

**IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JAMES HAYES, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

MAJOR LEAGUE BASEBALL
ADVANCED MEDIA, L.P.,

Defendant.

Case No. 1:22-cv-05822

Honorable Steven C. Seeger

**DEFENDANT MLB ADVANCED MEDIA, L.P.'S
MOTION TO DISMISS IN FAVOR OF ARBITRATION,
FOR LACK OF STANDING, AND FOR FAILURE TO STATE A CLAIM**

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I. INTRODUCTION

This putative class action is part of a spate of recent lawsuits trying to extend a 1988 statute addressing intentional leaks of videotape-viewing information, the Video Privacy Protection Act (“VPPA”), far beyond its intended scope to implicate the routine use of a program called the Facebook pixel. The VPPA prohibits “video tape service provider(s)” who deliver “prerecorded video cassette tapes or similar audio visual materials” from “knowingly” disclosing “personally identifiable information” (“PII”) that “identifies a [consumer] as having requested or obtained specific video materials or services.” 18 U.S.C. § 2710 (a), (b)(1). The VPPA is a “quite narrow” statute passed before the age of the internet in response to a prominent news story—an exposé published by the *Washington City Paper* after a store clerk leaked a list of 146 films rented by Supreme Court nominee Robert Bork. *See In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 278–79, 284 (3d Cir. 2016). Although the VPPA prohibits only a specific type of disclosure, Plaintiff now seeks to apply the statute to the alleged transmission of data to Facebook when users are logged into Facebook and the pixel is operating on a separate website (such as MLB.com) containing videos.

Plaintiff’s lawsuit against Defendant MLB Advanced Media, L.P. (“MLBAM”) fails on multiple grounds. *First*, it fails under Fed. R. Civ. P. 12(b)(3) because Plaintiff agreed many times that disputes with MLBAM like this one must be resolved by arbitration. Plaintiff admits that before any of the challenged activity took place, he subscribed to several of MLBAM’s digital products on MLB.com. When he did so, he agreed to a binding clause requiring arbitration. Based on that binding clause, which expressly covers any disputes Plaintiff has arising from his use of MLBAM digital products, including this dispute, the Court should compel arbitration and dismiss this case for improper venue.

Second, Plaintiff's complaint fails under Rule 12(b)(1) because Plaintiff does not allege facts supporting that he was actually injured, as required to establish Article III standing. The Supreme Court's recent decision in *TransUnion LLC v. Ramirez* requires plaintiffs to allege a concrete injury in fact. 141 S. Ct. 2190 (2021). As *TransUnion* made plain, alleging a violation of a statute is not enough to satisfy the injury requirement absent allegations of concrete harm. Yet Plaintiff completely fails to allege that he suffered a concrete harm. He thus lacks standing.

Third, Plaintiff's complaint fails under Rule 12(b)(6) because it does not state a viable claim under the VPPA for several independent reasons. To begin, the VPPA prohibits "disclos[ing]" PII to a third party. 18 U.S.C. § 2710(b)(1). PII for purposes of the VPPA comprises "three distinct elements": "[1] the consumer's identity; [2] the video material's identity; and [3] the connection between them." *In re Hulu Priv. Litig.*, 86 F. Supp. 3d. 1090, 1095–96 (N.D. Cal. 2015). Plaintiff does not (and cannot) allege that MLBAM ever possesses his Facebook ID—the "consumer's identity" piece of the alleged PII here—and therefore MLBAM cannot possibly disclose PII.

Plaintiff also does not (and cannot) satisfy the crucial connection element of PII in this context. The VPPA does not prohibit the disclosure of user data itself or video data itself. Rather, it prohibits the disclosure of information identifying a particular person "as having requested or obtained" a video. The connection between a person and a video can be made on the discloser's end or "by an act of the recipient," but it must be made. *Id.* at 1096. In Judge Bork's example, the connection was obvious: a store clerk handed over a list of videos Judge Bork rented. Here, however, Plaintiff does not allege that anyone at Facebook, the alleged recipient, ever identified him "as having requested or obtained" a video on MLB.com. Nor does Plaintiff plausibly allege that MLBAM, the alleged discloser, did so. As noted, MLBAM does not even possess the

Facebook IDs of users of its websites, let alone connect them with video titles to disclose to Facebook. Instead of alleging that MLBAM possesses this information, Plaintiff acknowledges that the Facebook ID is sent from his own browser to Facebook through a Facebook cookie—a piece of code on Plaintiff’s browser. Plaintiff’s own allegations thus undermine any claim that MLBAM connected and “disclose[d]” PII. Plaintiff cannot sustain a VPPA claim in this context.

