

APPENDIX

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APPENDIX A

23-7597-cv

United States Court of Appeals

for the

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.

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

BRIEF FOR PLAINTIFF-APPELLANT

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JURISDICTION

The district court had federal question jurisdiction under 28 U.S.C. § 1331 because this case arises under the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710. The district court dismissed the complaint with prejudice on September 30, 2023 (JA116-26), and entered final judgment for defendant-appellee Flippo Media, Inc., dba FITE, dba FITE TV (“FITE”) on October 3, 2023 (JA127).¹ Plaintiff-appellant Detrina Solomon (“Solomon”) timely appealed on October 27, 2023. JA128. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES ON APPEAL

1. Whether the complaint plausibly alleges that FITE disclosed Solomon’s “personally identifiable information” to Facebook in violation of the VPPA when FITE transmitted Solomon’s Facebook ID and the titles and URLs of videos she accessed to Facebook.

2. Whether the district court abused its discretion by dismissing the complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) and denying leave to amend without previously informing Solomon of the complaint’s deficiencies or ruling that amendment to cure those deficiencies would be futile.

SUMMARY OF ARGUMENT

I. Solomon plausibly has alleged that FITE disclosed her “personally identifiable information” under the VPPA when FITE disclosed her Facebook ID

¹References to the Joint Appendix are designated “JA__.”

and the titles and URLs of specific videos she accessed to Facebook.

The statutory construction of “personally identifiable information” is a purely legal question that is a matter of first impression in this Court. In this case, the Court can reach the correct result by adopting a narrow rule that, regardless of whatever else might be covered, “personally identifiable information” necessarily includes that which a disclosing party transmits to a particular recipient with knowledge that the recipient can use that specific information to personally identify the individual in question. This result would be fully consistent with the text, purpose, and legislative history of the statute.

If this Court adopts either of the two alternative definitions of “personally identifiable information” articulated by other Courts of Appeals, Solomon's allegations are sufficient under those definitions as well.

If this Court adopts the definition from the First Circuit, it should hold that Solomon has plausibly alleged that FITE's disclosure of her Facebook ID was reasonably and foreseeably likely to personally identify her to Facebook.

If this Court adopts the definition from the Third and Ninth Circuits, it should hold that Solomon has plausibly alleged that the disclosure would readily permit an ordinary person to identify her. This is because, as alleged in her complaint, a user's Facebook ID is something that any ordinary person can easily use, via any web browser, to navigate directly to that user's public Facebook profile page. Thus, Solomon

has plausibly alleged that a Facebook ID is by itself sufficient to identify a Facebook user, regardless of whatever specific content may or may not appear on that user's Facebook profile.

II. The district court abused its discretion by denying Solomon leave to amend her complaint. In doing so, the court disregarded clear Second Circuit precedent. As this Court recently summarized and reaffirmed in *Mandala v. NTT Data, Inc.*, ---F.4th---, 2023 WL 8499054 (2d Cir. Dec. 8, 2023), “in the absence of a valid rationale like undue delay or futility, it is improper to simultaneously dismiss a complaint with prejudice under Rule 12(b)(6) and deny leave to amend when the district court has not adequately informed the plaintiff[] of its view of the complaint's deficiencies.” *Id.* at *7.

As Solomon stated in opposing FITE's motion to dismiss, she was prepared to amend her complaint to directly address any pleading deficiencies the district court might identify. In denying her that opportunity, the court did not find that Solomon had acted with undue delay or that amendment would be futile. Nor did the court identify any other valid rationale. Nevertheless, the court dismissed the complaint and denied leave to amend without previously identifying any pleading deficiencies. In doing so, the court exceeded the bounds of its discretion.

This Court should reverse so that Solomon can amend her complaint to cure the perceived pleading deficiencies and have her case adjudicated on the merits.

ARGUMENT

* * *

I. The Complaint Plausibly Alleges that FITE Disclosed Solomon’s “Personally Identifiable Information” to Facebook in Violation of the VPPA.

To resolve this appeal, the Court first must determine what information constitutes “personally identifiable information” under the VPPA. This is a question of first impression in this Court. *See* JA119; *Wilson v. Triller, Inc.*, 598 F. Supp. 3d 82, 90-91 (S.D.N.Y. 2022).

