

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10  
11 JESSE CANTU,

12 Plaintiff,

13 v.

14 TAPESTRY, INC.,

15 Defendant.

Case No. 22-cv-1974-BAS-DDL

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS**

**(ECF No. 10)**

16  
17  
18 Plaintiff Jesse Cantu (“Plaintiff”) is a self-described consumer and data privacy  
19 advocate who commenced this class-action suit on December 13, 2022, against Defendant  
20 Tapestry Inc. (“Defendant”), which does business as Coach.com (“Coach”). Plaintiff  
21 claims that Defendant’s actions—disclosing, without consent, the identities of customers  
22 and the titles of videos they view on Coach’s website to Facebook—violate the Video  
23 Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710.

24 Now before the Court is Defendant’s Motion to Dismiss Plaintiff’s First Amended  
25 Complaint (“FAC”). (Mot., ECF No. 10.) Defendant argues that Plaintiff’s Complaint  
26 must be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil  
27 Procedure (“Rule”) 12(b)(1). In the alternative, Defendant argues that Plaintiff has failed  
28

1 to state a claim upon which relief can be granted. Plaintiff opposes (Opp’n, ECF No. 13)  
2 and Defendant replies (Reply, ECF No. 14).<sup>1</sup>

3 The Court finds the resolution of Defendant’s Rule 12(b)(1) and Rule 12(b)(6)  
4 motion is suitable without the need for oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.  
5 R. 7.1 (d)(1). For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES**  
6 **IN PART** Defendant’s Motion to Dismiss.

## 7 **I. BACKGROUND**

8 In 1988, the *Washington City Paper* published a list of then-Supreme Court nominee  
9 Robert Bork’s video rental history after a D.C.-area store provided the information to a  
10 reporter. In response to the disclosure, Congress passed the VPPA, recognizing that such  
11 an invasion of privacy, especially in an era of rapidly developing technology, is “an issue  
12 that goes to the deepest yearnings of all Americans.” S. Rep. No. 100–599, at \*6 (1988).  
13 The VPPA prohibits any “video tape service provider” from “knowingly disclos[ing], to  
14 any person, personally identifiable information concerning any consumer of such  
15 provider.” 18 U.S.C. § 2710(b)(1). The Act provides for liquidated damages in the amount  
16 of \$2,500, as well as punitive damages and other equitable relief for violations of its  
17 provisions. *Id.* § 2710(2)(A)–(D).

18 In the instant case, Plaintiff alleges that Defendant leverages an elaborate system of  
19 cookies and other data capturing processes to better tailor its marketing and advertising  
20 campaigns to its customers. (FAC ¶¶ 9, 53.) To do this, Defendant enlists a Facebook-  
21 curated software, known as the Facebook Tracking Pixel (“Facebook Pixel”). (FAC ¶ 10.)  
22 The Facebook Pixel is a string of programming code that advertisers integrate into their  
23 websites. (*See id.*) Once installed, the Facebook Pixel allows Defendant to collect  
24 information about how users interact with its site. (FAC ¶¶ 11, 13.)

---

25  
26  
27 <sup>1</sup> Defendant also filed a “Notice of Recent Authority” (ECF No. 15), which drew a corresponding  
28 response from Plaintiff (ECF No. 16). The Court will disregard both the Notice of Recent Authority and  
Plaintiff’s response, as Defendant failed to seek leave of court to file such a notice, pursuant to section 4F  
of this Court’s Standing Order for Civil Cases.

1 Most notably, Plaintiff alleges that when a user visits Coach.com, Defendant has  
2 programmed the Facebook Pixel to record the Website’s URL and the title of any video  
3 watched on the website. (FAC ¶¶ 19–21.) Facebook Pixel then sends such information to  
4 Facebook. (*Id.*) It also links a user’s video viewing information to a specific Facebook  
5 ID, should that user have a Facebook account. (FAC ¶ 56.)

6 Facebook Pixel does so using three different cookies. (FAC ¶¶ 23–28.) When a  
7 visitor watches a video on Coach.com while logged into Facebook, the Facebook Pixel  
8 compels a visitor’s browser to transmit a “c\_user cookie,” which contains a visitor’s  
9 unencrypted Facebook ID. (FAC ¶ 23.) A Facebook ID is a lengthy string of numbers,  
10 which by itself, contains no personally identifiable information. (FAC Fig. 6.) But  
11 Plaintiff alleges that anyone can connect a Facebook ID to one’s Facebook profile, simply  
12 by appending the string of numbers to the end of Facebook.com. (FAC ¶ 29.) This leads  
13 one to the Facebook account associated with the Facebook ID. (*Id.*) When a visitor’s  
14 browser has recently logged out of Facebook, a smaller set of cookies is sent through the  
15 Facebook Pixel. (FAC ¶ 24.) The “fr cookie” contains an encrypted Facebook ID and  
16 browser identifier. (FAC ¶ 25.) Another cookie, called the “datr cookie,” supplies browser  
17 information, and the “\_fbp cookie contains, at least, an unencrypted value that uniquely  
18 identifies a browser.” (FAC ¶¶ 26–27.) Plaintiff does not explain how the encryption  
19 status of a Facebook ID affects one’s ability to identify a particular Facebook user. And  
20 he does not allege whether, by themselves, these smaller sets of cookies disclose  
21 information sufficient to identify a specific Facebook profile. However, he claims that  
22 “alongside event data for videos,” the “fr cookie” and “\_fbp cookie” allow Facebook to  
23 identify a particular Facebook user. (FAC ¶¶ 25–26.) Facebook then “matches activity on  
24 Coach.com with a user’s profile.” (FAC ¶ 34.)