Finally, Plaintiff fails to state a viable claim because the VPPA’s plain text excludes from liability disclosures “incident to the ordinary course of business.” 18 U.S.C. § 2710(b)(2)(E). In one of its few opportunities to address the VPPA, the Seventh Circuit has interpreted this exception broadly, recognizing that the VPPA addresses purposeful leaks, not routine transmissions to third-party service providers. Congress has made clear that the ordinary-course-of-business exception includes disclosures made for marketing purposes—the precise purpose for which Plaintiff alleges that MLBAM made disclosures here.

In short, the Court should dismiss this case in favor of arbitration, to which Plaintiff himself agreed by consenting to MLBAM’s Terms of Use. Barring that, the Court should dismiss this case based on one of the other fundamental defects in the complaint.

II. BACKGROUND

A. Plaintiff agreed to MLBAM’s Terms of Use—which include a mandatory arbitration clause—before any of the purported disclosures he challenges.

Plaintiff brings a single putative-class-action claim under the VPPA against MLBAM. (Dkt. No. 1.) MLBAM operates MLB.com, which features a broad selection of online content related to Major League Baseball. (*See id.* ¶ 13.) Plaintiff alleges that “since at least 2017,” he has been registered for an account on MLB.com and has subscribed to an MLB online newsletter, both of which allegedly contain video content. (*Id.* ¶¶ 12–13, 42–43.) The purported disclosures Plaintiff challenges began three years later in “approximately 2020,” when he says he

got a Facebook account and “used his MLB.com digital subscriptions to view prerecorded Video Media through MLB.com while logged into his Facebook account.” (*Id.* ¶¶ 12, 44.) This means that the challenged disclosures occurred well after Plaintiff registered for an account with MLBAM and subscribed to MLB.com newsletters in 2017.

When Plaintiff subscribed to MLBAM’s digital products in 2017, he agreed to MLBAM’s Terms of Use at least two times and in two ways. He agreed to those Terms when subscribing to MLB.com newsletters. (*See* Dkt. No. 1 ¶ 42; Declaration of Joshua Frost (“Decl.”)¹ ¶¶ 8–11.) And he agreed to those Terms when he registered for an account at MLB.com. (*See* Dkt. No. 1 ¶ 43; Decl. ¶¶ 4–6.)

MLBAM’s Terms of Use have included substantially the same arbitration clause since 2016. (*See* Exs. A–C.²) That clause binds subscribers to arbitrate all disputes about their use of MLB.com and MLB.com newsletters. It provides:

Any and all disputes, claims or controversies arising out of or relating to this Agreement, the breach thereof, or any use of the [MLBAM]³ Properties . . . except for claims filed in a small claims court that proceed on an individual (non-class, non-representative) basis, shall be settled by binding arbitration before a single arbitrator appointed by the American Arbitration Association (‘AAA’). . . .

¹ Because courts apply a summary-judgment standard to motions to compel arbitration, the Court can properly consider the declaration of Joshua Frost and the attached exhibits when addressing MLBAM’s arbitration-related arguments. *See, e.g., Miracle-Pond v. Shutterfly, Inc.*, No. 19-cv-04722, 2020 WL 2513099, at *3 (N.D. Ill. May 15, 2020) (“Courts deciding motions to compel arbitration apply a summary judgment standard. . . . The Court may consider exhibits and affidavits regarding the arbitration agreement.”). Additionally, Plaintiff’s complaint incorporates by reference MLBAM’s signup prompts and Terms of Use, *see, e.g.,* Dkt. No. 1 ¶¶ 15–18, 42–43, so the Court can properly consider them when deciding this motion. *See, e.g., Sonrai Sys., LLC v. AMCS Grp. Inc.*, No. 16-cv-9404, 2017 WL 4281122, at *8 n.3 (N.D. Ill. Sept. 27, 2017) (“the incorporation-by-reference doctrine” is properly applied “to websites relied upon by plaintiffs in their complaints” and “the contents of documents which the plaintiff references in, and which are central to, the complaint”) (citation and quotations omitted).

² Exhibits cited in this motion are attached to the declaration of Joshua Frost. (*See* Decl. ¶¶ 13–15.)

³ Beginning in 2019, the Terms of Use substituted “MLB” for “MLBAM.” (*See* Exs. A–C.)

(Exs. A–C § 11 (emphasis added).) The Terms of Use define MLBAM “Properties” to include the MLB.com “Website . . . and all materials contained in this Website and/or otherwise accessible via other [MLBAM]-controlled products or services.” (Exs. A–C § 1.)

In sum, Plaintiff agreed to MLBAM’s Terms of Use, which contain a binding arbitration clause, before any of the alleged disclosures that he challenges occurred.