In the district court, Solomon did not advocate for a particular standard on this issue; rather, she argued that under either of the standards adopted by the other Courts of Appeals to have considered the question—the “foreseeability” standard of the First Circuit, or the “ordinary person” standard of the Third and Ninth Circuits—she has adequately alleged disclosure of personally identifiable information. JA80-87.

* * *

This Court need not formulate its own blanket definition of personally identifiable information, nor must this Court accept, reject, or attempt to synthesize the standards formulated by the other Courts of Appeals to resolve the question before it: whether FITE’s disclosure of Solomon’s video viewing information and Facebook ID to *Facebook*, which FITE knew Facebook could use to personally identify her, constitutes disclosure of personally identifiable information under the VPPA. The Court should answer this question in the affirmative in view of the text, purpose, and legislative history of the statute.

Solomon alleges that a Facebook ID is a unique identifier “linked to an individual’s Facebook profile” in a manner that “uniquely and personally identifies that person’s Facebook account” (JA9-10 at ¶ 7), and that Facebook can therefore use Solomon’s Facebook ID to personally identify her (JA32 at ¶ 106). Solomon further alleges that FITE *knew* that her Facebook ID would be disclosed *to Facebook* along with the titles and URLs of the videos she accessed. JA19 at ¶ 54; JA32 at ¶ 107.

Solomon’s proposed rule would therefore comport with the statutory text by prohibiting the disclosure of specific types of information—here, Solomon’s Facebook ID, coupled with the titles and

* * *

Moreover, Solomon alleges that Facebook IDs, because they are uniquely assigned to each Facebook user, identify individuals “more precisely than a name or email address,” and that Facebook profiles, as a general matter, contain “detailed and personal information.” JA9-10 at ¶ 7. That is enough to satisfy the ordinary person test. Solomon should not be required to plead what specific items of personal information may or may not appear on her public Facebook profile. The fact that a recipient of Solomon’s Facebook ID can quickly and easily navigate directly to her unique Facebook profile is sufficient by itself to find that the Facebook ID readily permits an ordinary person to identify her, regardless of what specific information is publicly available on that profile.

* * *

II. The District Court Abused Its Discretion by Denying Solomon Leave to Amend Her Complaint.

A. This Court Strongly Favors Liberal Grant of Leave to Amend After Dismissal Under Rule 12(b)(6).

Federal Rule of Civil Procedure 15(a)(2) provides that courts “should freely give leave” to amend a complaint “when justice so requires.” Fed. R. Civ. P. 15(a)(2). This is a “liberal standard” that is “consistent with [this Court’s] strong preference for resolving disputes on the merits.” *Attestor Value Master Fund v. Republic of Argentina*, 940 F.3d 825, 833 (2d Cir. 2019) (quoting *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015)). In particular, “[t]his circuit strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under Rule 12(b)(6).” *Noto v. 22nd Century Grp., Inc.*, 35 F.4th 95, 107 (2d Cir. 2022).

Thus, this Court has consistently held that “in the absence of a valid rationale like undue delay or futility, it is improper to simultaneously dismiss a complaint with prejudice under Rule 12(b)(6) and deny leave to amend when the district court has not adequately informed the plaintiff[] of its view of the complaint’s deficiencies.” *Mandala*, ---F.4th---, 2023 WL 8499054, at *7 (collecting cases).

B. Solomon Requested Leave to Amend and Is Prepared to Address the Complaint’s Perceived Deficiencies.

Here, in opposing FITE’s motion to dismiss under Rule 12(b)(6), Solomon requested that if the district

court were to grant the motion “in any respect,” Solomon “should be granted leave to amend the Complaint to remedy any perceived deficiencies.” JA94 (citing *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)). In ruling on the motion to dismiss, the district court informed Solomon for the first time of its view regarding the complaint’s supposed deficiencies. JA116-26. Having been apprised of those perceived deficiencies, Solomon is prepared to amend the complaint to address them.

