerous putative class action suits filed across the country alleging that companies that provide streaming video on the internet have violated the VPPA by installing and using the Pixel.

Presently pending before the Court is Defendant’s motion to dismiss. For the reasons stated below, Defendant’s motion is granted.

I. BACKGROUND

Defendant is a digital streaming company that sells monthly and annual subscriptions to three on-demand video channels, FITE+, TrillerVerzPass, and NWA All Access, which provide streaming video content. (Id. ¶¶ 24, 26.) Defendant “also offers for purchase various stand-alone pay-per-view events, some of which also are included in its subscription channels.” (Id. ¶ 9.)

A subscription to TrillerVerzPass provides access, through Defendant’s website and “app,” to various boxing,

combat, and music events. (Id. ¶ 26.) These events include “hip-hop battles” as well as shows “featuring sporting matches combined with live musical performances.” (Id. ¶ 37; see also id. ¶ 26.) TrillerVerzPass and Defendants’ other channels provide both “live and on-demand video content.” (Id. ¶ 2.)

Plaintiff had a paid subscription to TrillerVerzPass during the past two years. (Id. ¶ 9.) Plaintiff has had a Facebook account since 2009.

Each Facebook has a unique Facebook ID (“FID”), which is a unique sequence of numbers linked to an individual’s Facebook profile.” (Id. ¶¶ 6-7.) “Entering ‘facebook.com/[FID]’ into any web browser returns the Facebook profile of the specific individual.” (Id. ¶ 7; see id. ¶ 62.)

Plaintiff alleges that the Pixel installed by Defendant on its site sends certain information to Facebook, which she contends violates the VPPA. Specifically, Plaintiff alleges the Pixel Defendant installed sends to Facebook: (1) a subscriber’s unique Facebook ID (“FID”); and (2) the titles and URLs for specific videos that the subscriber accessed on Defendant’s website. (Id. ¶¶ 57-73.) Plaintiff maintains that the disclosure of this information violates the VPPA.

II. DISCUSSION

A. Motion to Dismiss Standard

To survive a motion to dismiss brought under Rule 12(b)(6), “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) (quoting Bell Atl. Corp. 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. (citing Twombly, 550 U.S. at 556). Although a court must accept all factual allegations in the complaint as true, it is “not bound to accept as true a legal conclusion couched as a factual allegation.” Twombly, 550 U.S. at 555. Ultimately, if the plaintiff’s allegations “have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” Id. at 570.

B. The VPPA

Congress passed the VPPA in 1988 after a newspaper obtained and published a list of then-Supreme Court nominee Robert Bork’s video rental history from a video store. Wilson v. Triller, Inc., 598 F. Supp. 3d 82, 90 (S.D.N.Y. 2022). In response to this incident, Congress enacted the VPPA, “with the goal, according to the Senate Report, of “preserv[ing] personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials.” Id. (quoting Sen. Rep. No. 100-599, at 1).

“[T]o plead a plausible claim under section 2710(b)(1) [of the VPPA], a plaintiff must allege that (1) a defendant is a ‘video tape service provider,’ (2) the defendant disclosed ‘personally identifiable information concerning any customer’ to ‘any person,’ (3) the disclosure was made knowingly, and (4) the disclosure was not authorized by section 2710(b)(2).” Walker v. Meta Platforms, Inc., No. 22-CV-02442, 2023 U.S. Dist. LEXIS 93111, 2023 WL 3607282, at *4 (N.D. Cal. Mar. 3, 2023) (quoting Mollett v. Netflix, Inc., 795 F.3d 1062, 1066 (9th Cir. 2015)).

Plaintiff alleges that Defendant violated the VPPA because the Pixel it installed and used sends to Facebook

certain information including: (1) a subscriber's FID; and (2) the titles and URLs for specific videos that the subscriber accessed on Defendant's website. (*Id.* ¶¶ 57-73.)

In its motion to dismiss, Defendant argues, *inter alia*, that Plaintiff has not alleged a plausible VPPA claim because: (1) she has not identified what, if any, personal information, is contained on her public Facebook profile page; and (2) only "prerecorded" content is covered by the VPPA and Plaintiff has not alleged she accessed any "prerecorded", as opposed to "live," videos.

In the past year, courts across the country have decided motions to dismiss raising similar arguments about companies' use of the Pixel and other technologies that can disclose information about a user to third parties. Since the parties have filed the motion papers in this case, they have each filed letters addressing recent decisions in this area.

C. Analysis

1. Plaintiff Has Not Plausibly Alleged that Defendant Disclosed "Personally Identifiable Information"

To pursue a VPPA claim, Plaintiff must plausibly allege that Defendant "knowingly disclose[d], to any person, [her] personally identifiable information." 18 U.S.C. § 2710(b). Under the VPPA, the term "personally identifiable information" ("PII") "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." *Id.* § 2710(a)(3).

While the Second Circuit has not further defined PII, other Courts of Appeals have adopted different standards

for determining what constitutes PII. See Wilson v. Triller, Inc., 598 F. Supp. 3d 82, 90-91 (S.D.N.Y. 2022). The Court finds persuasive the standard that has been adopted by the Third and Ninth Circuits—namely, that the “prohibition on the disclosure of personally identifiable information applies only to the kind of information that would readily permit an ordinary person to identify a specific individual’s video-watching behavior.” In re Nickelodeon Consumer Priv. Litig., 827 F.3d 262, 267 (3d Cir. 2016); see also Eichenberger v. ESPN, Inc., 876 F.3d 979, 985 (9th Cir. 2017).

Plaintiff alleges—and Defendant does not dispute—that knowledge of Plaintiff’s FID would allow an ordinary person to access Plaintiff’s Facebook public profile page. Defendant, however, argues that the fact that mere fact that Plaintiff’s FID was disclosed along with the video titles she accessed is, standing alone, insufficient because Plaintiff has not identified any personal information that can be seen on her public Facebook profile. Under Defendant’s logic, absent this additional information, it cannot be said that the FID would identify Plaintiff as the person who accessed the videos at issue.

The complaint does not say anything about the information or photos found on Plaintiff’s public Facebook profile page. Instead, the complaint merely alleges that an “FID allows any ordinary person to quickly and easily use an unencrypted FID to locate, access, and view a particular user’s Facebook profile, and all of the detailed and personal information contained in it.” (Compl. ¶ 7.) The complaint includes an exemplar screenshot of Mark Zuckerberg’s Facebook page, which includes his name, photographs of him, and other personal information. (Id. ¶ 63.) Plaintiff maintains that it is not

necessary for her to allege anything further in order to state a plausible claim that her PII was disclosed.

Under the “ordinary person” standard articulated by the Third and Ninth Circuits, district courts have reached different conclusions on the question of whether an FID (along with the names of the videos that were accessed), standing alone, constitutes PII or whether a plaintiff must allege more to state a plausible VPPA claim. Compare Ghanaat v. Numerade Labs, Inc., No. 23-CV-00833, 2023 U.S. Dist. LEXIS 157378, 2023 WL 5738391, at *4 (N.D. Cal. Aug. 28, 2023) with Golden v. NBCUniversal Media, LLC, No. 22-CV-9858, 2023 U.S. Dist. LEXIS 150622, 2023 WL 5434378, at *6 (S.D.N.Y. Aug. 23, 2023) (collecting cases and concluding that an FID constitutes PII). In Ghanaat, the court explained that:

[An] FID can constitute PII where it leads to a Facebook page that discloses personal and identifying information about the consumer.

Here, plaintiffs’ allegations are inadequate because they do not allege their Facebook pages contain any personal information, such as their names or email addresses. Accordingly, the complaint does not adequately allege that their FIDs result in the sharing of any personal information. Plaintiffs thus fail to allege this element of their claim or state an injury.

2023 U.S. Dist. LEXIS 157378, 2023 WL 5738391, at *4; see also Wilson, 598 F. Supp. 3d at 92 (dismissing VPPA claim involving the social media app Triller because although the “complaint alleges what sort of information could be included on a user’s profile and then ultimately disclosed to the third parties, it contains no allegation as

to what information was actually included on [the plaintiff's] profile nor how that information could be used by a third party to identify [plaintiff]"); cf. Feldman v. Star Trib. Media Co. LLC, No. 22-CV-1731, 2023 U.S. Dist. LEXIS 37416, 2023 WL 2388381, at *8-10 (D. Minn. Mar. 7, 2023) (denying motion to dismiss where complaint alleged that the plaintiff's "Facebook profile and his email address contain his name,' making it feasible to identify [him] by reference to this information.").