B. Plaintiff challenges disclosures made through routine use of the Facebook pixel for marketing purposes.

Turning to the technology behind Plaintiff’s challenged disclosures, his allegations center on a website tool called the Facebook pixel. The pixel is a “snippet of programming code” “from Facebook” that allegedly tracks certain “website events” as users navigate websites like MLB.com, and then enables the user’s browser to send information back to Facebook. (Dkt. No. 1 ¶¶ 4, 27.) Plaintiff alleges that the pixel is installed “on websites all over the internet,” *id.* ¶ 28, and he does not allege that MLBAM uses it in a unique way. Plaintiff alleges that the “Facebook pixel . . . benefits MLB.com by improving its ability to promote its content and services to its subscribers,” and that MLBAM benefits “from the advertising and information services that stem from use of the pixel.” (*Id.* ¶¶ 29, 30.)

C. Plaintiff challenges disclosures of Facebook IDs from users’ own browsers to Facebook.

Plaintiff’s VPPA claim challenges automatic disclosures allegedly made when the Facebook pixel is used. Specifically, Plaintiff claims that when he is logged into Facebook and watches a video on MLB.com, Facebook’s pixel causes two pieces of data to be disclosed to Facebook: (1) the URL of the video he watched; and (2) his Facebook ID, a string of numbers associated with his Facebook account. (Dkt. No. 1 ¶¶ 5, 31.) But Plaintiff’s allegations reveal that Facebook IDs are in Facebook cookies on users’ browsers. They are neither possessed nor transmitted by MLBAM. Plaintiff alleges that the purportedly problematic disclosures occur

“[w]hen a Facebook user with one or more personally identifiable *FID cookies on their browser*” views videos on MLBAM’s website. (*Id.* ¶ 31 (emphasis added).) Plaintiff alleges that “viewed Video Media” and the user’s Facebook ID are allegedly “transmitted to Facebook *by the user’s browser.*” (*Id.* (emphasis added).) He claims this transmission is “cause[d]” by MLBAM’s “website code.” (*Id.*) But the only website code Plaintiff provides—a screenshot of the purported type of transmission he challenges—shows a transmission that he acknowledges is “sent from the [user’s] device to Facebook.” (*Id.* ¶ 38.) In other words, Plaintiff alleges that Facebook IDs are sent from his own browser to Facebook.

D. Plaintiff does not allege personal harm from the challenged disclosures.

Plaintiff does not explain how MLBAM’s use of the Facebook pixel injured him. He merely alleges that he is “entitled by law to privacy,” Dkt. No. 1 ¶ 46, and that he and putative class members have a “statutorily protected right to privacy,” *id.* ¶ 66. For these alleged statutory violations, Plaintiff seeks to represent a putative class of “hundreds of thousands” of digital subscribers to MLB.com and its newsletters and seeks relief including “liquidated damages not less than \$2,500 per plaintiff.” (*Id.* ¶¶ 47, 50, 67.)

III. ARGUMENT

A. The Court should compel arbitration and dismiss this case based on the binding arbitration clause in MLBAM’s Terms of Use.

Plaintiff cannot sue MLBAM in this Court, or any court, because he agreed to MLBAM’s Terms of Use, which expressly refer this dispute to binding arbitration. In fact, Plaintiff’s allegations reveal he agreed *twice* to MLBAM’s Terms of Use—once when registering for an account on MLB.com, and again when subscribing to MLB.com newsletters. (*See* Dkt. No. 1 ¶¶ 42–43; Decl. ¶¶ 3–6, 8–11.) “The Court must grant a motion to compel arbitration under the [Federal Arbitration Act (‘FAA’)] where the parties have a written arbitration agreement and the

asserted claims are within its scope.” *Auyeung v. Toyota Motor Sales, USA, Inc.*, No. 19-cv-278, 2019 WL 3385189, at *3 (N.D. Ill. July 1, 2019). The “principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (citations and quotations omitted). “Once it is clear . . . that the parties have a contract that provides for arbitration . . . , any doubt concerning the scope of the arbitration clause is resolved in favor of arbitration.” *Gore v. Alltel Commc’ns, LLC*, 666 F.3d 1027, 1032 (7th Cir. 2012).

Plaintiff and MLBAM formed a binding agreement to arbitrate through the Terms of Use—twice—and Plaintiff’s VPPA claim falls within its scope. The Terms of Use require that any “arbitration shall be held in New York County, New York.” (Exs. A–C § 11.) Dismissal under Rule 12(b)(3) “is appropriate when the forum selection clause of a contract requires arbitration in another district.” *Wilcosky v. Amazon.com, Inc.*, 517 F. Supp. 3d 751, 759 (N.D. Ill. 2021). The Court should therefore compel Plaintiff to arbitrate and dismiss this case under Rule 12(b)(3). *See, e.g., Perry v. MLB Advanced Media, L.P.*, No. 18-cv-1548-PSG-GJS, 2018 WL 5861307, at *7 (C.D. Cal. May 30, 2018) (granting motion to compel arbitration and dismissing case after ruling that MLBAM’s Terms of Use are valid and enforceable).

