**No. 14-15046**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARK ELLIS,
*Plaintiff-Appellant,*

v.

THE CARTOON NETWORK INC.,
*Defendant-Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
Case No. 1:14-cv-00484-TWT
The Honorable Thomas W. Thrash

# RESPONSE BRIEF OF APPELLEE

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**Certificate of Interested Persons and Corporate Disclosure Statement**

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel for Defendant-Appellee Cartoon Network, Inc. supplements Appellant's certificate of interested persons and corporate disclosure statement as follows:

1. Jacob A. Sommer (attorney for Defendant-Appellee in this proceeding).

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## STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Cartoon Network takes no position on oral argument.

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## STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331 based on Plaintiff's allegation that Cartoon Network violated the federal Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710; *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 771 F.3d 1274, 1280 (11th Cir. 2014).

The District Court granted Cartoon Network's motion to dismiss, and entered a final judgment on October 8, 2014. (Doc. 35 – Pg. 10; Doc. 36. – Pg. 1.) Appellant filed his Notice of Appeal on November 5, 2014. (Doc. 37 – Pg. 1.) This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

## ISSUE PRESENTED FOR REVIEW

Whether a device identifier assigned to a mobile device is personally identifiable information under the Video Privacy Protection Act such that disclosure of that number, along with a video watched by a person using the device, violates the Act.

## STATEMENT OF THE CASE

Plaintiff-Appellant Mark Ellis filed a single count complaint against Defendant-Appellee The Cartoon Network, Inc. ("Cartoon Network") alleging a violation of the VPPA on February 19, 2014. That Complaint alleged that Cartoon Network provided only an anonymous device identifier (a 64-digit, randomly assigned, number referred to as an Android ID), to a third party analytics company, Bango, in violation of the VPPA. (Doc. 1 – Pg. 1.)

Cartoon Network moved to dismiss the original complaint on April 25, 2014. (Doc. 20 – Pg. 1.) In response, on May 16, 2014, Ellis filed an amended complaint, which Cartoon Network again moved to dismiss. The District Court granted Cartoon Network's motion to dismiss on October 8, 2014. (Doc. 35 – Pg. 10.)

The District Court found that Ellis had standing and that he was a "consumer" under the VPPA. (Doc. 35 – Pg. 5-7.) But Ellis had not pled a violation of the VPPA because an Android ID, which Cartoon Network allegedly provided to Bango, was not personally identifiable information. (Doc. 35 – Pg. 8-9.) In reaching that conclusion, the District Court reasoned that "[t]he Android ID is a randomly generated number that is unique to each user and device. It is not, however, akin to a name." (Doc. 35 – Pg. 3.) Thus, "[w]ithout more, an Android ID does not identify a specific person." (*Id.*) The District Court accordingly dismissed the action with prejudice for failure to state a claim upon which relief could be granted. (Doc. 36 – Pg. 1.) Ellis filed a notice of appeal on November 6, 2014. (Doc. 37 – Pg. 1.)

**Statement of Facts**

Cartoon Network is a Delaware Corporation, based in Atlanta, Georgia. (Doc. 23 – Pg. 3 ¶6.) Cartoon Network produces and distributes various content, including television programming. (Doc. 23 – Pg. 1-2 ¶11.) It distributes this

content through several mediums, including cable television and mobile software applications like the one Ellis downloaded to his Android smartphone. (*Id.*) Android is Google's mobile operating system, which many smartphone manufacturers use.

To download the Cartoon Network app (the "App") to an Android smartphone, a user must go to Google's app store, called "Google Play." (*See* Doc. 23 – Pg. 4-5 ¶10.) The App "Description" on Google Play explains that users can utilize the App to watch video clips of various Cartoon Network shows. (Doc. 23 – Pg. 4 ¶9.) Users who log in with their television provider (for example, Xfinity, Cox, or DIRECTV) can also watch full episodes of shows or watch live TV streamed directly to their Android devices. (*Id.*)

Appellant Mark Ellis is a North Carolina citizen who claims he began using the App to view video clips in early 2013. (Doc. 23 – Pg. 15 ¶32.) His amended complaint alleged that each time an Android user viewed a video clip or watched a television show on the App, the App disclosed the numeric identifier of the device he was using to an unrelated third party. (Doc. 23 – Pg. 2 ¶2.) Specifically, it alleged that unknown to the App's users "each time they view [a] video clip or television show, the [App] sends a record of such activities to an unrelated third party data analytics company called Bango." (Doc. 23 – Pg. 6 ¶12.) According to the amended complaint, this "complete record" of materials viewed is sent "along

with the unique Android ID associated with the user's mobile device." (Doc. 23 – Pg. 6-7 ¶12.)