First, with respect to the district court’s conclusion that her “VPPA claim fails” because the complaint “says nothing about any personal information on her public Facebook profile page” (JA121), Solomon is prepared to amend to allege that her public Facebook profile page has at all relevant times displayed her name.

Second, in response to the district court’s conclusion that her allegations were insufficient to plausibly allege that she “actually accessed any ‘prerecorded’ video” on FITE’s website, Solomon can and will amend to “explicitly allege[]” that she accessed “indisputably ‘prerecorded’ video” content from FITE’s TrillerVerz channel on one or more occasions during the relevant period, as distinct from “live” content.² JA124.

To the extent this Court finds that deficiencies remain after resolving the statutory construction issues of first impression presented in this appeal,

³ Accordingly, the Court does not need to reach the issue of whether the current version of the complaint plausibly alleges this element of Solomon’s claim.

Solomon remains ready and willing to make these amendments to cure any perceived deficiencies.

C. The District Court Exceeded Its Discretion by Simultaneously Dismissing Solomon’s Complaint Under Rule 12(b)(6) and Denying Leave to Amend.

Despite Solomon’s request for leave to amend, the district court simultaneously dismissed the complaint with prejudice and denied leave to amend, without having provided any prior notice of its view of the complaint’s alleged deficiencies, and without any finding of a “good reason” for the denial such as “futility, bad faith, undue delay, or undue prejudice to the opposing party.” *MSP Recovery Claims, Series LLC v. Hereford Ins. Co.*, 66 F.4th 77, 90 (2d Cir. 2023) (quoting *Bensch v. Est. of Umar*, 2 F.4th 70, 81 (2d Cir. 2021)). In doing so, the district court exceeded the bounds of its discretion. *Mandala*, ---F.4th---, 2023 WL 8499054, at *7; *Loreley*, 797 F.3d at 190-91.

The district court began its analysis by noting that Solomon requested leave to amend “[i]n a footnote on the final page of her brief.” JA124; *see also* JA125 (“During the subsequent briefing of the motion to dismiss, Plaintiff elected to address leave to amend in a conclusory footnote.”). Although the court did not expressly find that Solomon had waived her request for leave to amend by making it in a footnote, the court implied that the use of a footnote was improper. This Court has observed, however, that “form alone” generally is not an appropriate basis on which to “deem a request for leave to amend insufficient.” *Loreley*, 797 F.3d at 190.

Next, the district court cited an unpublished summary order, *Gregory v. ProNAi Therapeutics Inc.*, 757 F. App'x 35 (2d Cir. 2018), as an example of this Court “affirming denial of leave to amend where, *inter alia*, ‘plaintiffs sought leave to amend in a footnote at the end of their opposition to defendants’ motion to dismiss,’ but ‘they included no

* * *

APPENDIX B

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Plaintiff-Appellant,

—against—

FLIPPS MEDIA, INC., DBA FITE, DBA FITE TV,

Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK
(CENTRAL ISLIP)**

BRIEF FOR DEFENDANT-APPELLEE

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* * *

located through such a search. J.A. 22 (Compl. ¶ 63). Plaintiff also did not explain in the complaint what information she provided when she set up her Facebook account. The complaint is silent, for example, on whether Plaintiff provided her real name or any other identifying information when she opened an account.

The complaint is also vague (perhaps deliberately so) on how Pixel works. There are no facts to show, for example, that FITE's site itself captures or gathers the FID and URLs and sends them directly to Meta's servers. That allegation would be particularly difficult to make because Plaintiff does not allege that she provided her FID to FITE or that FITE can access the c_user cookie that Meta set on her browser. Rather, Plaintiff's theory appears to be that Pixel triggered or caused her own browser to send the URLs and FID to Meta's servers when she accessed videos or events on FITE's site. See J.A. 90 (arguing in opposition to motion to dismiss that FITE is liable for its "necessary and active role in disclosing its subscribers' PII to Facebook" and that "[n]o information about subscribers' video habits would be transmitted to Facebook at all if *Defendant* had not installed and operated the Pixel on its websites").