The Court finds the reasoning in Ghanaat persuasive and adopts it here. Accordingly, Plaintiff needed to allege that her public Facebook profile page contained identifying information about her in order [*9] to state a plausible claim.¹ As her complaint says nothing about any personal information on her public Facebook profile page, her VPPA claim fails.

2. Plaintiff Has Failed to Plausibly Allege that She Accessed "Prerecorded" Videos

Under the VPPA, a defendant qualifies as a "video tape service provider" if the defendant is "engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." 18 U.S.C. § 2710(a)(4) (emphasis added). And, as noted above, under the VPPA, PII "includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." Id. § 2710(a)(3).

¹ Ghanaat did not explicitly address whether a plaintiff's public Facebook profile page must have contained the requisite personal information at the time the allegedly unlawful disclosure was made. While such a showing would seem necessary, the Court does not need to decide that question here.

“[C]ourts have uniformly declined to interpret ‘similar audio visual materials’ as covering ‘live’ video content broadcast over the internet.” Walker v. Meta Platforms, Inc., No. 22-CV-02442, 2023 U.S. Dist. LEXIS 93111, 2023 WL 3607282, at *5 (N.D. Cal. Mar. 3, 2023). Therefore, VPPA claims only apply to “prerecorded” video content and do not cover “live” video content. See 2023 U.S. Dist. LEXIS 93111, [WL] at *4-8; see also Stark v. Patreon, Inc., 635 F. Supp. 3d 841, 851 (N.D. Cal. 2022); Louth v. NFL Enter. LLC, No. 21-CV-405, 2022 U.S. Dist. LEXIS 163706, 2022 WL 4130866, at *4 (D.R.I. Sept. 12, 2022). Thus, to state a viable VPPA claim, Plaintiff must plausibly allege that she accessed “prerecorded” video content and that Defendant disclosed identifying information about those prerecorded videos.

Defendant asserts that Plaintiff’s claim fails because she has not plausibly alleged that she accessed any prerecorded video on Defendant’s site. Plaintiff does not dispute that the VPPA applies only to “prerecorded” video and is inapplicable to “live” video. Instead, she contends that any purportedly “live” video streams on Defendant’s service technically still qualify as “prerecorded” and, thus, are covered by the VPPA. Plaintiff also maintains that the factual allegations in her complaint are sufficient to plausibly allege that she accessed other, indisputably, prerecorded video on Defendant’s site.

The Court concludes that Plaintiff’s complaint fails to plausibly allege that she accessed any “prerecorded” video on Defendant’s site.

First, Plaintiff’s brief asserts, in a footnote, that the video streams billed as “live” on Defendant’s site are technically “prerecorded.” Plaintiff has waived this argument by advancing it only in a footnote. This

argument also fails on the merits. Plaintiff's complaint alleges:

Defendant provides pre-recorded content via its online streaming services, whether or not the content is billed as "live." For "live" streaming events, video of the event is first recorded as a video file (such as in a standard RAW file format). That video file is then delivered to an encoder to convert the video into a smaller, streamable file. The smaller, streamable video files are then transmitted via the Internet to individual devices for viewing, such that end users of Defendant's website always view pre-recorded content.

(Compl. ¶ 40.) This allegation is insufficient to plausibly allege that this "live" content actually qualifies as "prerecorded" for purposes of the VPPA. Notably, a similar argument was rejected in Walker, which explained:

[Walker] contends that live streamed video content on Facebook Live counts as "prerecorded" and, therefore, falls within the scope of "similar audio visual materials." . . . Walker argues that "Meriam-Webster dictionary defines 'prerecorded' as something 'recorded in advance,'" and Facebook Live content fits that definition because the technical process that Meta employs to live stream video involves "taking data input from users, writing that data onto its physical servers, reading that data, and only then delivering that data to end users." . . . Walker contends that the fact that this technical

process results in the transmission [*12] of video content on a near-contemporaneous basis relative to its production does not change the fact that the process involves the “recording” of the video data on Meta’s servers and the “rebroadcasting” of the recorded video data to viewers via Facebook Live.

The Court is not persuaded. Even under Walker’s proposed definition of “prerecorded” (i.e., “recorded in advance”), live streamed video content would not qualify as prerecorded. Walker’s allegations raise the inference that, during a Facebook Live broadcast, the video content is broken down into pieces, which are recorded onto Meta’s servers and then transmitted to the viewer in a continuous stream that results in the viewer being able to view the video content at the same time or nearly at the same time as it is being generated. . . . “Recording” the video content on Meta’s servers in the course of transmitting the content is not the same as “prerecording” the video content, in advance of its transmission. Further, it appears that at least some forms of broadcasting live television may employ a technical process for transmitting the video content that is analogous to the process that Meta allegedly employs for transmitting live [*13] video content via Facebook Live, yet Walker has cited no case in which a court has held that live television broadcasts count as “prerecorded” or are otherwise covered under the VPPA. Accordingly, the Court declines to

interpret “prerecorded” and the VPPA in the manner that Walker proposes.

Walker, 2023 U.S. Dist. LEXIS 93111, 2023 WL 3607282, at *7 (emphasis in original). Similarly, the Court concludes that here, Solomon has not plausibly alleged that the content that is advertised as “live” on Defendant’s site actually qualifies as “pre-recorded” for purposes of the VPPA.

Plaintiff also insists that she has plausibly alleged that she accessed other indisputably “prerecorded” video on Defendant’s site. Plaintiff, however, never explicitly alleges that she actually accessed such “prerecorded” video on Defendant’s site. Instead, Plaintiff’s brief pieces together a hodgepodge of various factual allegations that she asserts are sufficient to plausibly suggest that she accessed “prerecorded” video. (Pl. Mem. at 16.) The Court finds that these allegations are insufficient—particularly given the preference of many viewers to watch sporting events “live”—to plausibly allege that Plaintiff actually accessed any “prerecorded” video.²

3. Leave to Amend

In a footnote on the final page of her brief, Plaintiff asks for leave to amend in the event Defendant’s motion is granted so that Plaintiff can “remedy any perceived deficiencies.” (Pl. Mem. at 18.) The Court denies Plaintiff’s request for leave to amend. See Gregory v. ProNAi Therapeutics Inc., 757 F. App’x 35, 39 (2d Cir. 2018) (affirming denial of leave to amend where, *inter alia*, “plaintiffs sought leave to amend in a footnote at the end

² Defendant also advances other arguments in its motion to dismiss. In light of the dismissal of Plaintiff’s complaint on the grounds above, the Court declines to reach these additional arguments.

of their opposition to defendants' motion to dismiss," but "they included no proposed amendments"). Plaintiff has had more than ample opportunity to address the deficiencies identified above, but has not identified any proposed amendments. Notably, prior to briefing the motion to dismiss, Defendant filed a pre-motion conference letter, which asserted that Plaintiff's complaint was deficient because: (1) it failed to identify what, if any personal information, her Facebook profile contained; and (2) live events are not covered by the VPPA. On the former point, Defendant's pre-motion letter explained, at length, that:

Plaintiff has not alleged that FITE disclosed her PII because the Complaint contains no information about what personal information her Facebook profile contains that would allow an ordinary person to connect the data in the alleged transmissions to her. Plaintiff does not allege that FITE shared her name, address, social security number, or any other specific information about her; she alleges that FITE sent Facebook the titles and URLs of videos she watched, together with her numeric FID. The Complaint contains an "exemplar Facebook profile" for Mark Zuckerberg and nakedly states that anyone with Plaintiff's FID could pull up her public Facebook profile, but is silent about what, if any, personal information is on her profile. The lack of any allegation about what information can be gleaned from her public Facebook profile dooms her claim. See Wilson v. Triller, Inc., No. 21-cv-11228, 598 F. Supp. 3d 82, 2022 WL 1138073, *6 (S.D.N.Y. April 18, 2022)[.]

(ECF No. 17.)