That was the lone allegation against Cartoon Network. The amended complaint did not allege that any information other than the user's 64-digit Android ID was provided to Bango. Nor did it allege that Mr. Ellis or any other users had provided their names or other identifying information to Cartoon Network to use the App or watch videos. It did not allege that Cartoon Network otherwise knew the actual identity of its users. Most importantly, the amended complaint did not allege that Cartoon Network transmitted to Bango any information that itself identified him (or any other real-world person), such as a name, mailing address, or email address.

The amended complaint described Bango as a data analytics company that specializes in "tracking individual user behavior across the Internet and mobile applications." (Doc. 23 – Pg. 6 n.3.) It speculatively alleged that "to gain a broad understanding of a given consumer's behavior across all of the devices that he or she uses" companies like Bango "have to find ways to 'link' his or her digital personas." (Doc. 23 – Pg. 7 ¶13.) And that these companies' "primary solution has been to use certain unique identifiers to connect the dots." (*Id.*) The amended complaint did not, however, plead any facts showing that Bango performed such "dot connecting" to identify Ellis or any other App user by name.

Instead, the amended complaint cited only to various materials on Bango's website to try to create the specter of such identification. For example, the amended complaint pointed to a statement by Bango that its technology "reveals customer behavior, engagement and loyalty across and between all your websites and apps." (Doc. 23 – Pg. 6 n.3.) The amended complaint cited a statement on Bango's website, purportedly for the proposition that Bango "automatically identifies" consumers as they act across the Internet. (Doc. 23 – Pg. 11 ¶22.) Ellis then combined these generic statements with speculation that Bango and other analytics companies maintain "digital dossiers" on consumers and that "[o]nce a consumer's identity is matched with their device's Android ID, a wealth of extremely precise information can be gleaned about the individual." (Doc. 23 – Pg. 9 ¶19.)

**Standard of Review**

This Court has jurisdiction to review the District Court's order of dismissal under 28 U.S.C. § 1291. The Court reviews a district court's order on a motion to dismiss *de novo* and may affirm on any ground supported in the record. *Hardison v. Cohen*, 375 F.3d 1262, 1269 (11th Cir. 2004).

Under Fed. R. Civ. P. 12(b)(6), dismissal is proper if a plaintiff cannot allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007). "A claim has facial

plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965). Under *Iqbal*, "conclusory allegations … are not entitled to an assumption of truth; legal conclusions must be supported by factual allegations." *Randall v. Scott*, 610 F.3d 701, 709-10 (11th Cir. 2010).

## SUMMARY OF THE ARGUMENT

The VPPA is a disclosure statute. It limits the ability of businesses that deliver videos to consumers to disclose a consumer's identity and the videos they watch. Here, the essential element of the VPPA is missing: Cartoon Network does not even have information "which identifies a person as having requested or obtained specific video materials." And it certainly has not disclosed it. Rather than face this fact, Ellis seeks to turn the act of counting how many people watch videos into a violation of the VPPA, a statute passed in 1988 to prevent video stores from giving out customer names without permission.

Ellis's amended complaint is fundamentally flawed. The VPPA is concerned with what information a video tape service provider discloses, not what other parties may do with that information. And information that is not personally identifiable when held by Cartoon Network cannot become personally identifiable when given to some recipients and not others. Instead, the VPPA simply prohibits

disclosure of information that "identifies a person" as having requested or obtained specific video material. 18 U.S.C. § 2710(b)(1). The complaint does not allege that this happened.

When faced with similar facts, including a case with nearly identical ones, *every district court to confront the issue* has found that a device identifier like an Android ID is not personally identifiable information under the VPPA. Courts have uniformly rejected the highly variable understanding of personally identifiable information Ellis endorses in favor of a predicable test: a video tape service provider violates the VPPA when it discloses information that itself identifies an actual individual. Ellis ignores these cases, relegating them to a footnote at the end of this brief, and instead cites a handful of common-law cases that are nothing like the case at hand, none of which support finding that a number like the Android ID is personally identifiable information under the VPPA. Indeed, even in the few non-VPPA cases relied on by Ellis, the information that was disclosed was of such a nature that public sources allowed anyone to identify the individual at issue. *See, e.g.*, *Ruzicka v. Conde*, 999 F.2d 1319, 1320 (8th Cir. 1993). That is nothing like what is alleged here. Ellis's citations to other statutes and regulations that, in some cases, include persistent identifiers like Device IDs, are likewise inapplicable, as they define terms other than "personally identifiable

information," and have other objectives, such as preventing the collection of information regarding children.

Even if Ellis's "recipient understanding" test were the appropriate legal standard, the amended complaint does not adequately allege that Bango actually identified Ellis. There are hundreds of millions of Android devices—each of which has one (or more) Android IDs assigned to it, and each Android ID can be used by multiple individuals simultaneously. The amended complaint does not allege—and it defies common sense to think—that Bango possesses a so-called "digital dossier" on all of them. Nor does Ellis allege that he personally registered for any of Bango's services or otherwise interacted with Bango.