The complaint includes "exemplar screenshot excerpts," which allegedly show disclosures of URLs and FIDs through the use of Pixel. See J.A. 20, 22, 24 (Compl. ¶¶ 57, 64, 69). The screenshots do not depict information relating to Plaintiff herself; instead, the complaint refers to an unnamed "individual." See J.A. 20, 23, 24 (Compl. ¶¶ 58, 65, 70). There are no facts in the complaint to show where Plaintiff obtained these screenshots, although they appear to have been taken

from an unidentified person's web browser. Nor are there facts in the complaint to establish that the screenshots depict information in the form it was received by Meta's servers or to show that anyone at FITE or Meta could gain access to, and read, the depicted information.

One of the screenshots is reproduced below:



J.A. 24 (Compl. ¶ 69). According to the complaint, the string of characters following the word “GET” in box A includes the title of a video or event that the unidentified user accessed by sending a “GET request” to FITE’s website. *See id.* (Compl. ¶ 70). “A GET request is a message sent from an HTTP client, such as a web browser, to a server asking for the content located at a particular URL.” *United States v. Raymonda*, 780 F.3d 105, 110 n.1 (2d Cir. 2015). When the unidentified user’s web browser requested the content at the depicted URL from FITE’s server, Pixel allegedly caused the user’s browser to send that GET request to Meta’s servers as well. Because the GET request is so difficult to read, Plaintiff highlighted in the screenshot where she says the title of the video or event can be found. Even with that assistance it is difficult to decipher. Moreover,

because it is merely an “excerpt” of the GET request, J.A. 24 (Compl. ¶ 69), locating the title could be even more difficult than shown in the screenshot.

Box B allegedly shows the FID contained on the c_user cookie of the unnamed person who accessed the video. That is also difficult to make out. Again, because the c_user cookie is set on the user’s browser (by Meta), Pixel allegedly triggered the browser to send the cookie and FID to Meta’s servers. There are no allegations to show how someone could find the FID unless they had access to the web browser where the screenshots were obtained.

Plaintiff brought the case on behalf of all persons in the United States who subscribed to FITE’s services “or purchased a pay-per-view event from FITE and accessed video content on FITE’s website . . . or app while having a Facebook account.” J.A. 29 (Compl. ¶ 91). The complaint alleges a cause of action under

* * *

giant’s computers receive. That is not a “disclosure” under the plain meaning of the word.

B. The complaint does not plausibly allege that FITE, rather than Plaintiff’s own web browser, transmitted the URLs and FID to Meta’s servers.

Plaintiff has not sufficiently pleaded that FITE “disclosed” her PII for another reason: she does not plead facts to show that FITE itself transmitted to Meta’s servers—or even possessed—what she claims is PII. Plaintiff describes her attenuated theory of FITE’s alleged “disclosure” of PII in paragraphs 50

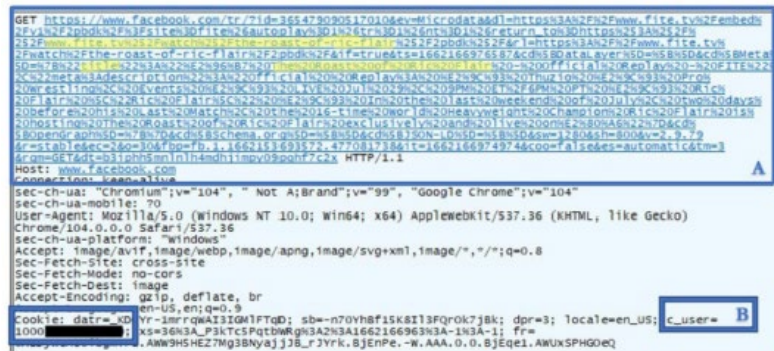
through 57 of her complaint. When read closely, Plaintiff does not allege facts showing that FITE itself disclosed Plaintiff's FID and viewing history. Instead, Plaintiff states in conclusory form that FITE "disclosed" URLs containing video titles and FIDs to Facebook. See J.A. 20, 22, 24 (Compl. ¶¶ 57, 64, 69).