In response to this letter, Plaintiff did not offer to amend her complaint and instead asserted:

FITE argues in error that Plaintiff “has not alleged that FITE disclosed her PII” because she has not alleged what specific information was available on her Facebook profile. Plaintiff’s claim under the VPPA is not based upon the disclosure of any detailed information available on Plaintiff’s (or class members’) Facebook profile, but rather upon FITE’s disclosure of the individual unique FIDs themselves, along with users’ specific video viewing activity. Plaintiff has alleged that an FID is a unique, personal identifier that every Facebook user — including herself and every other class member — possesses. That is sufficient for a claim under the VPPA; Plaintiff was not required to reveal her specific FID number at the pleading stage. And whatever additional personal information may or may not be accessible from her or any other class members’ Facebook profile is irrelevant. See Stark v. Patreon, Inc., 635 F. Supp. 3d 841, 2022 WL 7652166, at *8 (N.D. Cal. Oct. 13, 2022)[.]

(ECF No. 20.)

During the subsequent briefing of the motion to dismiss, Plaintiff elected to address leave to amend in a conclusory footnote. Moreover, since the motion to dismiss was briefed, the parties filed numerous letters discussing recent decisions involving VPPA claims, including the Walker decision cited above.

Plaintiff has had multiple opportunities to propose amendments that would address the content of her public Facebook profile page and any prerecorded video she accessed. Cf. Feldman, 2023 U.S. Dist. LEXIS 37416, 2023 WL 2388381, at *8-10 (denying motion to dismiss where the complaint alleged that the plaintiff's "Facebook profile and his email address contain his name,' making it feasible to identify [him] by reference to this information"). However, even though such information should be readily accessible to her, she has simply elected not to do so. Given all the circumstances here, the Court denies leave to amend.

III. CONCLUSION

For the reasons set forth above, the Court GRANTS Defendant's motion to dismiss and DENIES Plaintiff leave to amend. The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: September 30, 2023

Central Islip, New York

/s/ (JMA)

JOAN M. AZRACK, UNITED STATES DISTRICT
JUDGE

APPENDIX C
SECOND CIRCUIT ORDER DENYING
REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of July, two thousand twenty-five.

DETRINA SOLOMON, on behalf of herself and all others similarly situated, Plaintiff-Appellant,

v.

FLIPPS MEDIA, INC., dba FITE, dba FITE TV,
Defendant-Appellee.

ORDER

Docket No. 23-7597

Appellant, Detrina Solomon, has filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

44a

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

The seal of the United States Second Circuit Court of Appeals is a circular emblem. It features a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside this ring is a blue circle containing the words "SECOND CIRCUIT" in white, flanked by two white stars.

45a

APPENDIX D
COMPLAINT

*In the United States District Court for the Eastern
District of New York*

DETRINA SOLOMON, on behalf of herself and all
others similarly situated, Plaintiff,

v.

FLIPPS MEDIA, INC., dba FITE, dba FITE TV,
Defendant.

Case No. ____

CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

Plaintiff Detrina Solomon (“Plaintiff”), on behalf of herself and all other persons similarly situated, brings this action against Defendant Flipps Media, Inc. doing business as FITE and FITE TV (“FITE” or “Defendant”). Plaintiff makes these allegations on personal knowledge as to herself and upon information and belief as to all other matters.

NATURE OF THE ACTION

1. Plaintiff brings this consumer privacy class action on behalf of subscribers to FITE’s video streaming services and purchasers of FITE’s pay-per-view events who obtained specific video materials from its website and

applications and had a Facebook account during the time FITE used Facebook Pixel. FITE's systematic practice of knowingly disclosing its subscribers' and purchasers' personally identifiable information ("PII") to third-party Facebook, Inc. (now known as Meta Platforms, Inc.) without their informed, written consent violates the Video Privacy Protection Act, 18 U.S.C. § 2710 ("VPPA" or "Act").

2. FITE is a digital streaming company that provides subscribers to its FITE+, TrillerVerzPass, and NWA All Access channels and purchasers of its stand-alone pay-per-view events with a vast array of live and on-demand video content in the sports, entertainment, and music arenas on its website and app.

3. Congress enacted the VPPA in 1988 to give consumers "control over personal information divulged" in exchange for "services from video tape service providers," S. Rep. No. 100- 599, at 8, by prohibiting these providers from "knowingly disclosing" "personally identifiable information concerning any consumer." This includes "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider," without the consumer's specific and informed prior written consent. Defendant violated each element of this Act.

4. Plaintiff and the other members of the Class (defined below) are "consumers" because they are paid subscribers to at least one of FITE's websites or purchased at least one pay-per-view event from FITE. And Defendant is a "video tape service provider" because it operates a digital video streaming subscription service that provides its subscribers and purchasers with access to video content through its websites and applications.

5. Defendant knowingly discloses its subscribers' and purchasers' "personally identifiable information" ("PII") to Facebook through its use of the "Facebook Pixel" or "Pixel," a programming code that Facebook makes available to FITE to collect granular information about its subscribers' interactions with its websites. Facebook uses this information to build detailed profiles about FITE's subscribers and purchasers that enables FITE to serve them with targeted advertisements on Facebook and otherwise facilitates FITE's use of Facebook's advertising services.

6. Defendant intentionally installed the Pixel and selected the specific user information the Pixel would collect from its subscribers and its purchasers and send to Facebook, including specific videos the user accessed (via the video's title and the URL for the video) and the user's unencrypted and personally and publicly identifiable Facebook ID ("FID").

7. The FID is a unique sequence of numbers linked to an individual's Facebook profile that identifies the individual more precisely than a name or email address. Indeed, entering "facebook.com/[FID]" into any web browser returns the Facebook profile of the specific individual. Because a user's FID uniquely and personally identifies that person's Facebook account, an unencrypted FID allows any ordinary person to quickly and easily use an unencrypted FID to locate, access, and view a particular user's Facebook profile, and all of the detailed and personal information contained in it.

8. FITE thus discloses to Facebook through the Pixel in one transmission the following information each time a subscriber or purchaser accesses a video on its websites or applications: (1) the video's title and URL; and (2)

detailed, personal information that easily identifies the subscriber or purchaser via the FID. This information constitutes PII under the VPPA.

9. Finally, Defendant did not obtain—or even seek—the separate, informed written consent needed for it to lawfully disclose the PII of Plaintiff or any other Class member.

10. Accordingly, Plaintiff and all similarly situated subscribers and purchasers are “aggrieved persons” under the VPPA seeking to enjoin Defendant from further unauthorized disclosures of PII; awarding actual damages no less than liquidated damages of \$2,500 per violation, punitive damages, reasonable attorneys’ fees and costs, pre- and post-judgment interest as permitted by law; and any other relief the Court deems appropriate.

PARTIES

11. Plaintiff Detrina Solomon (“Plaintiff”) is a citizen and resident of Texas.

12. During the two years before she filed this action, Plaintiff has had a Facebook account, subscribed to Defendant’s TrillerVerzPass digital video streaming service, and used a laptop, tablet and smart phone to access streaming video content on that service.

13. Defendant Flipps Media, Inc., doing business as FITE and FITE TV, is a Delaware corporation with its principal place of business located at 626 RXR Plaza, PO Box 1793, Uniondale, NY 11556.

14. Founded in 2012, Defendant owns and operates an online digital streaming service that offers a wide range of video content in the sports, entertainment, and music arenas. Defendant’s video streaming content is available on its website (www.fite.tv) and mobile app.

15. Defendant is owned by Triller, Inc., a Delaware corporation with its principal place of business in Los Angeles, California. Triller acquired Defendant in July 2021.

16. “Triller is an integrated digital technology, media and entertainment company broadly engaged in the development, production, promotion, marketing and monetization of content through its mobile app, streaming platform, and virtual and live events,” as noted in the February 2022 regulatory filing. “Today, Triller has combined six companies through acquisitions,” including Defendant, “to create a technology platform that enables the creation, distribution, measurement, and monetization of content that is consumed digitally, in virtual worlds and during live events in an ecosystem[.]”

JURISDICTION AND VENUE

17. This Court has personal jurisdiction over Defendant because its principal place of business is in New York.

18. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

19. Venue is appropriate in this Court because Defendant resides in this District, and certain of the conduct alleged in this lawsuit occurred in this District.

COMMON FACTUAL ALLEGATIONS

I. The Video Privacy Protection Act

20. With certain exceptions that do not apply here, the VPPA prohibits “a video tape service provider,” from “knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider” without first obtaining the consumer’s informed,

written consent “in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer.” 18 U.S.C. § 2710.