Instead, Ellis engages in fanciful speculation, relying on out of context quotes from Bango's website stating that a separate Bango service for *accepting payments*—which Cartoon network is not alleged to have used—automatically identifies individuals. (Doc. 34 – Pg. 11-12.) This, however, is not sufficient to state a VPPA claim. *See, e.g., Eichenberger v. ESPN, Inc*., No. 2:14-cv-00463 TSZ (W.D. Wash. Nov. 24, 2014) (finding that even if the recipient "does 'possess a wealth of information' about individual consumers, it is speculative to state that it can, and does, identify specific persons as having watched or requested specific video materials" from an app).

Ellis is also not a "subscriber" of the Cartoon Network App (and therefore not a "consumer" under the VPPA). The terms "subscriber" contemplates a persistent relationship between the subscriber and the provider—certainly the type of relationship whereby the provider would at least know the name of the subscriber. Ellis has not alleged such a relationship here. He did not register or otherwise sign-up with Cartoon Network. He likewise paid nothing and committed to nothing. As the term "subscribe" was used in 1988, it would have referred to the normal practice of subscribing to magazines or newsletters.

As a practical matter, the outcome Ellis seeks would place thousands of websites and apps at risk of violating the VPPA merely by disclosing information about what users watch along with numbers like IP addresses, cookie IDs, and device IDs. Nearly every transaction on the internet captures a number like one of these. If the VPPA applies every time such a number is transmitted along with information about a video watched, it will place significant new duties on every video provider to interrogate third parties to determine whether they have the ability to identify any users using information received from the provider. The VPPA was never intended to require such steps or regulate the entire internet, and this Court should not read such requirements into the statute now. Rather, it should affirm the District Court and leave it to Congress to take up the comprehensive new privacy regulation Ellis seeks.

## ARGUMENT

### I. AN ANDROID ID IS NOT PII UNDER THE VPPA

#### A. The District Court's ruling is consistent with the language and purpose of the VPPA.

The District Court's holding that the Android ID is not personally identifiable information because it is not "akin to a name" and without more "does not identify a specific person" (Doc. 35 – Pg. 9) is consistent with the VPPA's statutory language and purpose. Congress passed the VPPA in 1988 after a newspaper reporter went to a video store and obtained a list of Judge Robert Bork's video rentals that the reporter then used in a profile published in a Washington, D.C. newspaper. S. Rep. No. 100-599, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1, 4342-5 ("Senate Report"). The disclosure by the video store identified Judge Bork by name. Congress was focused on remedying this wrong: the disclosure of video viewing habits of real-world individuals. The VPPA addresses this goal by making a "video tape service provider" liable only where it "knowingly disclos[es]" to any person "personally identifiable information concerning any consumer." 18 U.S.C. § 2710(b). The VPPA does not refer to devices, persistent identifiers, or other randomly generated numbers, but to people, defining "personally identifiable information" as "information which identifies a person as having requested or obtained specific video materials." *Id.* § 2710(a)(3).

The Senate's section-by-section analysis of the statute reinforces this

conclusion by stating that PII is information "that identifies a ***particular person*** as having engaged in a ***specific transaction*** with a video tape service provider." Senate Report at 11 (emphasis added). The section-by-section analysis also makes clear that the statute "does not restrict the disclosure of information other than personally identifiable information." *Id.* As the District Court properly observed, "[t]he emphasis [of the VPPA] is on disclosure, not comprehension by the receiving person." (Doc. 35 – Pg. 8.)

Contrary to Ellis's suggestion, the case at hand is nothing like what Ellis calls the "quintessential" disclosure involving Judge Bork that led to the VPPA's enactment. *See* Appellant Br. at 19-20. Ellis tries to analogize the Judge Bork disclosure to the facts here by arguing that "the name 'Robert Bork' is simply a string of eleven characters" no different than a numerical identifier, and irrelevant unless the recipient of the video rental list (there the newspaper reporter) knew it was referring to the Supreme Court nominee. *Id.* at 19-20. And that it is "only because of the context in which the disclosure was made and the outside knowledge of the reporter that he was able to understand to which particular individual the disclosure referred." *Id* at 20. This is simply wrong. Unlike here, no additional information is needed to know the identity of the person. The newspaper reporter gave the video store a specific name and the video store gave the reporter the list of rentals associated with that specific name. Had the reporter

had the wrong "Robert Bork" (*i.e.*, not the Supreme Court nominee), the video store's disclosure would still violate the VPPA.

In sharp contrast, the only information Ellis alleges Cartoon Network provided to Bango was not sufficient by itself to identify users. Indeed, unlike the video store, Cartoon Network does not even know the identities of App users. Thus, the VPPA's essential element is missing: there was no disclosure of personally identifiable information.