Whether FITE "disclosed" PII as that term is used in the VPPA is a legal conclusion that must be supported by specific factual allegations. See *Rothstein*, 708 F.3d at 94 ("[W]e are not required to credit conclusory allegations or legal conclusions couched as factual allegations."). Plaintiff vaguely alleges that FITE discloses information "via the Facebook Pixel." J.A. 20 (Compl. ¶ 57). But that is different from pleading facts to show that FITE sends the URLs and FIDs to Facebook's servers, which are absent from the complaint. As explained below, the specific factual allegations in the complaint—most notably the exemplar transmission screenshots on which Plaintiff relies—do not support Plaintiff's legal conclusion that FITE "disclosed" PII and, indeed, appear to contradict that general allegation. See *DPWN Holdings*, 747 F.3d at 151-52 ("Although factual allegations of a complaint are normally accepted as true on a motion to dismiss, that principle does not apply to general allegations that are contradicted by more specific allegations in the [c]omplaint." (internal citation and quotation marks omitted)). Plaintiff glaringly fails to allege in the complaint where the screenshots come from, but they appear to be screenshots from some user's web browser and show that: (1) the Facebook c_user cookie on the web browser transmitted the FID to Meta's servers, and (2) the web browser also transmitted the

URLs as “GET” requests to Meta’s servers. *See supra* at 7-8. That is not a disclosure by FITE.

First, the facts in the complaint do not establish that FITE itself sent Meta's servers Plaintiff's FID. Plaintiff does not allege that FITE ever possessed her FID and thus she does not, and cannot, claim that FITE provided her FID to Meta. Plaintiff alleges that she provided certain personal information to FITE when she created an account with FITE but does not allege that she ever provided her FID to FITE. *See* J.A. 14 (Compl. ¶ 31). Given this omission, the only reasonable inference is that the c_user cookie that Meta set on her browser transmitted the FID to Meta, not FITE's site or server.

The screenshots show the FID following “c_user=” in Box B below (Plaintiff’s annotation in paragraph 57 of the complaint):



Courts have explained that the “c_user cookie” is a Facebook cookie that Facebook sets on its users’ browsers, *Smith*, 262 F. Supp. 3d at 948, which contains the user’s FID, and that Facebook (now Meta) is the only company that can read the FID, *see In re Hulu Privacy Litig.*, 86 F. Supp. 3d at 1093-94, 1093 n.3, 1097. If Meta is the only entity that can read

Facebook’s c_user cookie—the cookie that contains a Facebook user’s numeric FID—it follows that FITE would not have been able to obtain FIDs from the c_user cookie to send back to Meta’s servers. And because Plaintiff does not allege that FITE otherwise obtained her FID, the only plausible conclusion is that the c_user cookie on Plaintiff’s web browser is what sent her FID to Meta’s servers. FITE could not have disclosed Plaintiff’s FID when FITE did not have it, and the FID was contained on a cookie on Plaintiff’s browser that only Meta’s servers could access. See *Eichenberger*, 876 F.3d at 986 (affirming dismissal of VPPA claim premised on information that the defendant “never disclosed and apparently never even possessed”); *Chutich v. Green Tree Acceptance, Inc.*, No. 88-cv-869, 1993 WL 173813, at *9 (D. Minn. Apr. 19, 1993) (“[I]t is axiomatic that a corporation cannot disclose what it does not know . . .”).

Second, the screenshots show, or at least strongly suggest, that FITE’s website also did not communicate the URLs to Meta’s servers. As illustrated in the below screenshot (with FITE’s annotation in the top left corner marked in red), a FITE.tv URL is embedded within a Facebook.com URL that follows the word “GET”:



As one court has explained, a “GET” request is sent by the user’s web browser to the web server associated with the URL that the user requests to access; “[t]he GET request specifies the page that the visitor wants to retrieve . . . [and] provides information about the visitor, like her language, operating system, browser settings, and other technical parameters.” *Smith*, 262 F. Supp. 3d at 947. That the screenshots show a “GET” request strongly suggests that the transmission depicted came from some user’s web browser, not FITE’s website. The complaint has no contrary allegations and is notably silent on where Plaintiff obtained the screenshots—from her or another user’s web browser or from some other source.