1. Plaintiff formed an agreement with MLBAM under the Terms of Use.

The VPPA applies only to “consumer[s].” 18 U.S.C. §§ 2710(a)(1), (b)(2). Plaintiff alleges that he qualifies as a consumer because he took two independent actions to “subscribe” to MLBAM’s digital properties before any of the disclosures he challenges here took place. *Supra* at 4. First, he “became a subscriber of MLB.com” in 2017. (Dkt. No. 1 ¶ 42.) Second, he subscribed to “MLB’s online newsletter since at least 2017.” (*Id.* ¶ 43.) Each of these actions independently required Plaintiff to agree to MLBAM’s Terms of Use. (*See Decl.* ¶¶ 3–6, 8–11.) “Whether an agreement to arbitrate has been formed is governed by state law.” *Miracle-Pond*,

2020 WL 2513099, at *3. Under New York law, which the Terms of Use select as controlling, Exs. A–C § 12, each of Plaintiff’s actions alone would have formed a valid agreement to arbitrate. *See Bernardino v. Barnes & Noble Booksellers, Inc.*, No. 17-cv-04570-LAK-KHP, 2017 WL 7309893, at *3 (S.D.N.Y. Nov. 20, 2017) (“*Bernardino I*”), *R&R adopted as modified*, No. 17-cv-04570-LAK, 2018 WL 671258 (S.D.N.Y. Jan. 31, 2018) (applying New York law to find a valid agreement to arbitrate a VPPA claim). Taking these two actions together, Plaintiff assented to the Terms of Use and their mandatory arbitration provision.

“Courts around the country have recognized that [an] electronic ‘click’ can suffice to signify the acceptance of a contract’ . . . as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.” *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017) (quoting *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033–34 (7th Cir. 2016)). Courts applying New York law have found that parties agreed to arbitrate during an online signup process when certain conditions were met, including:

- the screen was uncluttered;
- the text alerting the user to the existence of other Terms of Use appeared directly below the registration button;
- the hyperlink to the Terms of Use also was easily located under the registration button without scrolling;
- the text alerting the user to the other Terms of Use was clear and obvious by its font and color;
- the text itself was a “clear prompt” or suggestion to read the terms insofar as it stated “[b]y creating an Uber account, you agree to the Terms of Service”; and
- the notice to the Terms of Use was temporally connected to an action by the user, meaning that the terms were provided simultaneous to the customer action.

Bernardino I, 2017 WL 7309893, at *9 (citing *Meyer*, 868 F.3d at 78–79).

Plaintiff’s pleadings and the factual record—which this Court can and should consider on a motion to compel arbitration, *e.g.*, *Miracle-Pond*, 2020 WL 2513099, at *3—make clear that MLBAM’s digital properties put Plaintiff on notice that registering would bind him to the Terms of Use. First, when registering for an account on MLB.com, Plaintiff was presented with a clear, uncluttered signup form. (Decl. ¶¶ 4–6.) Directly above the “Register” button, the signup prompt stated, “I understand and agree to be bound by the MLB.com Terms of Use.” (*Id.* ¶¶ 5–6.) When Plaintiff subscribed to MLB.com newsletters, the same circumstances were present: an uncluttered form and a clear statement that Plaintiff understood and agreed to the MLB.com Terms of Use above the button he had to click to subscribe. (*Id.* ¶¶ 8–11.) Additionally, when Plaintiff subscribed to MLB.com newsletters, he had to deliberately check a box manifesting his agreement to the Terms of Use, with “Terms of Use” written in an offsetting color or font and hyperlinked to the full terms. (*Id.*) In short, during both signups, “a reasonably prudent smartphone [or computer] user would understand that the terms were connected to the creation of a user account.” *Meyer*, 868 F.3d at 78; *see also Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 840 (S.D.N.Y. 2012) (ruling it “was enough” for contract formation for plaintiff to be “informed of the consequences of his assenting click and . . . shown, immediately below, where to click to understand those consequences”).

Further, the arbitration provision itself is conspicuously placed in the Terms of Use. In both the table of contents and the arbitration clause itself, the first word of Section 11, in bold, capital letters, is “**ARBITRATION.**” (Exs. A–C); *see Zheng v. Live Auctioneers LLC*, No. 20-cv-9744-JGK, 2021 WL 2043562, at *5 (S.D.N.Y. May 21, 2021) (plaintiff bound by arbitration provision appearing in “bolded and numbered heading” in Terms).