25 To recap, Plaintiff claims that the code employed by Defendant generally can record  
26 and disclose the titles of videos watched on Coach.com. Cookies, which contain the  
27 Facebook IDs of those users watching such videos, are transmitted to Facebook, perhaps  
28 regardless of whether a user is actively logged into Facebook. And Facebook IDs are easily

1 linked to corresponding Facebook users, as anyone can append the numerical ID to the end  
2 of Facebook.com. Together, this information—Facebook IDs and the viewing history of  
3 customers—constitutes what Plaintiff alleges is “personally identifiable information”  
4 (“PII”) protected by the VPPA. *See* 18 U.S.C. § 2710(a)(3). The PII is disclosed to  
5 Facebook to “build audiences” and “retarget . . . Facebook’s advertising campaigns.” (FAC  
6 ¶ 58.) And this is all done without consent. (FAC ¶ 59.)

7 Plaintiff claims that during the “Class Period,” Defendant’s website hosted and  
8 delivered video content, such as the “Dream It Real” video. (FAC ¶ 15.) Plaintiff watched  
9 this video around October 31, 2022. (*Id.*) When he did so, Defendant disclosed to  
10 Facebook Plaintiff’s PII, like his Facebook ID and the title of the video he viewed, through  
11 the process just described above. Plaintiff brings suit on behalf of himself and a class of  
12 other users similarly situated who have watched videos on Coach.com. (FAC ¶¶ 46–51.)  
13 He seeks statutory and punitive damages, along with injunctive relief. (FAC at 16:2–14.)

## 14 **II. LEGAL STANDARDS**

### 15 **A. Standing**

16 Under Rule 12(b)(1), a party may move to dismiss a claim for lack of subject matter  
17 jurisdiction, including the absence of standing. *Chandler v. State Farm Mut. Auto. Ins.*  
18 *Co.*, 598 F.3d 1115, 1123 (9th Cir. 2010). Article III, Section 2, of the Constitution limits  
19 federal courts to hearing “actual cases or controversies.” *Spokeo, Inc. v. Robins*, 578 U.S.  
20 330, 337 (2016). This means that a plaintiff must have standing to bring suit in federal  
21 court. *Id.* at 338. A plaintiff must show three distinct elements to satisfy the irreducible  
22 constitutional minimum for standing. He must demonstrate (1) an injury-in-fact via “an  
23 invasion of a legally protected interest which is (a) concrete and particularized, and (b)  
24 actual or imminent, not conjectural or hypothetical”; (2) causation—the injury must be  
25 “fairly . . . trace[able] to the challenged action of the defendant”; and (3) redressability—  
26 meaning that it must be “likely, as opposed to merely speculative, that the injury will be  
27 redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)  
28 (internal citations and quotations omitted) (alteration in original).

1           When the issue of standing is challenged on a Rule 12(b)(1) motion to dismiss, “each  
2 element of standing ‘must be supported . . . with the manner and degree of evidence  
3 required at the successive stages of the litigation.’” *Maya v. Centex Corp.*, 658 F.3d 1060,  
4 1068 (9th Cir. 2011) (quoting *Lujan*, 504 U.S. at 561). That is, “[f]or purposes of ruling  
5 on a motion to dismiss for want of standing, both the trial and reviewing courts must accept  
6 as true all material allegations of the complaint and must construe the complaint in favor  
7 of the complaining party.” *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

8           **B. Failure to State a Claim**

9           A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the  
10 claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729,  
11 731 (9th Cir. 2001). To survive a motion to dismiss under Rule 12(b)(6), a complaint must  
12 plead sufficient factual allegations “to state a claim to relief that is plausible on its face.”  
13 *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). “A claim has facial plausibility  
14 when the plaintiff pleads factual content that allows the court to draw the reasonable  
15 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556  
16 U.S. 662, 678 (2009). The court must accept the factual pleadings in the complaint as true.  
17 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). It must also construe  
18 the factual pleadings and the inferences drawn from such pleadings in the light most  
19 favorable to the nonmoving party. *Id.* However, a court need not accept “legal  
20 conclusions” as true. *Iqbal*, 556 U.S. at 678. A plaintiff must do more in his complaint  
21 than allege a series of “labels and conclusions” to establish a plausible basis for a  
22 defendant’s liability. *Twombly*, 550 U.S. at 555. Indeed, “a formulaic recitation of the  
23 elements of a cause of action will not do.” *Id.* And when a plaintiff has failed to allege  
24 facts sufficient for a court to plausibly find a cause of action, it is not proper for the court  
25 to close that gap on behalf of the plaintiff and assume that “[he] can prove facts that [he]  
26 has not alleged . . . .” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of*  
27 *Carpenters*, 459 U.S. 519, 526 (1983).