### B. The District Court's ruling is consistent with every other district court to address this issue.

Every court to address the issue has refused to rewrite the VPPA and instead has come to the same conclusion: disclosure of a device identifier alone does not violate the VPPA. This includes cases decided before and after the District Court issued its decision.[1] For example, prior to the District Court's decision, courts in *In re Nickelodeon Consumer Privacy Litig.* (*Nickelodeon I*), No. 12-07829, 2014 WL 3012873 (D.N.J. July 2, 2014) and *In re Hulu Privacy Litig*., No. C 11-03764 LB, 2014 WL 1724344 (N.D. Cal. Apr. 28, 2014) dismissed VPPA claims on allegations similar to those here. And every opinion issued after the District Court's decision has followed suit. *See, e.g.*, *In re Nickelodeon Consumer Privacy Litig*. (*Nickelodeon II)*, No. CIV.A. 12-07829, 2015 WL 248334, at *2 (D.N.J. Jan.

[1] Ellis relegates all of these cases, several of which were brought by the same attorneys that represent Ellis, to a footnote at the end of his opening brief. *See* Appellant Br. at 23-24 n.6.

20, 2015); *Locklear v. Dow Jones & Co., Inc.*, No. 1:14-CV-00744 (N.D. Ga. Jan. 23, 2015); *Eichenberger v. ESPN, Inc*., No. 2:14-cv-00463 TSZ (W.D. Wash. Nov. 24, 2014). There is considerable value in maintaining a clear and consistent interpretation of the VPPA, which all of these other courts have found to be exclusively supported by the words Congress crafted in 1988.

In *Hulu*, the Northern District of California found that Hulu did not violate the VPPA by disclosing certain "unique numeric identifications tied to video watching" to analytics company comScore. *Hulu*, 2014 WL 1724344 at *7. The *Hulu* court reasoned that to violate the VPPA, the "disclosed information must identify a specific person and tie that person to video content that the person watched." *Id.* at *6. And the "unique identifier - without more" that Hulu allegedly disclosed to comScore was not personally identifiable information, even if that number "hypothetically could have been linked to video watching." *Id.* at *12, *1. Like Bango, comScore simply could not identify a user based solely on the information it received from Hulu.

Likewise, in *Nickelodeon I*, the Northern District of New Jersey dismissed a VPPA claim against Viacom based on its operation of certain Nickelodeon websites. Plaintiffs alleged that Viacom violated the VPPA by disclosing to its analytics provider the plaintiff's "anonymous username; IP address; browser setting; 'unique device identifier'; operating system; screen resolution; [and]

browser version," with the title of the video watched. *Nickelodeon I*, 2014 WL 3012873 at *10. Viacom sought dismissal arguing that the information disclosed was not PII.

The court agreed, holding that "there is simply nothing on the face of the statute or in its legislative history to indicate that 'personally identifiable information' includes the types of information—anonymous user IDs, a child's gender and age, and information about the computer used to access Viacom's websites—allegedly collected and disclosed by Viacom." *Id*. at *9. The court gave the phrase "information which identifies a person" its plain meaning, explaining "that PII is information which must, without more, itself link an actual person to actual video materials." *Id* at *10. Because none of the information Viacom disclosed "either individually or aggregated together, could, without more, serve to identify an actual, identifiable Plaintiff," the court dismissed plaintiffs' claim. *Id*.

The court distinguished between information that identifies a device and that which identifies a person. The court noted, for example, that much of the information Viacom allegedly disclosed "is not even anonymized information about the Plaintiff himself; it is anonymized information about a computer used to access a Viacom site." *Id*. And that "[k]nowing anonymized information about a computer, and an IP address associated with that computer, will not link actual

people . . . to their specific video choices, any more than knowing that an Opinion was written on an HP Compaq running Windows XP located at a Philadelphia IP address will link an actual judge to a specific case." *Id.* at *11. The Android ID is no different—it is anonymized information about a mobile device, not information about a "particular person."

And the decisions issued after the District Court's decision here have likewise clearly found that a device identifier, without more, is not personally identifiable information under the VPPA. In *ESPN*, plaintiff alleged that ESPN violated the VPPA when its app transmitted the serial number of plaintiff's Roku streaming television box and video viewing records to analytics company Adobe. ESPN sought dismissal on the ground that the Roku serial number was not personally identifiable information. The court agreed and dismissed the complaint. In doing so, the court explained that because "the information allegedly disclosed [to Adobe] is not PII (i.e., Plaintiff's Roku device serial number and his viewing records), Plaintiff's legal theory fails." *ESPN*, No. 2:2014-cv-00463 at 2.