Plaintiff's actions agreeing not once, but twice, to the Terms of Use demonstrate that he was on notice of the Terms, and his assent was "unambiguous in light of the objectively reasonable notice" he received. *See Meyer*, 868 F.3d at 79. Plaintiff is thus bound by the Terms.

2. Plaintiff's VPPA claim falls within the scope of the arbitration clause in MLBAM's Terms of Use.

Plaintiff's VPPA claim falls squarely within the broad coverage of the arbitration clause in the Terms of Use. Except for individual claims in small-claims court not at issue, the Terms of Use specify that "[a]ny and all disputes, claims or controversies arising out of or relating to . . . any use of the [MLBAM] Properties . . . shall be settled by binding arbitration" (Exs. A–C § 11.) Plaintiff alleges a statutory violation based on his use of MLB.com and MLB.com newsletters. (Dkt. No. 1 ¶¶ 42–43.) Both the website and newsletters are MLBAM "Properties," which the Terms of Use define to include MLB's "[w]ebsite . . . and all materials contained in this website and/or otherwise accessible via other [MLBAM]-controlled products or services." (Exs. A–C § 1.) MLBAM's Terms of Use have contained substantially the same arbitration clause and definition of "Properties" since 2016. (Exs. A–C.) That arbitration clause easily encompasses Plaintiff's cause of action under the VPPA. *See Bernardino I*, 2017 WL 7309893, at *4 (compelling arbitration of VPPA claim under Terms of Use mandating that "[a]ny claim or controversy at law or equity that arises out of the Terms of Use, the Barnes & Noble.com Site or any Barnes & Noble.com Service" be "resolved through binding arbitration"); *Perry*, 2018 WL 5861307, at *7 (enforcing the broad arbitration clause in MLBAM's Terms of Use).

Because MLBAM's Terms of Use bind Plaintiff and his sole claim falls within the scope of the arbitration clause, the Court should compel Plaintiff to arbitrate his case and grant MLBAM's motion to dismiss under Rule 12(b)(3). *See Wilcosky*, 517 F. Supp. 3d at 759.

B. Alternatively, the Court should dismiss this case for lack of standing because Plaintiff fails to allege any harm.

Plaintiff's suit should be dismissed for another, independent reason: He claims no harm, and thus he lacks standing to sue in federal court. To have standing to invoke federal jurisdiction, Article III of the Constitution requires Plaintiff to "allege an injury in fact that is traceable to the defendant's conduct and redressable by a favorable judicial decision." *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019) (Barrett, J.). An injury in fact must be "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, Plaintiff's alleged injury is, at most, a bare violation of his "statutorily protected" rights under the VPPA—not any harm resulting from that violation. (Dkt. No. 1 ¶ 8.) But the Supreme Court has made plain that a plaintiff cannot simply "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). Because Plaintiff's complaint lacks any allegation of harm, he cannot satisfy Article III standing, and this Court should dismiss his case for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

The Supreme Court's recent decision in *TransUnion* puts an even finer point on the "important difference" between "(i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law." 141 S. Ct. at 2205. "[U]nder Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court." *Id.* Or "[a]s then-Judge Barrett succinctly summarized, 'Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions.'" *Id.* (quoting *Casillas*, 926 F.3d at 332).

TransUnion and its predecessor, *Spokeo*, superseded earlier precedent in this Circuit. In *Sterk v. Redbox Automated Retail, LLC*, the Seventh Circuit held that VPPA plaintiffs had standing because “‘technical’ violations of the statute (i.e., impermissible disclosures of one’s sensitive, personal information) are precisely what Congress sought to legalize by enacting the VPPA.” 770 F.3d 618, 623 (7th Cir. 2014). But since *Sterk*, the Supreme Court in *TransUnion* and *Spokeo* has made clear that injury in fact cannot be shown through “technical violation[s].” *Id.* Rather, “‘Article III standing requires a concrete injury even in the context of a statutory violation.’” *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo*, 578 U.S. at 341).

Against this precedential backdrop, Plaintiff’s failure to plead any concrete harm is conspicuous. Plaintiff alleges only that he is “entitled by law to privacy,” Dkt. No. 1 ¶ 46, and that MLBAM “violated Plaintiff’s and the [putative] Class members’ statutorily protected right to privacy in their video-watching habits,” *id.* ¶ 66. But Plaintiff claims no harm at all that befell him from the alleged statutory violation of the VPPA. He does not allege any physical, financial, or other injury whatsoever.