Accordingly, Plaintiff’s conclusory allegation that FITE “disclosed” the URLs and FIDs to Meta cannot be credited. At most, Plaintiff has alleged that Pixel triggered Plaintiff’s web browser and the *c_user* cookie contained on it to send information to Meta’s servers. Plaintiff’s reading would render any act that was allegedly part of the causal chain leading to a disclosure to itself be a disclosure. Congress could have reached that result if it wished, including by creating a cause of action against a defendant who

“disclosed or caused the disclosure of” PII. Indeed, other laws expressly incorporate causing a disclosure when that was Congress’s intent. *See* 18 U.S.C. App. 3 § 5 (requiring notice of

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DETRINA SOLOMON, on	:	No. 2:22-cv-05508-
behalf of herself and all	:	JMA-JMW
others similarly situated,	:	Oral Argument
Plaintiff,	:	Requested
v.	:	Date of Service:
FLIPPS MEDIA, INC. dba	:	December 23, 2022
FITE and FITE TV,	:	
Defendant.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT FLIPPS MEDIA, INC.'S
MOTION TO DISMISS CLASS ACTION
COMPLAINT**

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* * *

“Uniform Resource Locator” (“URL”) that her web browser accessed when she watched a video on FITE’s website, and (2) her numeric Facebook ID (“FID”). The code in these transmissions—which, in the screenshots in the complaint, consists of letters, numbers, symbols, and other programming syntax surrounding and interspersed among the alleged PII—is a tiny portion of the millions or billions of other lines of computer code received by Facebook’s servers each day.

Based on those convoluted and insufficient allegations, Plaintiff seeks to represent a class of all Facebook accountholders in the United States who accessed content on FITE’s website within the last two years and to impose potentially millions of dollars in statutory damages on FITE. The Court should reject Plaintiff’s claim and dismiss the complaint for at least four reasons.

First, Plaintiff does not plausibly allege that the supposedly improper transmissions contained “PII” as defined in the VPPA. PII is information that identifies a specific person and a specific video that individual has watched, but the complaint lacks facts showing how someone could specifically identify Plaintiff through her numeric FID. The complaint includes a screenshot of an “exemplar Facebook profile” to show the types of information that can be included on a Facebook profile and alleges in conclusory fashion that any ordinary person can use a numeric FID to match a specific person with that numeric FID. But the complaint does not allege what personal information is available on Plaintiff’s public Facebook profile (e.g.,

name, hometown, employer, picture, etc.) or how someone could identify her as the person connected to a numeric FID. Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York recently dismissed a VPPA claim against an affiliate of FITE for this same pleading deficiency.

Additionally, Plaintiff has not plausibly alleged that the browser transmissions that Pixel allegedly triggered contained PII because most courts presented with the legal question of what constitutes PII have adopted an “ordinary-person” standard. The alleged transmissions of PII here—consisting of excerpts from complex computer code—do not meet that standard. No ordinary person could review, or likely even find, the unannotated versions of the alleged transmissions of PII included in the complaint and use them to identify a specific person as having watched a specific video on FITE’s website.

Second, Plaintiff has not plausibly alleged that FITE knowingly “disclosed” anything to anyone. Under the plain meaning of “disclose,” and in accordance with courts’ interpretation of the same language in the analogous Privacy Act of 1974, a defendant discloses PII when the defendant transmits, or provides another individual access to, PII, which that other individual reviews. Plaintiff merely alleges that the URLs of the events she accessed on FITE’s website and her FID were transmitted in complex lines of code to Facebook’s servers. She does not allege that any persons at Facebook reviewed that information, and given the millions or billions of similar transmissions received by Facebook’s servers daily, it is simply not plausible that anyone did.

Moreover, a careful parsing of the complaint reveals that Plaintiff has not alleged that FITE was itself a party to the allegedly unlawful disclosures. The screenshots in the complaint strongly suggest that the FID in the transmissions came not from FITE, but from a Facebook tracking cookie to which only Facebook has access and that Facebook places on its users' browsers. Plaintiff notably does not allege that FITE ever possessed her numeric FID, a prerequisite for FITE to have knowingly disclosed that information to Facebook. The screenshots also strongly suggest that the URLs were not sent to Facebook by FITE's website, but were "GET" requests sent directly from Plaintiff's web browser. The screenshots do not support, and indeed, appear to contradict, Plaintiff's conclusory statements that FITE disclosed PII via Pixel.

