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, Defendant.	CIVIL ACTION FILE NO. 1:22-CV-644-TWT

OPINION AND ORDER

This is a putative class action case brought under the Video Privacy Protection Act ("VPPA"). It is before the Court on the Defendant WebMD, LLC's ("WebMD") Motion to Dismiss [Doc. 29]. For the reasons set forth below, WebMD's Motion to Dismiss is DENIED.

I. Background[1]

This case arises under the VPPA from allegations that WebMD improperly disclosed personally identifiable information ("PII") of the Plaintiff Debra Lebakken, and others similarly situated, to Facebook through an online tool called the Facebook Tracking Pixel. (First Am. Compl. ¶¶ 3, 20, 85.) WebMD owns and operates the popular website, WebMD.com, which provides

[1] The Court accepts the facts as alleged in the First Amended Complaint as true for purposes of the present Motion to Dismiss. *Wildling v. DNC Servs. Corp.*, 941 F.3d 1116, 1122 (11th Cir. 2019).

online health information and medical news to individuals and generates revenue through advertising on its website. (*Id.* ¶¶ 2, 10.) WebMD delivers some of that health and medical information to individuals through videos, and it allegedly refines content for specific viewers based on prior videos they have watched on the website. (*Id.* ¶¶ 13–14.) Such content refining is made possible through data aggregators like Facebook, which harvest activity data of online users to create custom audiences and other similar tools for targeted advertising. (*Id.* ¶¶ 15, 18–19.) On its website, WebMD hosts one of Facebook's data aggregation tools, the Facebook Tracking Pixel, to analyze the online activity of WebMD users. (*Id.* ¶¶ 20–24.) Lebakken alleges in detail how WebMD's Facebook Tracking Pixel records user activity, transmits that data to Facebook, and employs the aggregated data to improve the targeting of its online content to WebMD users. (*Id.* ¶¶ 24–57.)

Lebakken created a Facebook account in 2007 and a WebMD account in 2017, the latter requiring her to submit her email address and birthday to create the account. (*Id.* ¶¶ 62–63.) She also provided her email address to WebMD to receive an e-newsletter, which frequently contained video content. (*Id.* ¶¶ 56, 62.) Lebakken alleges that when she watched videos on WebMD.com, WebMD disclosed her Facebook ID, her email address, and the video detail, along with other information, to Facebook. (*Id.* ¶¶ 65–66.) On February 15, 2022, Lebakken brought the present action, on behalf of herself and the putative class, seeking damages for the alleged violations of the VPPA.

(*Id.* ¶ 87.) WebMD now moves to dismiss the claims in Lebakken's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (Br. in Supp. of Def.'s Mot. to Dismiss, at 4.)

II. Legal Standard

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible" claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); Fed. R. Civ. P. 12(b)(6). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is "improbable" that a plaintiff would be able to prove those facts; even if the possibility of recovery is extremely "remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. *See Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983); *see also Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (noting that at the pleading stage, the plaintiff "receives the benefit of imagination"). Generally, notice pleading is all that is required for a valid complaint. *See Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. at 555).

III. Discussion

WebMD moves to dismiss the First Amended Complaint, arguing that Lebakken has failed to state a claim under the VPPA for several reasons. (Br. in Supp. of Def.'s Mot. to Dismiss, at 5.) Under the VPPA, "[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 for the relief" specified in the statute. 18 U.S.C. § 2710(b)(1). In support of its motion to dismiss, WebMD first argues that Lebakken is not a consumer of any video service, then argues that any disclosure of Lebakken's information did not constitute PII, and finally argues that WebMD did not disclose any PII knowingly. (Br. in Supp. of Def.'s Mot. to Dismiss, at 5–6.) The Court addresses each of these arguments and Lebakken's responses in turn.

A. Consumer Under the VPPA

WebMD first argues that Lebakken cannot state a claim under the VPPA because she failed to adequately allege that she is a consumer of any video service. (*Id.* at 10.) Lebakken responds that WebMD's e-newsletter constitutes a good or service under the VPPA and that Lebakken was a subscriber of that e-newsletter. (Pl.'s Resp. Br. in Opp'n to Def.'s Mot. to Dismiss, at 3.) Under the VPPA, a "consumer" is "any renter, purchaser, or subscriber of goods or services from a video tape service provider," and a "video tape service provider" is "any person, engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual

materials." 18 U.S.C. § 2710(a)(1), (a)(4). The parties dispute (1) whether Lebakken sufficiently alleged she was a subscriber of WebMD's e-newsletter and (2) whether that e-newsletter constitutes a good or service under the VPPA. (Br. in Supp. of Def.'s Mot. to Dismiss, at 10–16; Pl.'s Resp. Br. in Opp'n to Def.'s Mot. to Dismiss, at 3–13.)

1. Was Lebakken a Subscriber under the VPPA?

The Eleventh Circuit Court of Appeals has established a multi-factor test in determining whether an individual is a "subscriber" under the VPPA. *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1255–58 (11th Cir. 2015) ("Subscriptions involve some or [most] of the following [factors]: payment, registration, commitment, delivery, [expressed association,] and/or access to restricted content." (alterations in original) (citation omitted)). Generally, subscribing "involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity" but does not necessarily require payment. *Id.* at 1256. Indeed, "there are numerous periodicals, newsletters, blogs, videos, and other services that a user can sign up for (i.e., subscribe to) and receive for free." *Id.* Merely downloading a free smartphone application and watching videos at no cost does not constitute subscription. *Id.* at 1258 ("[T]he free downloading of a mobile app on an Android device to watch free content, without more, does not a 'subscriber' make."); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1344 (11th Cir. 2017) (finding "the ephemeral investment and commitment associated with

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