The mere disclosure of personal information to a third party is not, itself, a concrete harm. For instance, the Seventh Circuit recently held that a plaintiff’s allegation that her biometric information was sold to a third party, with no attendant harm, could not confer standing. *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1247 (7th Cir. 2021). Likewise, a court in this district found that a plaintiff lacked standing for failing to allege any injury resulting from a data breach that disclosed students’ names, emails, birth dates, and unique student identification numbers. *Kylie S. v. Pearson PLC*, 475 F. Supp. 3d 841, 847 (N.D. Ill. 2020).

So too here. Plaintiff claims that his PII was disclosed to Facebook, but he fails to allege any harm that befell him from the disclosure. As the Seventh Circuit recently clarified,

“allegations matter” when determining whether a complaint alleges concrete harm sufficient to confer standing. *Thornley*, 984 F.3d at 1246. Plaintiff, in this case, fails to allege any injury beyond a bare violation of law. *See also In re TikTok, Inc., Consumer Priv. Litig.*, No. 20-cv-4699, 2022 WL 2982782, at *23 (N.D. Ill. July 28, 2022) (“Defendants also could argue that Plaintiffs lack Article III standing to bring some of their claims [including a VPPA claim], given that a ‘bare procedural violation’ of a federal statute, without more, does not confer standing.” (quoting *TransUnion*, 141 S. Ct. at 2213)). Because Plaintiff has failed to allege any concrete harm, Plaintiff lacks standing under Article III.

C. Alternatively, the Court should dismiss this case for failure to state an essential element of a VPPA claim and because it falls within the VPPA’s ordinary-course-of-business exception.

Plaintiff’s lawsuit also should be dismissed for failure to plausibly plead a VPPA claim. Plaintiff’s complaint does not meet the pleading standards in Rule 12(b)(6) because he fails to plausibly allege that MLBAM disclosed his PII, and in any event, alleges disclosures that fall within the VPPA’s ordinary-course-of-business exception.

1. MLBAM did not “disclose” Plaintiff’s PII for purposes of the VPPA.

The first reason Plaintiff has not stated a VPPA claim is that he has not alleged a disclosure of PII by MLBAM even according to his own theory of data transmission. To determine whether Plaintiff has plausibly pleaded the disclosure element, the Court should “not credit” his “legal conclusions,” *see, e.g., Tobey v. Chibucos*, 890 F.3d 634, 639 (7th Cir. 2018), and instead should focus on the factual content he pleads. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable”). Setting aside Plaintiff’s legal conclusions, his factual allegations fail to state a claim. The VPPA penalizes only defendants who “disclose[]” PII, which it defines to include “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(b)(1), (a)(3). This means that for purposes of the VPPA, PII has three components: “[1] the consumer’s identity; [2] the video material’s identity; and [3] the connection between them.” *In re Hulu*, 86 F. Supp. 3d. at 1095–96. Plaintiff does not plausibly allege that MLBAM possesses Facebook IDs—the crucial “consumer identity” component of the PII it supposedly discloses. Because MLBAM does not possess Facebook IDs, it cannot disclose them, and Plaintiff cannot state a viable claim under the VPPA.

The “connection” requirement is “indispensable” to the VPPA’s purpose and structure. *Id.* at 1096. “The point of the VPPA, after all, is not so much to ban the disclosure of user or video data” but “to ban the disclosure of information connecting a certain user to certain videos.” *Id.* at 1095. For an actionable disclosure under the VPPA to occur, the connection between a user and a video must be made either by the alleged discloser or “by an act of the [alleged] recipient.” *Id.* at 1096. Plaintiff does not allege that anyone at Facebook—the alleged recipient—ever connected his Facebook ID with a title of a video he watched on MLB.com to identify him “as having requested or obtained specific video materials.” 18 U.S.C. § 2710(a)(3). Therefore, the only potentially viable claim would be that MLBAM must have made the connection. But, as explained above, Plaintiff fails to allege that MLBAM was ever in possession of information necessary to make the connection between a user’s identity with a particular video.

Courts have dismissed VPPA claims on these very grounds. For example, in *Eichenberger v. ESPN, Inc.*, the Ninth Circuit upheld the dismissal of a VPPA claim by distinguishing the information defendant ESPN possessed from the information it never possessed and so could not have connected and disclosed. 876 F.3d 979 (9th Cir. 2017). ESPN did not disclose PII to Adobe in violation of the VPPA, the court held, where the information it

disclosed “cannot identify an individual unless it is combined with [the] other data in Adobe’s possession—data that ESPN never disclosed and apparently never even possessed.” *Id.* at 986; *see also Robinson v. Disney Online*, 152 F. Supp. 3d 176, 182 (S.D.N.Y. 2015) (dismissing VPPA claim for failure to plausibly allege disclosure of PII and explaining that “the information actually ‘disclose[d]’ by a ‘video tape service provider,’ . . . must itself do the identifying that is relevant for purposes of the VPPA”—“not information disclosed by a provider, plus other pieces of information collected elsewhere by non-defendant third parties”).