In *In re Nickelodeon Consumer Privacy Litig*. (*Nickelodeon II)*, No. CIV.A. 12-07829, 2015 WL 248334, at *2 (D.N.J. Jan. 20, 2015), the court dismissed plaintiffs' second amended complaint, which attempted to cure the deficiencies identified by the court in *Nickelodeon I.* Although that complaint added information that Viacom allegedly disclosed to Google, the crux of plaintiffs'

theory remained that because Google owned a "vast network of services" such as Google.com, Gmail and YouTube, each of which collects data about users, sometimes including their full names, Google could take the information Viacom sent it and identify specific people by name. *Id.* at *3. But like Cartoon Network, *Viacom* did not provide Google with any information that itself identified a user. The Court thus again rejected plaintiffs' claims, reiterating that personally identifiable information "is information which must, without more, itself link an actual person to actual video materials," and that "[n]othing in the amended Complaint changes the fact that Viacom's disclosure does not – 'without more' – identify individual persons." *Id.* (emphasis in original).

In *Locklear v. Dow Jones & Co., Inc.*, No. 1:14-CV-00744 (N.D. Ga. Jan. 23, 2015) the court reached the same conclusion on allegations that Dow Jones' Wall Street Journal app transmitted Roku serial numbers and video records to analytics company mDialog. The *Dow Jones* court held that "just like" Cartoon Network, Hulu, and Nickelodeon, "third party mDialog had to take further steps, *i.e.*, turn to sources other than Dow Jones, to match the Roku number to Plaintiff," and that therefore the information was not PII under the VPPA. *Id.* at 13.

Ellis seeks to cast these opinions aside, summarily asserting in a footnote that they all "fail to apply the recipient understanding test explained here, involve significantly different factual allegations, and reach conflicting results." Appellant

Br. at 24 n.6. Setting aside the fact that the VPPA contains no such test and no court has elected to write one in, the factual allegations in each of these cases are strikingly similar to those here: each involves allegations that a device identifier (or, in the case of *Hulu*, another anonymous identifier) that itself does not identify a person was disclosed to an analytics company that could use that identifier in conjunction with information it might receive from other sources to identify individuals. And far from reaching "conflicting results," all of these cases concluded the same thing: that such device identifier was not personally identifiable information under the VPPA.

Each of these cases considered—and rejected—the "recipient understanding test" Ellis puts forth here. For example, in *Nickelodeon I*, the court explained that it is not enough that "information might one day serve as the basis of personal identification after some effort on the part of the recipient" because "the same could be said for nearly any type of personal information; this Court reads the VPPA to require a more tangible, immediate link." *Nickelodeon I*, 2014 WL 3012873 at *11. Likewise, in *Hulu*, the court held that the unique identifier Hulu disclosed to comScore was not personally identifiable information even if it "hypothetically could have been linked to video watching." *Hulu*, 2014 WL 1724344 at *12. And in *Dow Jones*, the court found that the Roku serial number allegedly disclosed to analytics provider mDialog was not personally identifiable

information because "mDialog had to take further steps, *i.e.*, turn to sources other than Dow Jones, to match the Roku number to Plaintiff." *Dow Jones* at 3.

The uniformity of district court decisions is not surprising in light of how companies transmit information using the Internet. If this Court accepts Ellis's invitation to rewrite the VPPA from a statute prohibiting disclosure to one that rests on the receiving party's comprehension it will create unpredictable and untenable results for parties doing business on the internet.[2] Any identifier or random number can be linked up to other information by another party. Ellis's analogy to baseball players and numbers makes no sense in this context. People do not wear Android ID numbers on their back, and there is no game program listing who every person is by Android ID. A more apt analogy would be a local video store in 1988 assigning each customer a number, but not keeping any record of their name. The store might give the list of customer numbers with the title rented

[2] Ellis argues that "determining whether a disclosure identifies an individual on its face presents an unclear standard." Appellant Br. at 18. It is Ellis's "recipient understanding test," however, that would create an unclear standard because it would require each video tape service provider to act as a detective and determine prior to any disclosure of a device identifier whether the recipient of the information has the ability to reverse engineer a person's actual identity using that device identifier in conjunction with information it may obtain from other sources. This is illustrated by Ellis's own citation to Google's transition from Android ID to "Advertising ID," the latter of which Ellis claims "consumers can easily reset . . . preventing apps from tracking their behavior over time." *Id.* at 12 n.4. If Ellis's test were applied, disclosing the Advertiser ID could violate the VPPA where the user had not reset it and would not violate the law if the user had reset it. This is not what the VPPA means.

and the date and the time of the rental to its accountants who are located in the building next door so that the accountants can tell the store what other movies are likely to be rented by people who like certain films. Unbeknownst to the video store, the accountants can watch video store customers go into the video store (it is a small town after all) and compare that to the list of rentals with the date, time, and customer number to identify the specific titles those customers rented. Did the video store violate the VPPA by disclosing the list of customers with these completely random numerical identifiers? No. It does not matter what the accountants can or cannot figure out, it matters what was given to him.