21. Congress passed the VPPA to protect the privacy of individuals’ video rental, purchase, and viewing information, so that consumers can “maintain control over personal information divulged and generated in exchange for receiving services from video tape service providers.” S. Rep. No. 100-599 at 8 (1988). “The Act reflects the central principle of the Privacy Act of 1974: that information collected for one purpose may not be used for a different purpose without the individual’s consent.” *Id.* at 7-8.

22. The need for the protections of the VPPA are more pronounced today than ever, given the largely unregulated, sprawling, and lucrative market for consumers’ online personal data, including their video watching habits. During a recent Senate Judiciary Committee meeting, “The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century,” Senator Patrick Leahy emphasized this point: “While it is true that technology has changed over the years, we must stay faithful to our fundamental right to privacy and freedom. Today, social networking, video streaming, the ‘cloud,’ mobile apps and other new technologies have revolutionized the availability of Americans’ information.”

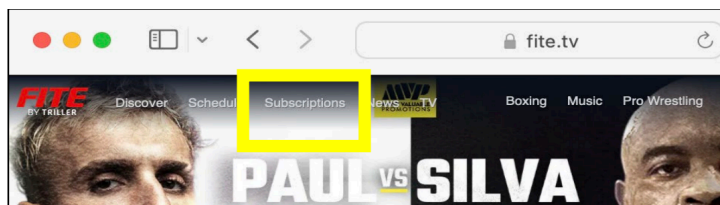
23. Defendant knowingly deprived Plaintiff and the proposed Class members of this important right for its own profit by systematically disclosing their PII to Facebook in violation of the Act.

II. Plaintiff and the Other Class Members Subscribe to or Purchase Defendant’s Services.

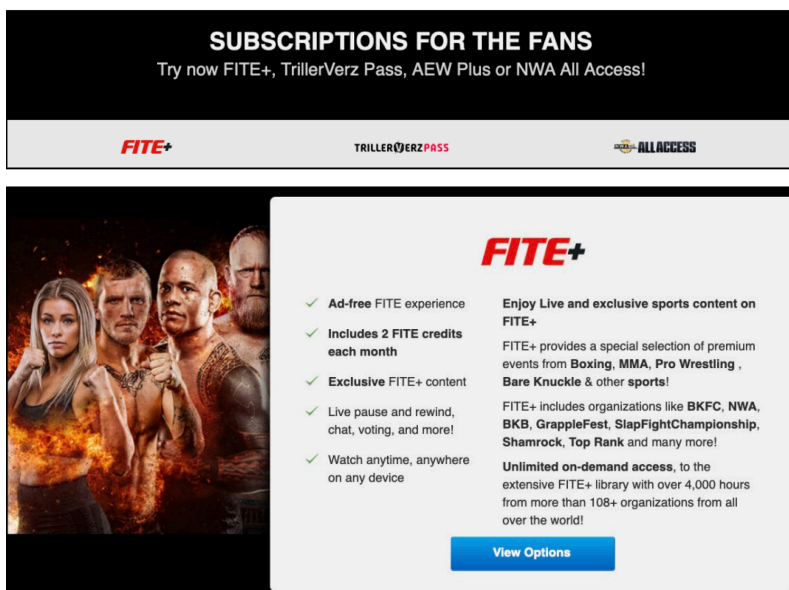
51a

24. Defendant owns and operates the FITE website and applications (collectively, “website”). Defendant’s website provides streaming video content to its subscribers and pay-per-view purchasers (collectively, “subscribers”).

25. To purchase a subscription and access the corresponding content, an individual turns to the “Subscriptions” button at the top of FITE’s website homepage (highlighted below):



26. Upon clicking the “Subscriptions” button, the individual is delivered to a menu of subscription channels for FITE+, TrillerVerzPass, and NWA All Access:





- ✓ Unlimited access to **TrillerVerz Boxing and Triad Combat**
- ✓ Unlimited access to premium **TrillerVerz Music** events including iconic **Verzuz Battles**
- ✓ Unlimited access to **Verzuz Games**
- ✓ Exclusive discounts on **PPV** events

TrillerVerz events are unique experiences which combine spectacular combat sport events and heart-pumping music performances to create the unprecedented world of the future of entertainment, the world of TrillerVerz.

Events in TrillerVerzPass feature stars such as **Michael Hunter, Pablo Cesar Cano, Ivan Golub, Danielito Zorrilla, Fat Joe, Dipset, The Lox, Ja Rule, Chaka Khan** and many more.

[View Options](#)







- ✓ **NWA Powerrr on Tuesday**
- ✓ **NWA USA on Saturday**
- ✓ **NWA Monthly Specials**
- ✓ Get access to a special selection of the **best past NWA PPV events**

Get unlimited access to a special selection of the best NWA PPV events and full catalogue of all NWA Powerrr and NWA PowerrrSurge shows.

Get the opportunity to see a classic wrestling format in a modern way and wrestling action of **Nick Aldis, Aron Stevens, Chris Adonis, Mike Bennett, Thunder Rosa, JR Kratos, Trevor Murdoch** and many more.

[View Options](#)

27. To access video content through the FITE+ service on Defendant's website, an individual must purchase a monthly or annual subscription plan from Defendant.

28. To access video content through the TrillerVerzPass service on Defendant's website, an individual must purchase a monthly or annual subscription plan from Defendant.

29. To access video content through the NWA All Access service on Defendant's website, an individual must purchase a monthly subscription plan from Defendant.

30. If an individual wants to access an individual pay-per-view event on Defendant's website that is not also available on one of the aforementioned services to which the individual already subscribes, that individual may purchase it on a stand-alone basis from Defendant's website.

31. To purchase a subscription or a pay-per-view event, an individual must provide to Defendant certain personal information, including personally identifiable information like their name, billing address, email address, and credit card information.

32. Defendant's subscribers and purchasers as discussed above are therefore consumers under the VPPA.

III. Defendant is a "Video Tape Services Provider" Because it Streams Video Content.

33. Defendant provides video tape services to its subscribers and purchasers by offering an array of video content on the website it owns and operates.

34. Defendant has characterized itself as "an industry leading transactional digital live streaming platform for sports and entertainment" in a regulatory filing from early 2022. This filing further noted that "the FITE network distributes free-to-air content, pay-per-view events, and subscription videos on-demand ('SVOD'). The service offers 15,000+ hours of videos on demand and streams 1,000+ live events per year to more than 5 million registered users worldwide. Originally dedicated to combat sports (including boxing, mixed martial arts, and professional wrestling), FITE has been an industry leading global digital distributor for countless marquee

events by HBO, Showtime, Fox, Top Rank/ESPN, WWE, Triller Fight Club, and more than 400 other publishers.”

35. Defendant provides streaming video content to subscribers of its FITE+, TrillerVerzPass, and NWA All Access channels and to purchasers of its stand-alone pay-per-view events on its website and app.

36. FITE+ offers paid monthly and annual subscription plans that offer video content spanning various combat sports including boxing, mixed martial arts, grappling, and professional wrestling from numerous organizations like Top Rank Boxing, Shamrock Fighting Championships, Impact Wrestling, and Thuzio.

37. TrillerVerzPass offers paid monthly and annual subscription plans providing access to Verzuz hip-hop battles and to TrillerVerzBoxing and Triad Combat shows featuring sporting matches combined with live musical performances.

38. NWA All Access offers a paid monthly subscription plan that provides unlimited access to the full catalogue of this professional wrestling organization’s NWA Powerrr, NWA PowerrrSurge, and NWA USA shows, a curated selection of past pay-per-view events, and access to its two weekly shows.

39. Defendant also offers for purchase various stand-alone pay-per-view events, some of which also are included in its subscription channels. Among these events are the widely viewed Ric Flair’s Last Match and the Jake Paul vs. Tyson Woodley boxing match.

40. Defendant provides pre-recorded content via its online streaming services, whether or not the content is billed as “live.” For “live” streaming events, video of the event is first recorded as a video file (such as in a standard

RAW file format). That video file is then delivered to an encoder to convert the video into a smaller, streamable file. The smaller, streamable video files are then transmitted via the Internet to individual devices for viewing, such that end users of Defendant's website always view pre-recorded content.

41. Defendant is a prototypical video tape service provider under the VPPA.

IV. Defendant Knowingly Discloses Subscribers' PII to Facebook Whenever They Access Videos on its Website.

42. Defendant knowingly discloses Plaintiff's and other Class members' PII to Facebook through the Pixel code it embedded on its website.