1 **III. ANALYSIS**

2 Defendant first argues that Plaintiff has not plausibly alleged he has Article III  
3 standing, such that this Court must dismiss the Complaint for lack of subject matter  
4 jurisdiction. Defendant avers that (1) Plaintiff has not adequately pleaded an “injury-in-  
5 fact,” because the “Dream It Real” video that he alleges to have watched is not a video and  
6 the disclosure is not of his own PII, and (2) Plaintiff cannot “fairly trace” his injury back  
7 to Coach because he has named the wrong defendant. (Mot. at 9–16.) In the alternative,  
8 Defendant argues that Plaintiff fails to state a claim under the VPPA because (1) it is not a  
9 “video tape service provider” within the meaning of the Act, (2) it did not “knowingly”  
10 disclose PII of its customers, (3) a Facebook ID is not PII, and (4) the disclosures are  
11 exempt from liability under the Act. (Mot. at 1, 3, 16–23.)

12 **A. Standing**

13 Defendant argues that Plaintiff fails the first two prongs of the test articulated in  
14 *Lujan*. That is, he cannot show an injury-in-fact, nor can he properly trace his injury back  
15 to Defendant because he has named the wrong company in his suit. *See Lujan*, 504 U.S.  
16 at 560–61. The Court is unpersuaded by either contention.

17 **1. Injury-in-Fact**

18 An injury-in-fact is a harm that is both “concrete and particularized” and “actual or  
19 imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (internal citations  
20 omitted). Under some consumer protection statutes, a claim that a particular provision has  
21 been violated is, by itself, not a “concrete and particularized” injury. *See, e.g., Spokeo*, 578  
22 U.S. at 341. That is, a plaintiff must plead an additional harm, like a financial or  
23 reputational harm, in addition to the bare statutory violation. *See id.* (holding that a plaintiff  
24 must allege more than a “bare procedural violation” of the Fair Credit Reporting Act that  
25 is “divorced from any concrete harm”).

26 This does not hold true for causes of action under the VPPA. In the Ninth Circuit,  
27 the concreteness requirement for Article III standing is satisfied when a consumer alleges  
28 that his data has been impermissibly disclosed in violation of the Act. *Eichenberger v.*

1 *ESPN*, 876 F.3d 979, 983 (9th Cir. 2017). Violations of the VPPA are not mere “procedural  
2 violations” as the Supreme Court described in *Spokeo*. *Spokeo*, 578 U.S. at 342;  
3 *Eichenberger*, 876 F.3d at 982. Rather, “every 18 U.S.C. § 2710(b)(1) violation ‘present[s]  
4 the precise harm and infringe[s] the same privacy interests Congress sought to protect’ by  
5 enacting the VPPA.” *Eichenberger*, 876 F.3d at 982 (citing *Van Patten v. Vertical Fitness*  
6 *Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (alterations in original)). Accordingly, it  
7 is sufficient for Plaintiff to plead facts that Defendant has disclosed his information in  
8 violation of the VPPA, and nothing more. *Id.*; *see also Perry v. Cable News Network*, 854  
9 F.3d 1336, 1341 (11th Cir. 2017) (“Accordingly, we hold that a plaintiff such as Perry has  
10 satisfied the concreteness requirement of Article III standing, where the plaintiff alleges a  
11 violation of the VPPA for a wrongful disclosure.”); *In re Nickelodeon Consumer Priv.*  
12 *Litig.*, 827 F.3d 262, 274 (3rd Cir. 2016) (“While perhaps ‘intangible,’ the harm is also  
13 concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of  
14 legally protected information.” (citing *Spokeo*, 578 U.S. at 340)).

15 Defendant does not disagree with the above proposition. (*See Reply* at 2:15–20.)  
16 Instead, it contends Plaintiff’s Complaint is still deficient because he did not watch a video  
17 in the first place, so he does not satisfy the standard for alleging a “concrete” injury  
18 elucidated in *Eichenberger*.<sup>2</sup> (*See Mot.* at 11:4–10, 14:7–9.) First, Defendant claims that  
19 the screenshot attached to Plaintiff’s Complaint shows he retrieved the “Dream It Real”  
20 video on an internet archive site, not Defendant’s website. (*Mot.* at 10:3–9.) More  
21 importantly, when one visits the web archive URL that appears in the image Plaintiff  
22 provided in his Complaint, Defendant argues that no video is displayed at all. Only a still  
23  
24  
25

---

26 <sup>2</sup> Defendant lumps all its standing arguments under the “fairly traceable” prong of the *Lujan* test.  
27 (*Mot.* at 9:20.) But the Court finds that it is more accurate to separate and consider some of Defendant’s  
28 arguments—namely that Plaintiff did not even watch a video in the first place, and that his PII was not  
disclosed—under the “injury-in-fact” element. These arguments do not concern whether Defendant is the  
cause of the harms Plaintiff alleges; rather, they argue that Plaintiff suffered no harm at all.

1 image appears. (Mot at 11:4–10; RJN, Ex. C.)<sup>3</sup> Thus, if Plaintiff did not watch a video in  
2 the first place, there can be no concrete injury.