Ellis cites no VPPA authority for the "recipient understanding test" he propounds. Nor does he point to any cases under analogous privacy statutes that dictate a result different from that reached by the District Court. Indeed, the only privacy case Ellis points to, *Pruitt v. Comcast Cable Holdings, LLC*, 100 F. App'x 713 (10th Cir. 2004), only affirms the correctness of the District Court's decision. Ellis argues that *Pruitt* "essentially stands for the proposition that a unique device identifier . . . may not be personally identifiable *without the key to match it to actual individuals*." Appellant Br. at 23 n.6. According to Ellis, the negative implication of this is that in any case where such a key does exist a unique identifier is personally identifiable information.

This argument distorts *Pruitt*. Plaintiffs in *Pruitt* alleged that Comcast violated the Cable Act, which limits cable providers' ability to "collect personally identifiable information concerning any subscriber." 47 U.S.C. § 551(b)(1). Comcast did so by maintaining an identifying number known as a "unit address" for each converter box that allowed Comcast to match a subscriber's purchase to Comcast's billing system. *Pruitt*, 100 F. App'x at 715. The billing system allegedly contained the subscriber's name and address. *Id.* The "heart of the dispute [was] whether the information stored within Comcast's converter boxes is personally identifiable information." *Id.* at 716. The Tenth Circuit held it was not, explaining that without the additional information from Comcast's billing system "one cannot connect the unit address with a specific customer; without the billing information even Comcast would be unable to identify which individual household was associated with the raw data in the converter box." *Id.* Put another way, in *Pruitt*, not only was there a "key," but the *same party* maintained the key *and* the unique identifier, and the court still concluded the identifier was not personally identifiable information under the Cable Act.

### C. The "common law" and other statutes and regulations Plaintiff-Appellant cites do not negate the VPPA statutory language and case law or otherwise suggest that a device identifier is PII under the VPPA.

Rather than rely on statutory text or cases on point, Ellis argues that the District Court (and every other court addressing the issue) simply got it wrong

primarily based on three out-of-circuit cases asserting common law claims for defamation and breach of contract. None of these cases bear any similarity to the case here either with respect to the claims asserted or the factual allegations made.

For example, *Ruzicka v. Conde Nast Publ'ng, Inc.*, 999 F.2d 1319, 1320 (8th Cir. 1993) addressed the enforceability of a reporter's promise not to reveal a source for an article about therapist-patient sexual abuse. The source had sued because, although the article did not include her name, it disclosed that she was a Minneapolis attorney that served on the Minnesota Task Force Against Sexual Abuse, which had only one female attorney member. *Id.* at 1322. The district court granted summary judgment for defendant, finding the reporter's promise too indefinite to enforce and plaintiff appealed. Importantly, the Eighth Circuit made clear that "[f]or purposes of our review, we consider the promise to be that [the plaintiff] not be identified ***or identifiable***." *Id.* at 1320 (emphasis added). Specifically, the court explained that the reporter "allegedly promised not to identify the plaintiff in a manner that would make her identifiable," with "identifiable" meaning "subject to identification; capable of being identified." *Id.* at 1321. Using that construct, the Eight Circuit found that the district court erred in finding the promise indefinite as a matter of law. The VPPA's definition of "personally identifiable information" by contrast speaks in terms of information that "identifies" a person.

Likewise, *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998) and *Cranberg v. Consumer Union of U.S., Inc.*, 756 F.2d 382 (5th Cir. 1985) are both defamation cases. As an initial matter, unlike the VPPA which limits disclosure of information that identifies a person, common law defamation speaks only in terms of "statement[s] concerning another." *See* Restatement (Second) of Torts § 558 (1997). Moreover, each of those cases was decided on grounds specific to defamation law and not applicable here.

In *Cranberg*, the court found that even though the individual plaintiff was not mentioned by name in the allegedly defamatory article, he could still bring a claim because the business of which he was a sole proprietor was mentioned and "Texas courts have allowed such suits on the grounds that a false publication concerning a business or product could tend to injure the reputation of the company's owner by subjecting him to financial inquiry." *Cranberg*, 756 F.2d at 389. And in *Taj Mahal Travel*, the court found that a letter sent only to customers of a specific travel agency imputing fraud and dishonesty on that agency was potentially defamatory even though the letter did not mention the agency by name because the particular agency was "the only entity with which the patron had contact." *Taj Mahal Travel Inc.*, 164 F.3d at 190. Neither of these cases is like this case where Plaintiff alleges that Cartoon Network disclosed a device identifier

to Bango which could identify him only if Bango combined it with unidentified information Bango collects from other unidentified sources. [3]

The various statutes and regulations Ellis cites that purport to treat "Unique Identification Numbers" as personally identifiable information also do not suggest that the District Court's decision was in error. *See* Appellant Br. at 24-28. As an initial matter, many of the statutes and regulations Ellis points to do not even use the term "personally identifiable information." For example, the COPPA implementing regulation language Ellis points to is a definition of the term "personal information." *Id.* at 24-25. Congress revisited and amended the VPPA in 2012 while the FTC's COPPA rulemaking was ongoing and did not choose to