Third, the VPPA applies only to "prerecorded" videos—not live broadcasts—but Plaintiff does not specify in her complaint whether she watched prerecorded videos or live events. Plaintiff's effort to shoehorn live events into the VPPA by alleging in conclusory fashion that "live" events fall within the VPPA because they are "first recorded as a video file" before being streamed conflicts with the plain language of the VPPA and should not be given any weight. The Court should follow the lead of other federal courts that have considered similar allegations and reject Plaintiff's efforts to expand the statute to cover both live and prerecorded videos.

Finally, if the Court finds the statute ambiguous as applied to Plaintiff's allegations, it should dismiss the complaint under the rule of lenity. That rule applies

here because the VPPA has both civil and criminal applications.

Because Plaintiff has not stated a claim upon which relief can be granted, and because some deficiencies cannot be cured by amendment, the complaint should be dismissed with prejudice.

BACKGROUND

FITE is a digital streaming company that offers a variety of live and on-demand video content in the sports, entertainment, and music areas. (Compl. ¶¶ 2, 34.) Plaintiff alleges that FITE “offers 15,000+ hours of videos on demand and streams 1000+ live events per year to more than 5 million registered users worldwide.” (*Id.* ¶ 34.) Plaintiff is a Texas resident who claims to have streamed unidentified videos from one of FITE’s services at some point within two years of filing her complaint. (*Id.* ¶¶ 11-12.) She asserts a single cause of action on behalf of herself and all other persons within the proposed class for alleged violations of the VPPA.

Congress enacted the VPPA in 1988 in response to a local video store’s disclosure to a newspaper reporter of the titles of videos that Supreme Court nominee Robert Bork’s family had rented. S. Rep. No. 100-599, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-5, *also available at* 1988 WL 243503, at *4-5. The act prohibits a “video tape service provider” from “knowing[ly] disclos[ing], to any person, [PII] concerning any consumer of such provider” without

* * *

APPENDIX D

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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

Plaintiff,

v.

**FLIPPS MEDIA, INC.
dba FITE and FITE TV,**

Defendant.

**Case No.: 2:22-cv-
05508-JMA-JMW**

**PLAINTIFF’S
OPPOSITION TO
DEFENDANT’S
MOTION TO
DISMISS AND
INCORPORATED
MEMORANDUM OF
LAW**

* * *

behavior.” *Eichenberger v. ESPN Inc.*, 876 F.3d 979, 985 (9th Cir. 2017) (quoting *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 267 (3d Cir. 2016)). Whatever standard the Court applies, Solomon’s allegations satisfy it.

A. An Ordinary Person Can Readily Identify Solomon Using Her Facebook ID.

The “ordinary person” test was established by the Third Circuit in *Nickelodeon*, whose reasoning and rule the Ninth Circuit adopted in *Eichenberger*. According to the *Nickelodeon* court, there is a “spectrum” of personally identifiable information. 827 F.3d at 282. Solomon’s Facebook ID easily falls on the

“identifiable” side of that spectrum. “At one end” of the spectrum is “a person’s actual name.” *Id.* Next is information “such as a telephone number or a physical address” that does not in itself identify a specific person but could be used to do so “by consulting publicly available sources.” *Id.* at 282–83. “Further down the spectrum” is information such as a social security number that requires “consulting another entity” to match to a specific person. *Id.* at 283. Finally, “even further down the spectrum” was the kind of information before the *Nickelodeon* court: IP addresses, “browser fingerprint[s],” and “unique device identifier[s],” *id.* at 281–82, all of which “would likely be of little help” to an “average person” trying to identify someone specific. *Id.* at 283. Likewise, in *Eichenberger*, the Ninth Circuit held that an ordinary person would not be able to use streaming device serial numbers to identify anyone specific where the serial numbers could be linked to specific persons only by stitching together “an enormous amount of information” collected by defendant “from a variety of sources” using defendant’s “complex” proprietary methods of analysis. 876 F.3d at 986.