3 This argument is unavailing. At the pleading stage, Plaintiff is under no obligation  
4 to provide figures such as screenshots to bolster his pleading. *See* Fed. R. Civ. P. 8(a)(2)  
5 (“A pleading that states a claim for relief must contain: . . . a short and plain statement of  
6 the claim showing that the pleader is entitled to relief.”). And to be sure, Plaintiff pleads  
7 that he watched the video around October 31, 2022. (FAC ¶ 15.) On a facial attack, the  
8 Court must accept his allegation as true.<sup>4</sup> *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th  
9 Cir. 2014).

10 Defendant nonetheless argues that where allegations of the complaint are  
11 contradicted by exhibits cited in the complaint or matters subject to judicial notice, the  
12 Court may disregard those allegations, particularly where they are conclusory and  
13

---

14 <sup>3</sup> Defendant filed concurrently with its Motion to Dismiss a Request for this Court to take Judicial  
15 Notice of seven separate exhibits labelled A–G. Under Rule 201 of the Federal Rules of Evidence, a court  
16 may take notice of an adjudicative fact if it is “not subject to reasonable dispute” because it “can be  
17 accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed.  
18 R. Evid. 201(b).

19 The Court **GRANTS** Defendant’s Request for Judicial Notice as it pertains to Exhibits A and B,  
20 because they are records of incorporation maintained by a government agency that “are not subject to  
21 reasonable dispute,” *see* Fed. R. Evid. 201(b), and are “of matters of public record,” *see Lee v. City of Los*  
22 *Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

23 The Court, however, **DENIES** Defendant’s Request for Judicial Notice of Exhibits C–G because  
24 they are copies and screen captures of webpages, whose accuracy can “reasonably be questioned.” *See*  
25 Fed. R. Evid. 201(b). Defendant claims that where websites “form the basis for Plaintiff’s claims and are  
26 *referenced* throughout the FAC,” judicial notice is appropriate. (RJN at 5:7–14 (emphasis added).) But  
27 here, Defendant confuses two doctrines. Indeed, the incorporation-by-reference doctrine “treats certain  
28 documents as though they are part of the complaint itself” “if the plaintiff refers extensively to the  
document or the document forms the basis of the plaintiff’s claim.” *Khoja v. Orexigen Therapeutics*, 899  
F.3d 988, 1022 (2018) (citing *United States v. Ritchie*, 342 F.3d 903, 907–09 (9th Cir. 2003)). But this is  
a separate doctrine from rule-based Judicial Notice. Applying the correct doctrine, Plaintiff’s Complaint  
does not “necessarily depend” on the documents Defendant is attempting to incorporate now. But even  
assuming, *arguendo*, that Defendant can properly incorporate the remaining exhibits by reference, this  
does not affect the outcome of the Court’s standing analysis, as further explained below.

<sup>4</sup> Defendant levels a facial attack on Plaintiff’s Complaint, asserting the allegations in the  
Complaint itself are insufficient to invoke federal jurisdiction. *See Safe Air for Everyone v. Meyer*, 373  
F.3d 1036, 1039 (9th Cir. 2004); *see also* (Mot. at ii:11–14) (“Tapestry brings this motion as a ‘facial’  
challenge to the [FAC] filed by Plaintiffs on the basis of the complaint and documents that are incorporated  
therein by reference and/or are the subject of Tapestry’s requests for judicial notice.”).



1 unsupported by specific facts. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 989  
2 (9th Cir. 2001) (finding the attachment of an arbitration award to a complaint showing the  
3 plaintiff physically attacked his head coach “fatally undermine[d]” the claim that the  
4 discipline meted out by the NBA and the team in response was motivated by racial animus).  
5 A “plaintiff can plead . . . himself out of a claim by including unnecessary details contrary  
6 to his claims.” *Id.* (citing *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–96 (9th  
7 Cir. 1998)). However, nothing in the screenshot “fatally undermines” what Plaintiff has  
8 pleaded here. Cantu’s imperfect attempt at bolstering his pleading with the help of an  
9 internet archiving service does not seriously foreclose his allegation that he visited  
10 Coach.com and watched an actual video, not a still image, at some time before filing his  
11 Complaint.

12 Defendant next argues that Plaintiff cannot have suffered an injury-in-fact because  
13 his PII was not disclosed. It posits two distinct points. First, it avers that other screenshots  
14 provided in the Complaint show the data disclosure for a video titled “LiveStream,” which  
15 Plaintiff never alleges to have watched. (FAC at Figs. 2, 4–8; Mot. at 12:7–8.) Second,  
16 Defendant claims Plaintiff’s Complaint shows the disclosure of PII of a “tester” account,  
17 not the disclosure of his own information. (Mot. 13:25–14:3; RJN, Ex. F (“When one does  
18 exactly as Plaintiff alleges—appending the Facebook ID allegedly transmitted by the  
19 c\_user cookie shown above . . . —it does not reveal Plaintiff’s Facebook profile at all.”).)  
20 Thus, Defendant argues Plaintiff never alleges his PII was disclosed, meaning he has no  
21 standing to sue. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982) (holding  
22 that even a “tester” must show an injury to himself to successfully plead Article III  
23 standing); *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) (same).