43. The Facebook Pixel, first introduced in 2013, allows online businesses like FITE to build detailed profiles about its users by collecting information about how they interact with their websites and facilitates the service of targeted advertising to them. The Pixel commonly relays whether users initiate purchases, what items they view, and, as relevant here, the exact content accessed on a particular webpage, including specific video materials. The Pixel can do this whether or not the site's users are logged onto Facebook and even after they clear their browser histories.

44. Defendant collects, uses and shares subscribers' personal information obtained through its websites for various marketing and advertising purposes, as demonstrated generally by provisions in its Privacy Policy.

45. Defendant's Privacy Policy states that when individuals use its online service, "we may ask you to

provide us with certain personal information that can be used to contact or identify you,” including “your name, phone number and email address.”

46. The Policy states that when individuals “use the Service, [Defendant’s] servers may automatically record information that your device sends,” including “the webpage you were visiting or content item you were playing.” It also states that Defendant “will use this information,” among other things, “for advertising and other marketing purposes.”

47. The Policy states that when individuals “use third party social networking services via the Service, [Defendant] may collect the user credentials for your account which may include your name, email address, gender, user ID, list of friends, and any other information that you have chosen to make public through such services.”

48. Finally, the Policy states that Defendant “may implement or allow third-party companies to implement automatic usage tracking processes” while noting that the information collected by these tracking processes “will be used in order to improve the Service quality (for example improvement of search results and the advertising selection) and to compile usage statistics.”

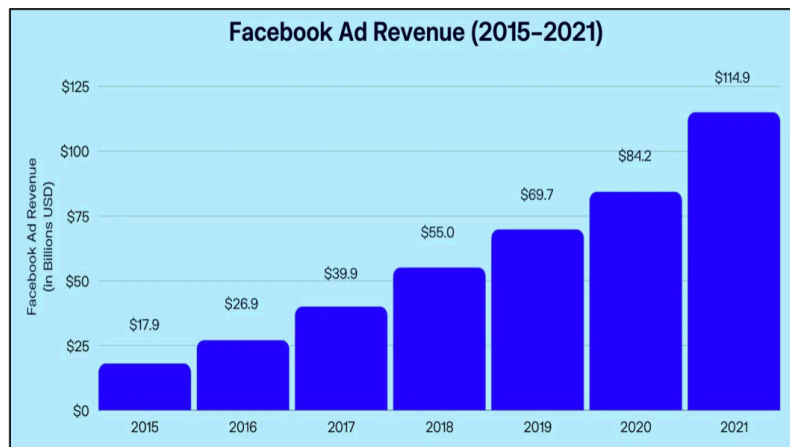
49. One important tracking technology that Defendant uses to further its advertising goals but does not disclose or discuss in its Terms of Use, Privacy Policy or any other material provided to subscribers is the Facebook Pixel.

50. Pixel is a unique string of code that businesses install on their websites. It places and triggers specific cookies of the businesses’ choosing that track users’ Internet activity and utilizes that information to build

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detailed user profiles. Pixel can do this whether or not the site's users are logged onto Facebook and even after they clear their browser histories.

51. Facebook promotes the Pixel to companies like FITE as a “powerful tool” that can “help power [its] Facebook ads . . . [to] reach a more relevant audience, provide a more personalized ad experience and optimize [its] ad campaigns towards better business outcomes.” Facebook also profits from Pixel. While Facebook does not charge businesses to install the Pixel on their websites, it charges them to place the advertising that the Pixel makes possible on Facebook's platform. The Pixel is an important piece of Facebook's advertising business, which comprises 97% of the company's annual revenue and has made it the world's leading social media marketing platform. As shown below, Facebook's advertising revenues have increased significantly year after year since 2015, culminating in nearly \$115 billion in worldwide revenue in 2021:



58a

52. To take advantage of Facebook's targeted advertising and analytical services, Defendant intentionally installed the Pixel on its websites via step-by-step instructions provided on Facebook's website.

53. During the installation process, Defendant chose certain of a menu of available "Events" for incorporation into the Pixel installed on its website. Pixel's Events track specific information about the activity of users when they visit a company's website. One of the Events that Defendant chose for its Pixel is "PageView." PageView captures and shares the URL and title of each video a subscriber or purchaser accesses on its site, as shown in the below Pixel Helper Extension exemplar:

 Facebook Pixel Troubleshoot Pixel

Pixel ID: 365479090517010 [click to copy](#)

[View Analytics](#)

▼  PageView

EVENT INFO

Setup Method: Manual

URL Called: Hide

```
https://www.facebook.com/tr/?id=365479090517010&ev=PageView&dl=https%3A%2F%2Fwww.fite.tv%2Fembed%2Fv1%2F2pbdk%2F%3Fsite%3Dfite%26autoplay%3D1%26tr%3D1%26nt%3D1%26return_to%3Dhttps%253A%252F%252Fwww.fite.tv%252Fwatch%252Fthe-roast-of-ric-flair%252F2pbdk%252F%26ref%3Dsearch&rl=https%3A%2F%2Fwww.fite.tv%2Fwatch%2Fthe-roast-of-ric-flair%2F2pbdk%2F&if=true&ts=1662165685424&sw=1280&sh=800&v=2.9.5&r=c2&ec=0&o=30&fbp=fb.1.1662153693572.477081738&it=1662165685414&coo=false&rqm=GET&dt=cvsobykqfyc57q03sp574c11pdq5wlkn
```

Load Time: 17.33 ms

Pixel Code: Hide

```

```

Pixel Location: Hide

```
https://www.fite.tv/embed/v1/2pbdk/?site=fite&autoplay=1&tr=1&nt=1&return_to=https%3A%2F%2Fwww.fite.tv%2Fwatch%2Fthe-roast-of-ric-flair%2F2pbdk%2F&ref=search
```

Frame: IFrame

54. Defendant also knew that the Pixel installed on their websites would send Facebook cookies identifying their subscribers, including unencrypted FIDs. This is demonstrated by, among other things, Defendant's indisputable familiarity with and use of identifying cookies on its website in connection with its targeted advertising efforts, and its knowledge of how the Pixel worked, i.e., that the Pixel's sharing of information with Facebook enabled Defendant's websites to show targeted advertising to its digital subscribers based on the video content those subscribers had viewed on the websites.

55. Defendant's knowledge that the Pixel on its website would send Facebook cookies personally identifying their subscribers, like the `c_user` cookie, is further shown by its use of in-house targetted advertising technology on all content on its website. As noted in the February 2022 regulatory filing, parent company Triller "monetize[s] its live and virtual audiences through targeted consumer engagement, content moderation, and social selling driven by AI technology developed by Amplify.ai," which Triller acquired soon after Defendant in 2021. "Amplify.ai's technology is incorporated into each piece of short-form and long-form content created within the Triller app or broader Triller ecosystem," i.e., including all of Defendant's content. "As this content is shared across the internet and other social media platforms, advertisers gain visibility and control into where, when, and how their content is positioned in order to optimize engagement and performance."

56. An FID is a unique, personal, and persistent identifier Facebook assigns to each of its users that allows anyone to look up the user's Facebook profile to learn that person's identity. If the FIB is combined with a video title watched by that Facebook user—all of which Defendant

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knowingly provides to Facebook through the Pixel embedded on its websites—any ordinary person could identity a subscriber and the specific video materials that subscriber accessed on Defendant’s sites.

57. For FITE+, Defendant disclosed to Facebook the video title and FID of a FITE+ subscriber in a single transmission via the Facebook Pixel. This transmission is depicted in the following exemplar screenshot excerpt:



58. In the graphic above, Box A shows that Pixel sent the information contained in this shot, including that which follows, to Facebook. The highlighted information in Box A shows the URL for “The Roast of Ric Flair” that was accessed on www.fite.tv, and subsequently identifies the “title” of this video. Box B identifies the subscribers’ unencrypted FID as the number following the “c_user” cookie (the FID of the individual who accessed this video has been redacted for privacy reasons).