Likewise here, Plaintiff’s Facebook ID—the user-identity component of the alleged PII—is “data that [MLBAM] never disclosed and . . . never even possessed” according to Plaintiff’s own theory. *See Eichenberger*, 876 F.3d at 986. A close look at Plaintiff’s own allegations shows that Facebook IDs reside in Facebook cookies on users’ browsers, and they travel between users’ browsers and Facebook. Plaintiff alleges that the supposedly problematic disclosures occur “[w]hen a Facebook user with one or more personally identifiable *FID cookies on their browser*” views videos on MLBAM’s website or app. (Dkt. No. 1 ¶ 31 (emphasis added).) Plaintiff thus concedes that his Facebook ID is in a *Facebook cookie on his own browser*—not something in MLBAM’s possession. *See In re Hulu*, 86 F. Supp. 3d at 1093–94 n.3 (“A ‘cookie’ is a file on a user’s computer.”).

Plaintiff further admits that “viewed Video Media” and users’ Facebook IDs are allegedly “transmitted to Facebook *by the user’s browser*.” (Dkt. No. 1 ¶ 31 (emphasis added).) Plaintiff’s own example web session in his complaint shows how this works. (*See id.* ¶¶ 37–38.) Plaintiff includes a screenshot of website code allegedly showing the disclosure of a video name and Facebook ID to “www.facebook.com.” (*Id.* ¶ 38.) As Plaintiff acknowledges in the caption provided with these screenshots, this code shows a communication “sent *from the [user’s] device*

to Facebook.” (*Id.* (emphasis added).) In other words, Plaintiff’s own example shows that the disclosure he complains of was made by his own browser—not MLBAM. The complaint contains no additional examples of alleged conduct violating the VPPA.

Because Plaintiff cannot allege facts showing that MLBAM possesses and discloses a crucial component of the alleged PII (Facebook IDs), Plaintiff instead alleges that MLBAM’s “website code . . . *causes* the digital subscriber’s identity and viewed Video Media to be transmitted to Facebook by the user’s browser.” (*Id.* ¶ 31 (emphasis added).) Even if true—and Plaintiff alleges no facts supporting that MLBAM’s website code does so—the VPPA does not extend to cover what may be “caused.” The plain language of the statute does not apply any time a defendant “causes” user and video data to be disclosed that might someday be connected by someone to form PII. Rather, the statute requires that connection to be made. In other words, like the store clerk who leaked Judge Bork’s video history, the defendant must either (a) actively connect and “identif[y] a person as having requested or obtained specific video materials” or (b) disclose information that someone on the receiving end will actively connect in this way. *See* 18 U.S.C. § 2710(a)(3). Plaintiff does not plausibly allege that MLBAM did either.

When Congress wants to prohibit “causing” a disclosure, it says so explicitly. *See, e.g.*, 15 U.S.C. § 6821 (prohibiting any person to “*cause to be disclosed . . . customer information of a financial institution*” (emphasis added)); 10 U.S.C. § 949p-5 (“accused reasonably expects to disclose, *or to cause the disclosure of*, classified information” (emphasis added)). Congress was not concerned with unintentional, passive disclosures when it passed the VPPA; it was concerned with intentional revelations like the one that “motivated its passage”—a store clerk leaking to a *Washington City Paper* reporter a list of videos rented by Judge Bork. *See In re Nickelodeon*,

827 F.3d at 284. “Every step away from that 1988 paradigm will make it harder for a plaintiff to make out a successful [VPPA] claim.” *Id.* at 290.

Plaintiff’s allegations are many steps removed from that 1988 paradigm. This is not a case, for example, where the product manager responsible for the MLB Film Room, an extensive online library of MLB videos, allegedly publicized Plaintiff’s viewing history—the sort of disclosure that the VPPA might cover. Rather, Plaintiff here challenges the transmission of data to Facebook by Plaintiff’s own browser, and Plaintiff does not even allege that anyone has ever used that data to learn his viewing history.

In sum, it is clear from the face of the complaint that MLBAM did not possess or connect and disclose the most crucial component of the alleged PII—Facebook IDs. Although Plaintiff’s complaint has many conclusory allegations that MLBAM itself “disclos[ed]” his Facebook ID, *e.g.*, Dkt. No. 1 at 1, his factual allegations directly undermine this conclusion. *See, e.g., McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (after disregarding “legal conclusions,” “[i]f the allegations give rise to an ‘obvious alternative explanation,’ then the complaint may ‘stop[] short of the line between possibility and plausibility of ‘entitle[ment] to relief’” (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Iqbal*, 566 U.S. at 681)). This Court should not allow Plaintiff’s complaint to go forward and force MLBAM to incur significant discovery costs on a defective theory of liability.