24 For a similar reason as above, the Court is unpersuaded by Defendant’s argument.  
25 Plaintiff pleads that he “visited the Website and watched one or more video.” (FAC ¶ 41.)  
26 As a result, Defendant “also disclosed identifiers for Plaintiff . . . [and] disclosed Plaintiff’s  
27 video viewing habits to a third party.” (FAC ¶ 42.) The Court must accept this as true.  
28 And again, nothing about the screenshots provided by Plaintiff contradicts his factual

1 allegations such that they are fatal to his cause of action. *See Sprewell*, 266 F.3d at 989.  
2 On Defendant’s facial challenge to standing, the Court takes as true that Plaintiff visited  
3 Coach.com at a certain date, and it also accepts as true that Coach discloses PII as it did  
4 with the tester account and its “LiveStream” video. Thus, it can be permissibly inferred  
5 that Plaintiff’s data was similarly disclosed when he visited the website. Plaintiff has  
6 plausibly pleaded he watched the video and that his PII was disclosed. And that is enough,  
7 for now. *See Lujan*, 504 U.S. at 561.

## 8                   **2. Fairly Traceable**

9           To survive a motion to dismiss for lack of Article III standing, a plaintiff must also  
10 establish that his injury is “fairly traceable” to the actions of the named defendant. That is,  
11 “[p]laintiffs must show that the injury is causally linked . . . to the [defendant’s] alleged  
12 misconduct, and not the result of misconduct of some third party not before the court.”  
13 *Wash. Env’t Couns. v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013).

14           Defendant’s remaining challenge to Plaintiff’s standing is simply that he has named  
15 the wrong defendant. Thus, his injury cannot be fairly traced back to Coach. Defendant  
16 argues that the website that allegedly hosted the “Dream It Real” video “is a webpage  
17 promoting the charity works of the Coach Foundation, not Defendant Tapestry, Inc.” (Mot.  
18 11:11–12:6.) Defendant then goes on to explain that Coach Foundation is a separately  
19 incorporated company and distinct legal entity from Tapestry, Inc., with the former  
20 embodying its own philanthropic mission divorced from the larger Coach brand. (RJN,  
21 Ex. A–B.) Thus, Defendant would like this Court to dismiss the Complaint because “the  
22 only reasonable inference from these facts is that the webpage and Dream It Real concern  
23 the Coach Foundation, which is not a party to this case.” (Mot. at 12:1–2.)

24           What exactly Defendant means by arguing that “the webpage and Dream It Real  
25 concern the Coach Foundation” (and not Coach.com) is ambiguous. (*Id.* (emphasis  
26 added).) If “concern” means Tapestry does not own, or is not responsible for, the webpage  
27 and video content Plaintiff alleges to have watched, this argument fails. Plaintiff alleges  
28 he watched the videos on Coach.com. (FAC at 1:1–5.) That, by itself, is enough to

1 overcome the Rule 12(b)(1) motion. And even if one looks to the screenshot of the “Dream  
2 It Real” video that Plaintiff provides in his Complaint, one can see that the URL for this  
3 content is <https://coach.com/coachfoundation>. (FAC Fig. 1.) “Coach.com” precedes  
4 “Coach Foundation.” Defendant is, of course, free to challenge the allegation after the  
5 pleadings stage, but the Court cannot make such a factual determination on a Rule 12(b)(1)  
6 motion that facially attacks the complaint. *See, e.g., Czarnionka v. Epoch Times Ass’n,*  
7 *Inc.*, No. 22 CIV. 6348 (AKH), 2022 WL 17069810, at \* 4 (S.D.N.Y. Nov. 17, 2022)  
8 (holding plaintiff’s allegations that defendant disclosed his PII sufficient to overcome a  
9 motion to dismiss); *Belozarov v. Gannett Co.*, No. CV 22-10838-NMG, 2022 WL  
10 17832185, at \*4 (D. Mass. Dec. 20, 2022) (same); *Harris v. Pub. Broad. Serv.*, No. 1:22-  
11 CV-2456-MLB, 2023 WL 2583118, at \*5 (N.D. Ga. Mar. 20, 2023) (“If discovery reveals  
12 Defendant played no role in the transmission of Plaintiff’s information to Facebook, the  
13 Court will consider that at summary judgment.”).

14 If “concern” instead means that the webpage and video—even if truly operated by  
15 Coach.com—serves to promote Coach Foundation’s philanthropic mission such that  
16 Plaintiff’s injury is not “fairly traceable” to the corporate objectives of the larger Coach  
17 enterprise, this argument also is unconvincing. The content of the webpage and video is  
18 irrelevant to the VPPA’s non-disclosure requirement. The Court finds nothing in the  
19 statute that would require otherwise. *See Belozarov*, 2022 WL 17832185, at \*3 (holding  
20 liability under the VPPA is not restricted to a video’s precise content). Thus, Defendant  
21 cannot challenge Plaintiff’s standing on this basis because a cognizable harm under the  
22 VPPA is not determined by the content of the pre-recorded video or any webpage it is  
23 hosted on.