In arguing that Solomon’s Facebook ID does not disclose Solomon’s identity, Defendant relies almost entirely upon an unreported case from further down the spectrum, *Wilson v. Triller*, 2022 WL 1138073 (S.D.N.Y. April 18, 2022). *Wilson* involved neither the use of the Facebook Pixel nor the disclosure of a Facebook ID; rather, the claims in that case were based upon the defendant’s actions in disclosing to corporate affiliates a unique user identification number (UID) that had been generated by the defendant, along with the video viewing history

associated with that UID. *Id.* at *87. While the plaintiff acknowledged that the disclosed information was “‘anonymized’ and thus did not itself identify” her or any other particular user, she nevertheless argued the information was PII because it could be “used by” the corporate affiliates “to associate the watch history with a particular individual” by “combin[ing] it with other information so as to deduce the true identity of the individual associated with the video watch data.” *Id.* at **90-91. The court rejected her argument, noting that each UID was required to be paired with that user’s Triller profile page, which may or may not contain personal information about the user. *Id.* at *92.

The court in *Wilson* was not faced with remotely the same situation this Court faces here, where Solomon’s personally identifiable Facebook ID itself was transmitted to Facebook along with her video viewing history. Rather, as with a social security number, an additional step would have to be taken to connect the anonymized UID to a profile page, and then to an individual. *See Nickelodeon*, 827 F.3d at 283. And unlike the publicly identifiable Facebook ID transmitted here, whether the Triller profile page was capable of identifying an individual Triller user would depend on the level of information included on the profile page, such as information in an “About Me” page or a URL associated with a photograph of the user. *See Wilson*, 2022 WL 1138073 at *92.

Unlike the anonymized UID in *Wilson* or the device and other anonymized identifiers at issue in *Nickelodeon* and *Eichenberger*, Solomon’s Facebook ID readily permits an ordinary person to identify her. As the Complaint explains, anyone, even someone with

limited technical proficiency, can enter “facebook.com/” and Solomon’s Facebook ID into a web browser and be taken directly to her personal Facebook page. Compl. ¶ 7; *see id.* ¶¶ 62–63 (illustrating simple, one-step process for identifying a person using her Facebook ID), ¶ 86 (alleging Solomon was a Facebook user with a Facebook ID while she was a FITE subscriber). Like looking up a telephone number or address in a phone book, linking Solomon’s Facebook ID to her identity is well within the reach of an ordinary person, unaided by any advanced or proprietary means. Solomon’s Facebook ID thus satisfies the ordinary person test—a result expressly contemplated by *Eichenberger*, *see* 876 F.3d at 986 (“[a] Facebook link or an email address may very well readily enable an ‘ordinary person’ to identify an individual”), and actually reached by a federal district court in a recent decision applying *Eichenberger* to another VPPA action regarding a company’s use of the Pixel and addressing the Facebook ID. *See Stark v. Patreon, Inc.*, 2022 WL 7652166, at **7–8 (N.D. Cal. Oct. 13, 2022).

B. Solomon’s Facebook ID Is Reasonably and Foreseeably Likely to Reveal Her Identity When Disclosed to Facebook.

Solomon’s Facebook ID also handily satisfies the First Circuit’s less-restrictive foreseeability test. In *Yershov*, the First Circuit began by explaining this standard in plain language:

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.

820 F.3d at 486. The court then held that the defendant disclosed PII when it disclosed to a third party the GPS coordinates of its users’ devices, together with special device identifiers unique per device and per user, whenever its users watched a video. *Id.* at 484–86. According to the complaint’s allegations, the third-party recipient “ha[d] the ‘game program,’ so to speak,” that allowed it to link the coordinates and identifiers to specific persons. *Id.* at 486. At any rate, the court suggested, “[g]iven how easy it is to locate a GPS coordinate on a street map,” GPS coordinates without more can constitute PII under the right circumstances. *Id.* (“[I]magine [defendant] had disclosed that a person viewed 146 videos on a single device at 2 sets of specified GPS coordinates . . . [T]his disclosure would enable most people to identify what are likely the home and work addresses of the viewer (*e.g.*, Judge Bork’s home and the federal courthouse).”). Allowing that some connections between information and identity may be “too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable

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