59. The information transmitted in the above graphic is alternatively shown in the screen shot below. While the formatting is different, this graphic nonetheless demonstrates that Defendant's Pixel sent the same specific types of PII to Facebook:

61a

QueryString	
Name	Value
id	365479090517010
ev	Microdata
rl	https://www.fite.tv/watch/the-roast-of-ric-flair/2pbdk/ A
ts	1662165686929
cd[DataLaver]	0
cd[Meta]	{ "title": "The Roast of Ric Flair - Official Replay - FITE", "meta:description": "Official Replay: ✓ Thuzio ✓ Pro Wrestling, Events ✓ LIVE Jul 29, 9PM ET/8PM PT ✓ Ric Flair 'Ric Flair' ✓ In the last weekend of July, two days before his Last Match, the 16-time World Heavyweight Champion Ric Flair is hosting The Roast of Ric Flair exclusively and live on..." } B
cd[Schema.org]	0
cd[JSON-LD]	0
sw	1280
sh	800
v	2.9.5
f	c2
ec	2
o	30
fbp	fb.1.1662153693572.477081738
it	1662165685414
coo	false
es	automatic
rqm	GET
dt	h2e997gg6x6it97y35w9fjnfjkr6zn

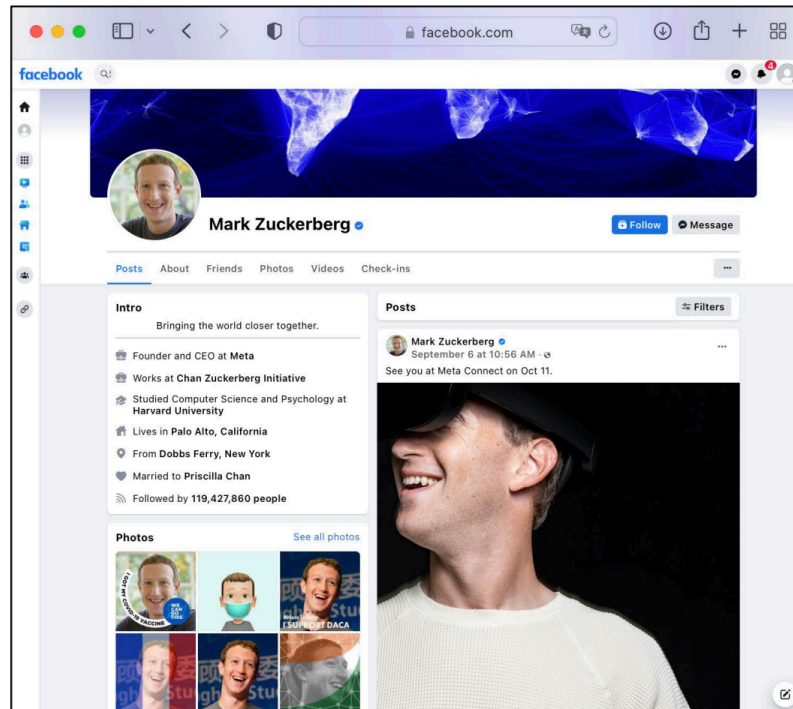
60. In this table, Box A shows that the subscriber accessed the URL of <https://www.fite.tv/watch/the-roast-of-ric-flair>. Box B shows that the “title” of the video is “The Roast of Ric Flair – Official Replay,” and it also gives a “description” of the video. The cookies sent in this transmission, including the c_user cookie, are the same as those contained in the prior graphic.

61. Entering the URL identified in the preceding graphics on a web browser pulls up the video.

62. An ordinary person could identify the subscriber accessing this video by entering the unencrypted FID associated with the c_user cookie on their search bar as follows: [https://www.facebook.com/\[unencrypted FID\]/](https://www.facebook.com/[unencrypted FID]/). Doing so reveals the subscriber’s Facebook profile that identifies the subscriber. This basic method of accessing a person’s Facebook profile is generally and widely known among the public.

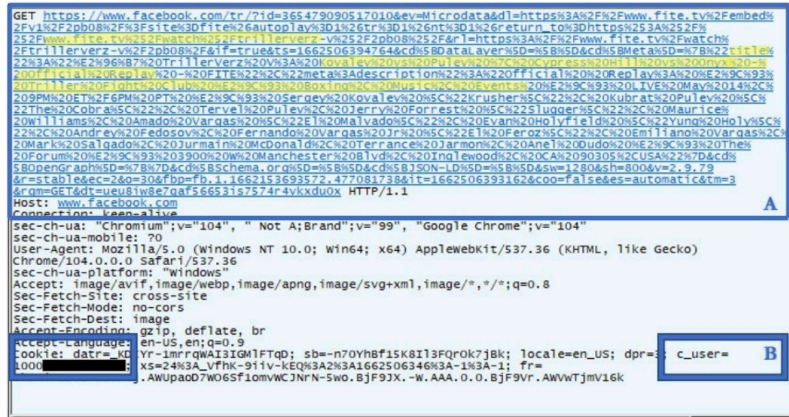
62a

63. An exemplar Facebook profile of the type one would see after entering a subscriber's unencrypted FID follows:



64. For TrillerVerzPass, Defendant disclosed to Facebook the video title and FID of a TrillerVerzPass subscriber in a single transmission via the Facebook Pixel. This transmission is depicted in the following exemplar screenshot excerpt:

63a



65. In the graphic above, Box A shows that Pixel sent the information contained in this shot, including that which follows, to Facebook. The highlighted information in Box A shows the URL for the “TrillerVerz V” event that was accessed on www.fite.tv and subsequently identifies the full “title” of the video as “TrillerVerz V - Kovalev vs. Pulev | Cypress Hill vs. Onyx – Official Replay,” followed by the full lineup of fighters and performers and the location of the event. Box B identifies the subscribers’ unencrypted FID as the number following the “c_user” cookie (the FID of the individual who accessed this video has been redacted for privacy reasons).

66. The information transmitted in the above graphic is alternatively shown in the screen shot below. While the formatting is different, this graphic nonetheless demonstrates that Defendant’s Pixel sent the same specific types of PII to Facebook:

64a

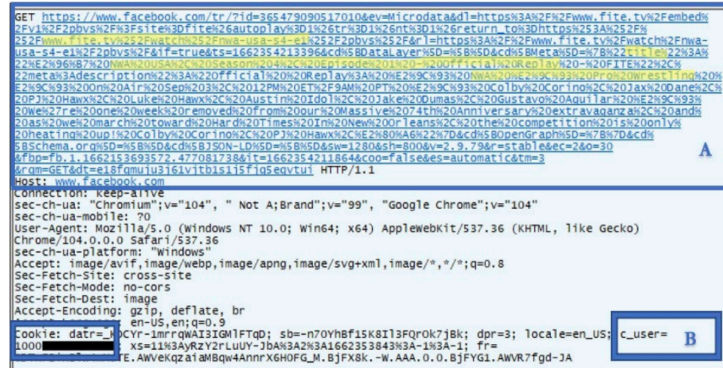
QueryString	
Name	Value
id	365479090517010
ev	Microdata
u	https://www.fite.tv/embed/1/20b08/Data=fite&autoplay=1&tr=1&nt=1&return_to=https%3A%2F%2Fwww.fite.tv%2Fwa
rl	https://www.fite.tv/watch/trillerverz-v/2pb08/ A
tr	true
ts	1662505585127
cd[natalayer]	0
cd[Meta]	("title":"TrillerVerz V: Kovalev vs Pulev Cypress Hill vs Onyx - Official Replay - FITE","meta:description":"Official Replay: ✓ Triller Fight Club ✓ Boxing, Music, Events ✓ LIVE May 14, 9PM ET/6PM PT ✓ Sergey Kovalev \\'Krusher\\', Kubrat Pulev \\'The Cobra\\', Tervel Pulev, Jerry Forrest \\'Slugga\\', Maurice Williams, Amado Vargas \\'El Malvado\\', Evan Holyfield \\'Yung Holy\\', Andrey Fedosov, Fernando Vargas Jr \\'El Feroz\\', Emiliano Vargas, Mark Salgado, Jurmain McDonald, Terrance Jarmon, Anel Dudo ✓ The Forum ✓ 3900 W Manchester Blvd, Inglewood, CA 90305,USA") B
co[OpenGraph]	0
cd[Schema.org]	0
cd[JSON-LD]	0
sw	1280
sh	800
v	2.9.79
r	stable
ec	2
o	30
fbp	fb.1.1662153693572.477081738
it	1662505583531
coo	false
es	automatic
tn	3
rqm	GET

67. In this table, Box A shows that the subscriber accessed the URL of www.fite.tv/watch/trillerverz-v. Box B shows that the “title” of the video is “TrillerVerz V - Kovalev vs. Pulev | Cypress Hill vs. Onyx – Official Replay,” and it also gives a “description” of the video by giving the full lineup of fighters and performers along with the location of the event. The cookies sent in this transmission, including the `c_user` cookie, are the same as those contained in the prior graphic.