24 As such, Defendant’s Motion to Dismiss under Rule 12(b)(1) fails because the Court  
25 finds that Plaintiff has sufficiently pleaded a redressable harm under the VPPA that would  
26  
27  
28

1 garner him Article III standing.<sup>5</sup> The Court, therefore, **DENIES** Defendant’s Motion to  
2 the extent it seeks to dismiss Plaintiff’s Complaint for lack of subject matter jurisdiction.

3 **B. Failure to State a Claim**

4 Because the Court finds Defendant’s standing arguments unpersuasive, the Court  
5 now turns to Defendant’s second contention that Plaintiff has failed to state a claim upon  
6 which relief can be granted. To plead a plausible claim under Section 2710(b)(1), Plaintiff  
7 must allege that “(1) defendant is a ‘video tape service provider,’ (2) the defendant  
8 disclosed ‘personally identifiable information concerning any customer’ to ‘any person,’  
9 (3) the disclosure was made knowingly, and (4) the disclosure was not authorized by  
10 section 2710(b)(2).” *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1066 (9th Cir. 2015).  
11 Defendant challenges all four elements. The Court finds that Plaintiff has failed to  
12 sufficiently plead facts that show Defendant is a “video tape service provider” within the  
13 meaning of the VPPA. As such, it grants Defendant’s Motion to Dismiss without reaching  
14 the remaining elements.

15 The VPPA defines a “video tape service provider” as “any person, engaged in the  
16 business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of  
17 prerecorded video cassette tapes or similar audio visual materials . . . .” 18 U.S.C. §  
18 2710(a)(4). Defendant contends that its business as a luxury fashion retailer cannot fall  
19 within the meaning of a “video tape service provider” as contemplated by the VPPA.<sup>6</sup> The  
20 Ninth Circuit has yet to speak directly on what constitutes a “video tape service provider.”  
21

---

22 <sup>5</sup> Defendant also argues that Plaintiff lacks Article III standing because the information disclosed  
23 is not PII within the meaning of the VPPA, and he has not adequately alleged that he was a consumer as  
24 defined by the Act. The Court will not consider these arguments as part of Defendant’s Rule 12(b)(1)  
25 motion because they attack the merits of Plaintiff’s VPPA claim, not his standing to sue. *See Williston*  
26 *Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly*  
*Subterranean Geological Formation*, 524 F.3d 1090, 1094 (9th Cir. 2008) (“As a general rule, when ‘[t]he  
question of jurisdiction and the merits of [the] action are intertwined,’ dismissal for lack of subject matter  
jurisdiction is improper.” (quoting *Meyer*, 373 F.3d at 1039 (9th Cir. 2004) (alterations in original))).

27 <sup>6</sup> Plaintiff states “Defendant does not challenge the first element that it is a ‘video tape service  
28 provider’ under the VPPA.” (Opp’n at 6:16–18.) That is wrong. (*See* Mot. at 1:18–23 (“Plaintiff Jesse  
Cantu . . . seeks to expand the Act well beyond where Congress could have ever imagined to encompass  
not only movies and the like, but essentially any moving images which appear on a website . . . .”).)

1 And, it has not foreclosed the possibility of businesses outside of the traditional brick-and-  
2 mortar rental store from incurring liability under the Act. *See Eichenberger*, 876 F.3d at  
3 979 (addressing other elements of plaintiff’s VPPA claim, but not whether ESPN was  
4 properly a “video tape service provider”); *Mollett*, 795 F.3d at 1066 (seeming to accept  
5 Netflix as a “video tape service provider” without further discussion).

6 This Court is also aware of the expansion of the VPPA over the past decade in other  
7 district courts to cover defendants even beyond video streaming services. Two important  
8 phrases in the statutory language have spurred such an expansion. The phrase “rental, sale,  
9 or delivery” indicates that Congress meant for the Act to cover more than just a physical  
10 video rental store like the one Judge Bork patronized. *In re Vizio, Inc., Consumer Priv.*  
11 *Litig.*, 238 F. Supp. 3d 1204 (C.D. Cal. 2017) (quoting 18 U.S.C. § 2710(a)(4)). “Indeed,  
12 lest the word ‘delivery’ be superfluous, a person need not be in the business of either  
13 renting or selling video content for the statute to apply.” *Id.* at 1221. Furthermore, the  
14 phrase “prerecorded video cassette tapes or similar audio visual materials” indicates that  
15 the VPPA’s protections extend beyond physical video tapes. 18 U.S.C. § 2710(a)(4)  
16 (emphasis added). As long as such content is pre-recorded, rather than live, the content  
17 need not be in any precise format to implicate the Act’s protections. *See In re Vizio*, 238  
18 F. Supp. 3d at 1221 (citing *In re Hulu Priv. Litig.*, No. C 11-03764 LB, 2012 WL 3282960,  
19 at \*5 (N.D. Cal. Aug. 10, 2012)); *see also Louth v. NFL Enters.*, No. 1:21-cv-00405-MSM-  
20 PAS, 2022 WL 4130866, at \*4 (D.R.I. Sept. 12, 2022) (declining to include live video  
21 broadcasts as “similar audio visual materials” under the VPPA).