2. Any disclosures by MLBAM to Facebook were “incident to the ordinary course of business” and permitted by the VPPA.

Finally, even if Plaintiff could establish a disclosure addressed by the VPPA—which he cannot—Plaintiff’s VPPA claim fails for the independent reason that MLBAM’s alleged conduct falls within a statutory exception for disclosures “incident to the ordinary course of business.” 18 U.S.C. § 2710(b)(2)(E). “[T]he VPPA provides several exceptions to the disclosure prohibition,”

including “allowing disclosure of a consumer’s video rental history . . . when the disclosure is incident to the . . . ordinary course of business.” *Sterk*, 770 F.3d at 621.

Although the VPPA defines “ordinary course of business” to mean “only debt collection activities, order fulfillment, request processing, and the transfer of ownership,” 18 U.S.C. § 2710(a)(4), courts have broadly interpreted the terms “order fulfillment” and “request processing” in this definition. They have done so in recognition of the “unremarkable fact that no business is an island and that video tape services providers, like many other businesses, ‘may use third parties in their business operations,’” explaining that “[t]he functions performed by these third parties fall within the definition of ‘order fulfillment’ or ‘request processing.’” *Rodriguez v. Sony Comput. Ent. Am., LLC*, 801 F.3d 1045, 1054 (9th Cir. 2015) (quoting S.Rep. No. 100-599, at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 4342, at 4342-12).

This broad interpretation is supported by a 1988 Senate Judiciary Report, which explains that the VPPA’s ordinary-course-of-business exception “takes into account that video tape service providers may use third parties in their business operations.” S.Rep. No. 100-599 at 14. The exception “allows disclosure to permit video tape service providers to use mailing houses, warehouses, computer services, and similar companies for marketing to their customers. These practices are called ‘order fulfillment’ and ‘request processing.’” *Id.*

Plaintiff’s own allegations show that MLBAM uses the services of a third party—Facebook—for precisely the purpose described in the Senate Judiciary Report: “marketing to [its] customers.” *See id.* For example, Plaintiff alleges that MLBAM benefits “from the advertising and information services that stem from use of the pixel.” (Dkt. No. 1 ¶ 30). Plaintiff further alleges that the “Facebook pixel . . . benefits MLB.com by improving its ability to promote its content and services to its subscribers.” (*Id.* ¶ 29.) In other words, Plaintiff expressly

alleges that MLBAM uses the Facebook pixel to improve its ability to market to its own subscribers. As the Senate Judiciary Report shows, MLBAM’s use of Facebook’s “computer services . . . for marketing to [its] customers” is exactly what the VPPA “call[s] ‘order fulfillment’ and ‘request processing.’” S.Rep. No. 100-599 at 14.

In one of the few opportunities the Seventh Circuit has had to address a VPPA claim, it has refused plaintiffs’ invitation to read the “ordinary course of business” exception narrowly. While upholding the dismissal of a VPPA claim, the Seventh Circuit in *Sterk* declined to read “order fulfillment” and “request processing” in ways not supported by the plain text of the statute. 770 F.3d at 624–25. Rejecting the plaintiffs’ strained statutory interpretation, the Seventh Circuit held that Redbox’s disclosure of its customers’ PII to a third-party customer-support provider was “incident to the request processing function” served by that third party. *Id.* at 626. The Seventh Circuit emphasized that “the permissibility of disclosure under the VPPA turns on the underlying purpose for which [the defendant] provides the information to a third party.” *Id.*

Here, the “underlying purpose for which” Plaintiff himself alleges that MLBAM discloses PII to Facebook is one of the purposes expressly contemplated by the Senate—“marketing activities.” *See id.* at 624, 626. No strained reading of Congress’s intent is required to reach this conclusion.

In short, Plaintiff’s own allegations support the conclusion that the disclosures he challenges are part of the ordinary course of MLBAM’s marketing business. They are thereby excluded from liability. To hold otherwise would expand the VPPA far past its intended scope and restrict the ability of companies to work with third parties to facilitate ordinary business functions like consumer marketing—including through routine use of the Facebook pixel, which, as Plaintiff alleges, is installed “all over the internet.” (*See* Dkt. No. 1 ¶ 28.)

IV. CONCLUSION

For these reasons, the Court should dismiss this case and compel arbitration. Alternatively, the Court should dismiss this case for lack of standing and failure to state a claim.

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Respectfully submitted,

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