[3] The *Dahlstrom v. Sun-Times Media, LLC*, No. 14-2295, 2015 WL 481097 (7th Cir. Feb. 6, 2015) case Ellis submitted as supplemental authority is likewise inapposite, in part because it was defining a different term. There, the question was whether date of birth, height, weight, hair color, and eye color were "personal information" under the Driver's Privacy Protection Act ("DPPA") such that a newspaper violated the DPPA when it obtained such information from the DMV for four police officers and published it along with the officers' names and pictures. The court found that it was. But this was because, unlike the VPPA, the text of the DPPA demonstrated that Congress intended to include information that did not itself identify a person. Specifically, the court observed that "[a]lthough many of the itemized categories . . . do uniquely identify the individual with whom they are associated, others (e.g., medical and disability information) do not." *Id.* at *4. The VPPA by contrast contains no such list expanding its definition of personally identifiable information beyond information that uniquely identifies an individual. The *Dahlstrom* court also placed weight on the fact that "the DPPA was enacted as a public safety measure, designed to prevent stalkers and criminals from utilizing motor vehicle records to acquire information about their victims" and "details regarding any pertinent physical feature" make identification of a potential victim easier. *Id*.

change the statute. Had Congress wanted to harmonize the VPPA with the FTC's approach to protecting information regarding children under 13, it would have done so. Likewise, the HIPPA regulations he points to prohibit the disclosure of "individually identifiable health information." *Id.* at 25.

Moreover, the fact that other statutes or regulations might define personally identifiable information to include device identifiers is irrelevant. As the *Nickelodeon* court explained when rejecting plaintiffs' invocation of COPPA regulations, "FTC rules implementing that statute are irrelevant to this Court's VPPA analysis." *Nickelodeon I*, at *12. Ellis's reliance on the FTC's inclusion of device identifiers in its definition of "personal information" in COPPA, after notice and comment rulemaking in 2012, also ignores the fact that: (1) the FTC does *not* use that same definition with regard to adults; and (2) the FTC's 2013 decision to include device identifiers in its definition of "personal information" was a controversial sea change in its interpretation, one that no one contemplated in 1984 when the VPPA was passed. If anything, invocation of such statutes and regulations only undermines Ellis's argument by demonstrating that Congress knows exactly how to extend protection to device identifiers when it wants to, and that the place for Ellis to press his novel theory is with Congress, not the Court.

## II. The Amended Complaint Fails to Adequately Allege that Bango Actually Identified Plaintiff-Appellant

The District Court's decision should also be affirmed on the separate,

independent, ground that the amended complaint fails to adequately allege that Bango actually identified Ellis. An appeals court has the authority to affirm a district court's judgment grounds not reached by the district court. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 970 (11th Cir. 2008). Here, because the District Court found that the Android ID was not personally identifiable information under the VPPA because it was not "akin to a name," the District Court did not have to evaluate Ellis's allegations regarding Bango's supposed reverse engineering of identities. Those allegations, however, are insufficient.

For example, Ellis places great weight on a quote from Bango's website that purports to stand for the proposition that Bango "automatically identifies" consumers as they act across the Internet. *See* Appellant Br. at 16. Ellis argues that such statement must be taken as true at the motion to dismiss stage. *Id*. at 17 n.5. The website statement from which he excerpts the word "automatically," however, is not even about the same service Bango provided to Cartoon Network. Rather, it relates to Bango's distinct mobile billing service (which Plaintiff does not allege Cartoon Network utilized). The full quote from which Plaintiff excerpts reads as follows:

> The Bango Payments Platform enables the world's biggest app stores and digital merchants to bill customers on their mobile devices. Bango's pervasive presence across the internet creates a unique platform effect for our partners, automatically identifying and billing hundreds of millions of their users, who benefit from frictionless, one-

click payments.[4]

Such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . do not suffice" to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009). *See also Gross v. White*, 8:05-CV-1767-27TBM, 2008 WL 2795805, at *2 (M.D. Fla. July 18, 2008) *aff'd*, 340 F. App'x 527 (11th Cir. 2009) ("Courts need not accept factual claims that are internally inconsistent; facts which run counter to facts of which the court can take judicial notice; conclusory allegations; unwarranted deductions; or mere legal conclusions asserted by a party."); *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1036 (11th Cir. 2001) ("[U]nsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal.")

More fundamentally, none of Ellis's allegations regarding Bango permit the court to infer more than the "mere possibility" of a violation and are therefore insufficient to show that he is entitled to relief. *See Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679, 127 S.Ct. at 1950). For example, Ellis points to his allegation that each time Cartoon Network disclosed Android IDs and viewing records to Bango, Bango "was able" to match that information with the person's actual identity. Appellant Br. at 16.

[4] *See* Doc. 34 – Pg. 11-12.

But such generic statements regarding the possibility that a party might do something are insufficient.