22 Yet to fall under the VPPA’s obligations, a defendant must also be “engaged in the  
23 business . . . of” delivering video content. 18 U.S.C. § 2710(a)(4). The Court finds the  
24 analysis undertaken by the Central District of California, and implicitly approved of in the  
25 Northern District of California, to be on point. *In re Vizio*, 238 F. Supp. 3d at 1204; *In re*  
26 *Facebook, Inc., Consumer User Profile Priv. Litig.*, 402 F. Supp. 3d 767 (N.D. Cal. 2019).  
27 The language “engaged in the business” “connotes ‘a particular field of endeavor,’ *i.e.* a  
28 focus of the defendant’s work.” *In re Vizio*, 238 F. Supp. 3d at 1221 (citing Webster’s

1 Third New International Dictionary 302 (1981) (def. 1d); The American Heritage  
2 Dictionary: Second College Edition 220 (1991) (defs. 1a, 1b); 2 Oxford English Dictionary  
3 695 (1989) (def. 14b); Webster’s New World Dictionary: Third College Edition 189 (1988)  
4 (def. 1.) For instance, a letter carrier who delivers a package containing a videotape  
5 obviously “delivers” such a product but in no way is “engaged in the business” of such  
6 delivery. *Id.* Thus, it is not enough for a business to be “peripherally or passively” engaged  
7 in the delivery of video content to come under the obligations imposed by the VPPA. *Id.*  
8 Instead, the defendant’s business must be “significantly tailored to serve that purpose” of  
9 delivering video content. *Id.*

10 On its face, Plaintiff’s Complaint falls short of this standard. Plaintiff alleges, in a  
11 conclusory fashion, that Defendant is “engaged in the business of ‘rental, sale, or delivery  
12 of prerecorded video cassette tapes or similar audio visual materials.’” (FAC ¶ 14  
13 (emphasis omitted).) He then alleges, specifically, Defendant’s “business model involves  
14 monetizing instances in which consumers watch videos.” (*Id.*) But this is insufficient.  
15 Even if it is true that Defendant’s business model monetizes the occasions its customers  
16 watch videos, Plaintiff has not alleged facts supporting an inference that Defendant or  
17 Coach’s enterprise is “significantly tailored” to achieving such a purpose. The VPPA’s  
18 standard is a higher bar, which Plaintiff’s allegations fail to reach. If anything, the  
19 “monetization” of “instances” plausibly suggests Coach “passively” or “peripherally”  
20 engages in the delivery of video content, but this is not enough to garner liability under the  
21 VPPA. *See In re Vizio*, 238 F. Supp. 3d. at 1221.

22 Plaintiff, in his Opposition, cites a string of cases purporting to expand liability  
23 under the VPPA such that Defendant, by hosting video content on its retail website, would  
24 fall under the Act’s sphere of regulation. But the cases cited stand for no such proposition.  
25 Take, for instance, *Cappello v. Walmart, Inc.*, which implicitly found Walmart.com to be  
26 a “video tape service provider.” No. 18-CV-06678-RS, 2019 WL 11687705, at \*2 (N.D.  
27 Cal. Apr. 5, 2019). (Opp’n 7: 15–17.) There, Walmart.com fell within the purview of the  
28 VPPA because it “sells a variety of consumer goods, including DVDs, Blu-Ray Discs,

1 video games, and other video media,” and then allegedly disclosed those product IDs along  
2 with the purchasers’ Facebook ID. It was not the case that Walmart.com happened to host  
3 a few instances of video content like Plaintiff has alleged here. *See Cappello*, 2019 WL  
4 11687705, at \*1. Walmart.com directly engaged in the sale and delivery of video content,  
5 and then disclosed the titles of videos purchased and the identities of its purchasers, just as  
6 was done with Judge Bork. It was thus more plausibly a “video tape service provider”  
7 within the meaning of the VPPA.

8 Next, Plaintiff invokes another set of decisions that extend VPPA liability to major  
9 entertainment platforms that digitally distribute video content. *See In re Hulu Priv. Litig.*,  
10 No. C 11-03764 LB, 2012 WL 3282960, at \*4–6 (N.D. Cal. Aug. 10, 2012) (finding the  
11 streaming service Hulu to be a “video tape service provider”); *Louth*, 2022 WL 4130866,  
12 at \*4 (finding the NFL mobile application to be a “video tape service provider” in so far as  
13 it produces pre-recorded content). (Opp’n at 6:25–27, 7:12–13, 7:20–22.)<sup>7</sup>

14 But when the Court compares these cases to the Complaint’s limited allegations, it  
15 finds the above authorities unpersuasive for extending liability to Defendant. In *Louth*, the  
16 plaintiffs alleged that the NFL mobile application disseminated “. . . exciting videos and  
17 highlights, and replays of every game.” 2022 WL 4130866, at \*1. In *In re Hulu*, it was  
18 alleged that the popular streaming service’s business revolved around “provid[ing] video  
19 content, both previously released and posted and originally developed.” 2012 WL  
20 3282960, at \*2. Such “programs include news, entertainment, educational, and general  
21 interest programs.” *Id.* There are no similar allegations in Plaintiff’s Complaint that show  
22 Defendant’s dissemination of video matches either the numerosity of pre-recorded videos  
23 disseminated by the NFL or the breadth of video material disseminated by a streaming  
24 service like Hulu. The allegations in *In re Hulu* and *Louth* support a claim that the  
25 respective products in each case are “significantly tailored” to delivering video content. *In*  
26 *re Vizio*, 238 F. Supp. 3d at 1221. Plaintiff’s allegations, on the other hand, beg for more.

