

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

DEBRA LEBAKKEN, individually and  
on behalf of all others similarly situated,

Plaintiff,

v.

WEBMD, LLC,

Defendants.

**MOTION TO DISMISS THE FIRST  
AMENDED COMPLAINT**

CIVIL ACTION

FILE NO.: 1:22-cv-0644-TWT

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION .....	4
II. FACTUAL BACKGROUND.....	6
A. Lebakken’s Newsletter Subscription.....	6
B. WebMD’s Alleged use of the Facebook Pixel.....	7
C. Plaintiff’s Video Views .....	8
III. LEGAL STANDARD .....	9
IV. ARGUMENT.....	9
A. Plaintiff is not a Consumer under the VPPA Because She Did Not Rent, Purchase, or Subscribe to Any Video Service from WebMD .....	10
1. Plaintiff is not a “subscriber” under the VPPA. ....	10
2. Plaintiff is not a subscriber of a video service .....	12
B. Plaintiff Failed to Allege Facts Sufficient to Suggest that WebMD Shared Her Personally Identifiable Information in Connection with Video Views. ....	16
1. Plaintiff fails to allege that her e-mail or Facebook ID was transmitted to Facebook.....	16
2. Plaintiff fails to allege that WebMD disclosed any Facebook IDs. ....	17
3. Browser information is not PII .....	18
C. Plaintiff Fails to Adequately Plead Any Alleged Disclosure Was Made Knowingly.....	19
V. CONCLUSION.....	21

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	6
<i>Austin-Spearman v. AMC Network Entertainment LLC</i> , 98 F. Supp.3d 662 (S.D.N.Y. 2015) .....	7, 9, 10
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6
<i>Costanzo v. City of Omaha</i> , No. 8:04CV99, 2004 WL 2359722 (D. Neb. Oct. 19, 2004) .....	12
<i>Ellis v. Cartoon Network</i> , 803 F.3d 1251 (11th Cir. 2015) .....	7, 8, 10
<i>In re Hulu Priv. Litig.</i> , No. C 11-03764 LB, 2014 WL 1724344 (N.D. Cal. Apr. 28, 2014).....	15, 16
<i>In re Hulu Privacy Litigation</i> , 86 F.Supp.3d 1090 (N.D. Cal. 2015).....	16, 17
<i>Mollett v. Netflix, Inc.</i> , Case No. 5:11–CV–01629–EJD, 2012 WL 3731542 (N.D. Cal. Aug.17, 2012) .....	16
<i>In re Nickelodeon Consumer Privacy Litigation</i> , 827 F.3d 262 (3d Cir. 2016) .....	12, 15
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986).....	6
<i>Perry v. Cable News Network, Inc.</i> , 854 F.3d 1336 (11th Cir. 2017) .....	8, 10, 11
<i>Robinson v. Disney Online</i> , 152 F. Supp. 3d 176 (S.D.N.Y. 2015) .....	13
<i>Yershov v. Gannett Satellite Information Network, Inc.</i> , 104 F. Supp. 3d 135 (D. Mass. 2015).....	8

**STATUTES, RULES & REGULATIONS**

18 U.S.C. § 2710(a)(1).....7  
18 U.S.C. § 2710(a)(3).....13, 16  
18 U.S.C. § 2710(a)(4).....7  
18 U.S.C. § 2710(b)(1).....6  
18 U.S.C. § 2710(b)(2)(B) .....16  
Fed. R. Civ. P. 12(b)(6).....1, 3

Defendant WebMD, LLC (“WebMD”), by and through its undersigned counsel, respectfully moves to dismiss Plaintiff Debra Lebakken’s (“Plaintiff”) First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. WebMD submits the following arguments in support of this Motion and requests that the Court enter an order dismissing the First Amended Complaint with prejudice.

## **I. Introduction**

This is one of more than a dozen Video Privacy Protection Act (“VPPA”) class actions plaintiff’s counsel and other members of the plaintiffs’ bar have filed in recent months in federal courts across the country. Challenging online content providers’ use of the Facebook Pixel, a piece of code installed on their websites, these actions seek to multiply the VPPA’s \$2,500 in statutory damages by a putative nationwide class. This is the only such action within the Eleventh Circuit, which has twice affirmed the dismissal of similar claims.

In 2017, Debra Lebakken subscribed to a free e-mail newsletter on WebMD.com, an online publisher of health news and information. Over four years later, in January 2022, Lebakken navigated to WebMD.com and watched unspecified videos. She does not allege that she accessed the videos through the newsletter, that she signed into the site, or that the videos were restricted to

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.