68. Entering the URL identified in the preceding graphics on a web browser pulls up the video.

69. For NWA All Access, Defendant disclosed to Facebook the video title and FID of an NWA All Access subscriber in a single transmission via the Facebook Pixel. This transmission is depicted in the following exemplar screenshot excerpt:

65a



70. In the graphic above, Box A shows that Pixel sent the information contained in this shot, including that which follows, to Facebook. The highlighted information in Box A shows the URL for “NWA, Season 4, Episode 1 – Official Replay” that was accessed on www.fite.tv and subsequently identifies the “title” of the video and provides a “description” of this “NWA Pro Wrestling” event by identifying the lineup of wrestlers and giving context. Box B identifies the subscribers’ unencrypted FID as the number following the “c_user” cookie (the FID of the individual who accessed this video has been redacted for privacy reasons).

71. The information transmitted in the above graphic is alternatively shown in the screen shot below. While the formatting is different, this graphic nonetheless demonstrates that Defendant's Pixel sent the same specific types of PII to Facebook:

66a

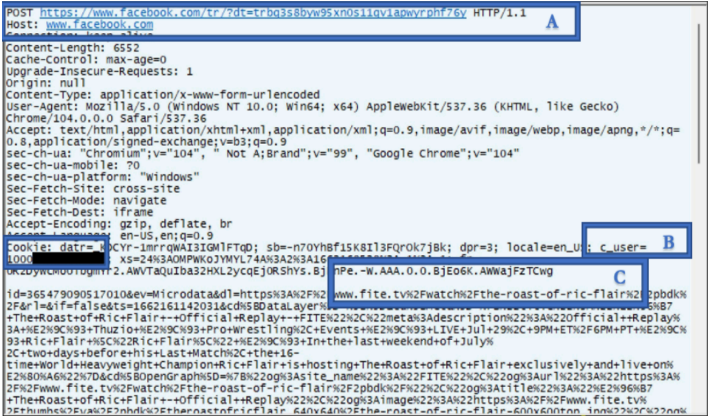
QueryString	
Name	Value
id	365479090517010
ev	Microdata
fi	https://www.fite.tv/watch/nwa-usa-s4-e1/2pbvs/ A
ti	true
ts	1662353204239
cd[html:yes]	0
cd[Meta]	{"title":"NWA USA, Season 4, Episode 1 - Official Replay - FITE","meta:description":"Official Replay: ✓ NWA ✓ Pro Wrestling ✓ On Air Sep 3, 12PM ET/9AM PT ✓ Colby Corino, Jax Dane, PJ Hawx, Luke Hawx, Austin Idol, Jake Dumas, Gustavo Aguilar ✓ We're one week removed from our Massive 74th Anniversary extravaganza, and as we march toward Hard Times in New Orleans, the competition is only heating up! Colby Corino, PJ Hawx,..." } B
cd[OpenGraph]	0
cd[Schema.org]	0
cd[JSON-LD]	0
sw	1280
sh	800
v	2.9.79
r	stable
ec	2
o	30

72. In this table, Box A shows that the subscriber accessed the URL of www.fite.tv/watch/nwa-usa-s4-e1. Box B shows that the “title” of the video is “NWA USA, Season 4, Episode 1 – Official Replay” and it also gives a “description” of the video by noting the promotion, genre, airing time, and wrestler lineup, and providing additional context. The cookies sent in this transmission, including the c_user cookie, are the same as those contained in the prior graphic.

73. Entering the URL identified in the preceding graphics on a web browser pulls up the video.

74. Finally, for a stand-alone pay-per-view event, Defendant disclosed to Facebook the video title and FID of an individual accessing the event in a single transmission via the Facebook Pixel. This transmission is depicted in the following exemplar screenshot excerpt:

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75. In the graphic above, Box A shows that Pixel sent the information contained in this shot, including that which follows, to Facebook. Box B identifies the subscribers' unencrypted FID as the number following the "c_user" cookie (the FID of the individual who accessed this video has been redacted for privacy reasons). Box C shows the URL of a video titled "The Roast of Ric Flair" following "watch" that was accessed on www.fite.tv, along with a "description" of the video.

76. The information transmitted in the above graphic is alternatively shown in the screen shot below. While the formatting is different, this graphic nonetheless demonstrates that Defendant's Pixel sent the same specific types of PII to Facebook:

78. Accordingly, Defendant violates the VPPA by knowingly disclosing its subscribers' FIDs alongside the specific accessed videos to Facebook.

79. Defendant does not request or receive separate, informed written consent when disclosing Plaintiff's or Class members' PII to Facebook, even though Defendant must obtain informed, written consent "in a form distinct

from any form setting forth” the consumers’ “other legal or financial obligations. *See* 18 U.S.C. § 2710(b)(2)

80. Instead, Defendant provides links to its Terms of Use and Privacy Policy, which subscribers need not click or read during the registration or purchase process.

81. Defendant’s Privacy Policy, quoted above, contains only general statements that it uses tracking technologies to collect and share certain personally identifiable subscriber or purchaser information with third parties in certain circumstances for advertising purposes. Defendant’s Terms of Use provides even less information about subscribers’ and purchasers’ personal information and how Defendant may use it. Neither document discloses that Defendant collects and transmits the specific subscriber PII at issue herein to Facebook.

82. Even if Defendant’s Terms of Use or Privacy Policy contained the informed, written consent required under the VPPA (which it does not), it is not in a form separate and distinct from consumers’ other legal and financial obligations.

83. Moreover, Defendant does not obtain informed, written consent when it seeks to disclose consumers’ PII or in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner.

84. Defendant also does not provide consumers like Plaintiff with the opportunity – in a clear and conspicuous manner – to withdrawn consent on a case-by-case basis or to withdraw consent from ongoing disclosures at the consumers’ election.

85. Accordingly, Defendant violates the VPPA by knowingly disclosing its subscribers' PII to Facebook without consent.

PLAINTIFF-SPECIFIC ALLEGATIONS

86. Plaintiff has had a paid subscription to Defendant's TrillerVerzPass channel during the past two years, and she has had a Facebook account since 2009.

87. During the two years before this action was filed, Plaintiff has used an Internet-connected laptop, tablet, and smart phone to access video content using her TrillerVerzPass subscription on Defendant's website.

88. On information and belief, Defendant disclosed to Facebook Plaintiff's unencrypted FID along with the title and URLs of the videos she accessed on Defendant's website within the past two years on one or more occasions.

89. Defendant did not seek or obtain Plaintiff's informed, written consent for any of the aforementioned disclosures, including in a separate and distinct form from any other document setting forth any other legal or financial obligations Plaintiff had to Defendant.

90. Each time Defendant disclosed Plaintiff's PII to Facebook, it violated her rights under the VPPA.

CLASS ALLEGATIONS

91. Plaintiff brings this lawsuit under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the following Class:

All persons in the United States who
subscribed to FITE's FITE+,
TrillerVerzPass, or NWA All Access channels
or purchased a pay-per-view event from FITE

and accessed video content on FITE's website (www.fite.tv) or app while having a Facebook account.

92. The Class Period is from September 14, 2020 to the present.

93. Excluded from the Class is Defendant, any control person of Defendant, as well as the officers and directors of Defendant and the immediate family members of any such person. Also excluded is any judge who may preside over this cause of action and the immediate family members of any such person.

94. Plaintiff reserves the right to modify, change, or expand the Class definition based upon information obtained in discovery or through further investigation.

95. **Numerosity:** The Class consists of at least thousands, and likely hundreds of thousands, of ascertainable individuals, making joinder impractical.