---

27  
28 <sup>7</sup> And though not cited by Plaintiff, one would include the Ninth Circuit decisions involving ESPN  
and Netflix in this category of cases, too. *See Eichenberger*, 876 F.3d at 979; *Mollett*, 795 F.3d at 1045.

1           Lastly, Plaintiff cites a plethora of decisions that extend VPPA liability to news  
2 websites that procure pre-recorded video. *See Belozarov*, 2022 WL 17832185, at \*3  
3 (finding plaintiff plausibly pleaded *USA Today* is a “video tape service provider”);  
4 *Czarnionka*, 2022 WL 17069810, at \*4 (holding plaintiff’s allegation that *The Epoch*  
5 *Times*’ webpage delivers a range of audiovisual content in the form of “news programs,  
6 television shows, documentaries, movies, and other audiovisual content” was sufficient);  
7 *Ambrose v. Boston Globe Media Partners LLC*, No. CV 21-10810-RGS, 2022 WL  
8 4329373, at \*2 (D. Mass. Sept. 19, 2022) (concluding plaintiff plausibly alleged *The*  
9 *Boston Globe* is a “video tape service provider”); *Lebakken v. WebMD, LLC*, No. 1:22-  
10 CV-644-TWT, 2022 WL 16716151, at \*3 n.2 (N.D. Ga. Nov. 4, 2022) (holding plaintiff’s  
11 allegations that WebMD delivers pre-recorded audio-visual materials via its newsletter and  
12 website was sufficient to survive a motion to dismiss). (Opp’n at 7:4–12, 7:17–19.)

13           These last cases come closest to suggesting that Defendant is a “video tape service  
14 provider.” The news sites, WebMD, and Defendant operate webpages. The webpages host  
15 pre-recorded video content. Some of this video content is embedded into the webpage,  
16 rather than physically delivered, bought, or sold. *See, e.g., Ambrose*, 2022 WL 4329373,  
17 at \*1. Still, in important ways, the allegations made in each case support the inference that  
18 news agencies and WebMD are “significantly tailored” to deliver audio visual material in  
19 ways Plaintiff has not alleged here. *Compare* FAC ¶ 14 (“Specifically, Defendants’  
20 business model involves monetizing instances in which consumers watch videos.”); *with*  
21 *Ambrose*, 2022 WL 4329373, at \*1 (alleging *The Boston Globe* “creates, hosts, and  
22 disseminates hundreds, if not thousands, of videos for various purposes” (internal quotation  
23 marks omitted)), *and Czarnionka*, 2022 WL 17069810, at \*4 (alleging *The Epoch Times*  
24 disseminates videos spanning “news programs, television shows, documentaries, movies,  
25 and other audiovisual content”), *and Lebakken*, 2022 WL 16716151, at \*1 (alleging  
26 Lebakken “provided her email address to WebMD to receive an e-newsletter, which  
27 frequently contained video content”). Such allegations plausibly suggest that the  
28



1 defendants in each above case have “significantly tailored” their business to video delivery.  
2 There are no similar allegations in this case.


3 Accordingly, the Court finds Plaintiff has failed to state a claim on the basis that he  
4 has not properly alleged that Defendant is a “video tape service provider.” Therefore, it  
5 **GRANTS** Defendant’s Motion to the extent it seeks dismissal pursuant to Rule 12(b)(6).  
6 Such dismissal is without prejudice. *See Tosco Corp. v. Cmtys. for a Better Env’t*, 236  
7 F.3d 495, 502 (9th Cir. 2001). If Plaintiff is able to do so, he may amend his Complaint to  
8 include further allegations supporting an inference that Defendant’s business model is  
9 “significantly tailored” to the delivery of video content, rather than “peripherally” or  
10 “passively” involved in such an exercise. *See In re Vizio*, 238 F. Supp. 3d at 1204. And  
11 because the Court finds that Plaintiff has not sufficiently pleaded the first element of his  
12 claim, it withholds judgment on the remaining elements.

13 **IV. CONCLUSION**

14 For the reasons stated above, the Court **DENIES** Defendant’s Motion to Dismiss  
15 Plaintiff’s Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction. (ECF.  
16 No. 10.) However, it **GRANTS** Defendant’s Motion to dismiss for failure to state a claim  
17 under Rule (12)(b)(6). Such dismissal is **WITHOUT PREJUDICE** to Plaintiff filing an  
18 amended pleading that resolves the deficiencies identified by this order. If Plaintiff wishes  
19 to do so, he must file a Second Amended Complaint by **July 24, 2023**.

20 **IT IS SO ORDERED.**

21  
22 **DATED: July 10, 2023**

  
**Hon. Cynthia Bashant**  
**United States District Judge**