In *Nickelodeon II*, for example, the court held that "[e]ven if the Court were to consider what Google could do with the information, rather than the nature of the information itself, Plaintiffs' claim would still fail because it is entirely theoretical." *Nickelodeon II*, 2015 WL 248334, at *3. This was because under plaintiffs' theory, "in order for Google to connect the information that Viacom provides it with the identity of an individual Plaintiff, one of the Plaintiffs would need to have registered on one of Google's services." *Id.* And "[c]rucially . . . Plaintiffs have alleged no facts whatsoever that a Plaintiff ever registered with Google. Such an allegation is necessary for the theoretical combination of information to actually yield one of the Plaintiff's identities." *Id.*

So too here. Notwithstanding Ellis's efforts to paint Bango as a monolithic and omniscient entity, for Bango to even theoretically be able to use the Android ID Cartoon Network allegedly provided Bango to identify Ellis, Ellis would have needed to (at the least) register for one of Bango's services. The amended complaint, however, makes no such allegation. In *ESPN*, the court found similar allegations regarding analytics company Adobe insufficient to plead a VPPA claim against ESPN, explaining that "[e]ven if Adobe does 'possess a wealth of information' about individual consumers, it is speculative to state that it can, and

does, identify specific persons as having watched or requested specific video materials from the WatchESPN application. *ESPN* at 2. *See also Nickelodeon I*, 2014 WL 3012873 at *2 n.3 (refusing to consider plaintiffs' allegation that Viacom and Google "were able to identify specific individuals" by connecting "online activity and information" with "offline activity and information," because it was "entirely conclusory" and supported by "no facts . . . which indicate when or how either Defendant linked the online information it collected with extra-digital information about the Plaintiffs").

## III. Ellis is not a Consumer under the VPPA

Even if Ellis had adequately alleged a disclosure of PII as required by the VPPA, Ellis is not a consumer under the VPPA because he is not a "subscriber" of the Cartoon Network App under the ordinary or natural meaning of that term. The VPPA defines a "consumer" as a "renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1). Ellis does not allege that he rented or purchased from Cartoon Network. Rather, he calls himself a "subscriber" of Cartoon Network because he "downloaded, installed and watched videos" using the App. Doc. 23 – Pg. 20, ¶ 45. Because the VPPA does not define "subscriber," the Court should "construe it in accordance with its ordinary or natural meaning." *United States v. Silvestri*, 409 F.3d 1311, 1333 (11th Cir.2005). Ellis did not register or otherwise sign-up with Cartoon Network. He

likewise paid nothing and committed to nothing. Indeed, Ellis could never have used the App or deleted it from his phone at any time—without being limited by any "agreement" or incurring any cost or continuing obligation.

As the term "subscribe" was used in 1988, it would have referred to the normal practice of subscribing to magazines or newsletters. This contemplates a persistent relationship between the subscriber and the provider—certainly the type of relationship whereby the provider would at least know the name of the subscriber. Under that use, downloading and using a free app converts someone into a "subscriber" under the VPPA.[5] This case differs from *Hulu* in which the court found that plaintiffs were "subscribers" where they "signed up for a Hulu account, became registered users, received a Hulu ID, established Hulu profiles, and used Hulu's video streaming services." *In re Hulu Privacy Litig.*, No. C 11-03674, 2012 WL 3282960, *7 (N.D. Cal. Aug. 10, 2012). Plaintiff here allegedly viewed videos, but this is the only characteristic he has in common with the *Hulu* plaintiffs.

[5] Dictionary definitions confirm the ordinary and natural meaning of "subscriber." *See* MACMILLAN ONLINE DICTIONARY, available at http://www.macmillandictionary.com/dictionary/american/subscribe (last visited Sept. 18, 2014) ("someone who pays money in order to receive something regularly, for example copies of a newspaper or magazine, or a service"); MERRIAM–WEBSTER ONLINE DICTIONARY, available at http://www.merriam-webster.com/dictionary/subscriber (last visited Sept. 18, 2014) ("to pay money to get a publication or service regularly").

Had Congress wanted the VPPA to cover every casual viewer of a video it could have expanded the definition of "Consumer" to include such individuals. The Electronic Communications Privacy Act ("ECPA") uses the terms "customer and subscriber" where it covers a range of users broader than subscribers. *See e.g.*, 18 U.S.C. § 2702(a)(2). And even those terms do not cover every person involved in a communication. *See e.g.*, *Organizacion JD Ltda. v. U.S. Dep't of Justice*, 124 F.3d 354, 360 (2d Cir. 1997) ("ECPA, therefore, clearly distinguishes between 'customers' and mere 'persons' or 'individuals' with other types of interests in electronic communications. The language used . . . suggests that 'customer' must be defined narrowly to give effect to this distinction.").

## CONCLUSION

For the reasons stated above, the District Court's order dismissing Ellis's claims with prejudice should be affirmed.

Dated: March 2, 2015

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