96. **Commonality and Predominance:** Common questions of law and fact exist concerning the Class's claim and predominate over any questions affecting only individual Class members. Questions common to the Class include:

a. Whether Plaintiff and the Class members are "consumers;"

b. Whether Defendant is a "video tape service provider;"

c. Whether the information Defendant disclosed to Facebook constitutes "personally identifiable information;"

d. Whether Defendant "knowingly disclosed" Plaintiff's and the Class members' PII to Facebook;

e. Whether Defendant obtained “the informed, written consent” of Plaintiff and the Class members “in a form distinct and separate from any form setting forth other legal or financial obligations” of those individuals;

f. Whether Defendant “provided an opportunity, in a clear and conspicuous manner,” for Plaintiff and the Class members “to withdraw on a case-by-case basis or to withdraw from ongoing disclosures,” at their “election;”

g. Whether Plaintiff and the Class members are “aggrieved persons;”

h. Whether Defendant’s conduct violates the VPPA;

i. Whether Defendant should be enjoined from disclosing Plaintiff’s and the Class members’ PII; and

j. The extent and form of any other preliminary or equitable relief that the Court determines appropriate.

97. Typicality: Plaintiff’s claims are typical of the claims of the Class because Plaintiff, like all Class members, has been injured in the same way by Defendant’s misconduct—disclosing consumers’ PII to Facebook—and seeks the same legal relief to remedy this misconduct.

98. Adequacy of Representation: Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions, including data privacy cases. Plaintiff does not have any interests antagonistic to those of the Class.

99. Ascertainability: The members of the Class can be readily determined through objective criteria and the utilization of data in the possession of Defendant or third-party Facebook that will identify Defendant’s subscribers

whose privacy rights as set forth in the VPPA were violated due to Defendant's misconduct as alleged herein.

100. **Superiority:** A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class-wide damages and injunctive relief are essential to induce Defendant to comply with federal privacy law. Moreover, Class members are very unlikely to pursue legal redress individually for the violations detailed herein because the amount of each Class member's claim is prohibitively small relative to the complexity of the litigation, the resources necessary to effectively prosecute this action, and Defendant's significant resources. A class action will allow these claims to be brought where they would otherwise go unaddressed because of the prohibitive costs of bringing individual lawsuits. Finally, a class action would provide the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

CAUSE OF ACTION

Violation of the Video Privacy Protection Act, 18 U.S.C. § 2710

101. Plaintiff incorporates and realleges the above factual allegations by reference.

102. The VPPA prohibits a "video tape service provider" from knowingly disclosing "personally identifying information" concerning any "consumer" to a third party without the "informed, written consent (including through an electronic means using the Internet) of the consumer." 18 U.S.C. § 2710.

103. As defined in 18 U.S.C. § 2710(a)(1), a "consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider." Plaintiff and

Class members are subscribers to or purchasers of Defendant's services that provide video content. Thus, Plaintiff and Class members are "consumers" under this definition.

104. As defined in 18 U.S.C. § 2710(a)(4), a "video tape service provider" is "any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audiovisual materials[.]" Defendant is a "video tape service provider" because it provides online video streaming services to its subscribers and purchasers.

105. As defined in 18 U.S.C. § 2710(a)(3), "personally identifiable information" includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." Defendant disclosed Plaintiff's and Class members' "personally identifiable information"—specifically, their unencrypted FIDs and the title and URL of the videos they requested or obtained—to Facebook.

106. This information constitutes personally identifiable information under 18 U.S.C. § 2710(a)(3) because it identified Plaintiff and each Class member to Facebook as an individual who accessed Defendant's video content, including the specific video materials requested or obtained on Defendant's website. Indeed, anyone with an FID could identify the individual associated with it simply by entering "facebook.com/[FID]" into a web browser.

107. Pursuant to 18 U.S.C. § 2710(b)(1), Defendant "knowingly" disclosed the PII of Plaintiff and the Class members because it intentionally programmed the Facebook Pixel into its website code while knowing that

Facebook would receive video titles and the consumer's FID when a consumer requested or obtained a specific video.

108. Defendant never obtained from Plaintiff or any Class member the separate and informed written consent needed to lawfully disclose their PII to a third-party pursuant to 18 U.S.C. § 2710(b)(2). More specifically, Defendant never obtained from Plaintiff or any Class member informed, written consent in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer; Defendant never obtained from Plaintiff or any Class member informed, written consent that, at the election of the consumer, was given at the time the disclosure is sought or was given in advance for a set period of time, not to exceed two years or until consent is withdrawn by the consumer, whichever is sooner; and Defendant never provided an opportunity, in a clear and conspicuous manner, for Plaintiff or any Class member to withdraw consent on a case-by-case basis or to withdraw consent from ongoing disclosures, at the consumer's election.

109. By disclosing Plaintiff's and Class members' PII, Defendant violated Plaintiff's and Class members' statutorily protected right to privacy in their video-watching activity, and they are each "aggrieved persons" entitled to relief under 18 U.S.C. § 2710(c).

110. As a result of these violations, Defendant is liable to Plaintiff and Class members.

111. On behalf of herself and all members of the Class, pursuant to 18 U.S.C. § 2710(c)(2)(A), Plaintiff seeks to enjoin Defendant's disclosures of PII; liquidated damages in the amount of \$2,500 per violation; punitive damages; reasonable attorneys' fees and costs; pre- and post-

judgment interest as allowed by law; and all other preliminary or equitable relief the Court deems appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, respectfully requests that the Court:

i. Certify this case as a class action, and appoint Plaintiff as Class Representative and the undersigned attorneys as Class Counsel;

ii. Enter judgment in favor of Plaintiff and the Class;

iii. Enjoin Defendant's future disclosures of Plaintiff's and Class members' PII;

iv. Award Plaintiff and Class members actual damages but not less than liquidated damages in an amount of \$2,500 per violation;

v. Award Plaintiff and Class members punitive damages;

vi. Award Plaintiff and Class members reasonable attorneys' fees and other litigation costs reasonably incurred;

vii. Award Plaintiff and Class members pre- and post-judgment interest as provided by law; and

viii. Award such other preliminary and equitable relief as the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of all issues triable as of right.

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Dated: September 14, 2022

Respectfully submitted,



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APPENDIX E

18 U.S.C. § 2710

18 U.S.C. § 2710. Wrongful disclosure of video tape rental or sale records.

(a) DEFINITIONS.—

For purposes of this section—

(1) the term “consumer” means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

(2) the term “ordinary course of business” means only debt collection activities, order fulfillment, request processing, and the transfer of ownership;

(3) the term “personally identifiable information” includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and

(4) the term “video tape service provider” means any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

(b) VIDEO TAPE RENTAL AND SALE RECORDS.—

(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider

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shall be liable to the aggrieved person for the relief provided in subsection (d).

(2) A video tape service provider may disclose personally identifiable information concerning any consumer—

(A) to the consumer;

(B) to any person with the informed, written consent (including through an electronic means using the Internet) of the consumer that—

(i) is in a form distinct and separate from any form setting forth other legal or financial obligations of the consumer;

(ii) at the election of the consumer—

(I) is given at the time the disclosure is sought; or

(II) is given in advance for a set period of time, not to exceed 2 years or until consent is withdrawn by the consumer, whichever is sooner; and

(iii) the video tape service provider has provided an opportunity, in a clear and conspicuous manner, for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures, at the consumer's election;

(C) to a law enforcement agency pursuant to a warrant issued under the Federal Rules of Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order;

(D) to any person if the disclosure is solely of the names and addresses of consumers and if—

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(i) the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and

(ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer;

(E) to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or

(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if—

(i) the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and

(ii) the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

(3) Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry. In the case of a State government

authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the video tape service provider, may quash or modify such order if the information or records requested are unreasonably voluminous in nature or if compliance with such order otherwise would cause an unreasonable burden on such provider.

(c) CIVIL ACTION.—

(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

(2) The court may award—

(A) actual damages but not less than liquidated damages in an amount of \$2,500;

(B) punitive damages;

(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(D) such other preliminary and equitable relief as the court determines to be appropriate.

(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

(4) No liability shall result from lawful disclosure permitted by this section.

(d) PERSONALLY IDENTIFIABLE INFORMATION.—

Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or

other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

(e) DESTRUCTION OF OLD RECORDS.—

A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (b)(2) or (c)(2) or pursuant to a court order.

(f) PREEMPTION.—

The provisions of this section preempt only the provisions of State or local law that require disclosure prohibited by this section.

(Added Pub. L. 100–618, §2(a)(2), Nov. 5, 1988, 102 Stat. 3195; amended Pub. L. 112–258, §2, Jan. 10, 2013, 126 Stat. 2414.)