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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL RODRIGUEZ,
Plaintiff,

No. C 11-4084 PJH

v.

**ORDER GRANTING MOTION
TO DISMISS**

SONY COMPUTER ENTERTAINMENT
AMERICA LLC, et al.,
Defendants.

_____ /

Defendants’ motion to dismiss plaintiff’s second amended class action complaint came on for hearing before this court on August 1, 2012. Plaintiff Daniel Rodriguez (“plaintiff”) appeared through his counsel, Rafey Balabanian and Ari Scharg. Defendants Sony Computer Entertainment America LLC (“SCEA”) and Sony Network Entertainment International LLC (“SNEI”) (collectively, “defendants”) appeared through their counsel, Michael Rhodes and Ray Sardo. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendants’ motion as follows:

BACKGROUND

This case arises under the Video Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710(e), and is based on plaintiff’s allegations that defendants unlawfully retained and disclosed plaintiff’s personally identifiable information (“PII”), including movie and video game rental and purchase histories. The VPPA requires companies to keep such PII confidential, and further requires them to “destroy personally identifiable information as soon as practicable, but no later than one year after the date when the information no

1 longer became necessary for the purpose for which it was collected.” Plaintiff alleges that
2 defendants “systematically and intentionally violate the VPPA by indefinitely storing and
3 maintaining” the customers’ PII beyond the time period set out in the statute, and further
4 alleges that defendants unlawfully disclose the customers’ PII without permission.

5 Plaintiff Rodriguez signed up for the PlayStation Network (“PSN”) service in or about
6 February 2008. At the time, PSN was managed by SCEA. Rodriguez rented and
7 purchased several movies between 2009 and 2011. Plaintiff claims that SCEA disclosed
8 his rental and purchase histories to SNEI and SNEA¹ without his consent, in violation of the
9 VPPA. Plaintiff also alleges that, since September 2011, SNEI (who took over PSN
10 management from SCEA) continues to disclose customers’ PII to SCEA without consent.

11 Plaintiff first filed suit on August 18, 2011, asserting a single cause of action under
12 the VPPA. Defendants moved to dismiss the complaint on November 30, 2011. But before
13 the motion was heard, plaintiff filed his first amended complaint on December 21, 2011,
14 again asserting a single cause of action under the VPPA. On February 3, 2012,
15 defendants moved to dismiss the first amended complaint, and that motion was heard by
16 this court on April 18, 2012. At the hearing, plaintiff explained that his cause of action
17 consisted of separate prongs for “retention” and “disclosure” of PII. Defendants noted that
18 the Sixth and Seventh Circuits had both issued opinions relating to the scope of the VPPA,
19 and that both had found that there is no private right of action with respect to the retention
20 claim. See Sterk v. Redbox Automated Retail, LLC, 672 F.3d 535 (7th Cir. 2012); Daniel
21 v. Cantrell, 375 F.3d 377 (6th Cir. 2004). The court adopted the reasoning of those courts,
22 and dismissed plaintiff’s “retention” claims with prejudice. With respect to the disclosure
23 claim, defendants argued that the allegedly improper disclosures actually fell within a VPPA
24 carve-out, which allows disclosures made in the ordinary course of business, including
25 transfer of ownership. The court agreed, and on this basis, dismissed plaintiff’s claims with
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27 ¹“SNEA” refers to Sony Network Entertainment America, Inc., which was merged into
28 SNEI on September 30, 2011.

1 respect to intra-Sony disclosures with prejudice, and granted leave to amend only as to any
2 possible disclosure to non-Sony entities. In the first amended complaint, plaintiff did not
3 specifically allege that any such outside disclosures had been made. Instead, his
4 allegations were based only on the fact that defendants reserved the right to make such
5 disclosures in their privacy policy.

6 On May 16, 2012, plaintiff filed his second amended complaint (“SAC”), which is the
7 subject of this motion. While plaintiff’s allegations still relate to the same PII-related actions
8 taken by Sony, the complaint is now split into three causes of action. First, plaintiff re-
9 asserts a “retention” claim under the VPPA. Second, plaintiff asserts a “disclosure” claim
10 under the VPPA, based on SCEA and SNEI’s disclosures to each other, and to SNEA.
11 Plaintiff does not allege that any disclosures were made to non-Sony entities. Third,
12 plaintiff asserts a breach of contract claim, arguing that “confidentiality of [] PII and timely
13 destruction of same” was part of the benefit of the bargain between defendants and their
14 customers, and that failure to meet those obligations constituted a material breach of
15 contract. Plaintiff also splits the putative class into subclasses, based on whether their
16 allegations stem from allegedly unlawful “retention” or “disclosure.”

17 LEGAL STANDARD

18 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
19 alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).
20 Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen.
21 Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for
22 failure to state a claim, a complaint generally must satisfy only the minimal notice pleading
23 requirements of Federal Rule of Civil Procedure 8. Rule 8(a)(2) requires only that the
24 complaint include a “short and plain statement of the claim showing that the pleader is
25 entitled to relief.” Fed. R. Civ. P. 8(a)(2). Specific facts are unnecessary – the statement
26 need only give the defendant “fair notice of the claim and the grounds upon which it rests.”
27 Erickson v. Pardus, 551 U.S. 89, 93 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
28 555 (2007)). All allegations of material fact are taken as true. Id. at 94. However, a

1 plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than
2 labels and conclusions, and a formulaic recitation of the elements of a cause of action will
3 not do." Twombly, 550 U.S. at 555 (citations and quotations omitted). Rather, the
4 allegations in the complaint "must be enough to raise a right to relief above the speculative
5 level." Id.

6 A motion to dismiss should be granted if the complaint does not proffer enough facts
7 to state a claim for relief that is plausible on its face. See id. at 558-59. "[W]here the
8 well-pleaded facts do not permit the court to infer more than the mere possibility of
9 misconduct, the complaint has alleged-but it has not 'show[n]'-that the pleader is entitled to
10 relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

11 DISCUSSION

12 As an initial matter, the court notes that its previous order granting defendants'
13 motion to dismiss clearly stated that "[t]o the extent plaintiff's claim under the [VPPA] is
14 premised on a claim for unlawful retention of plaintiff's personally identifiable information
15 ("PII"), the VPPA precludes claims premised solely on a defendant's allegedly unauthorized
16 'retention' of information." See Dkt. 59 at 1 (emphasis added) (dismissing retention claim
17 with prejudice). However, despite this dismissal, plaintiff's retention-based claim has
18 resurfaced in a variety of different packages. First, plaintiff re-alleges the exact same
19 retention claim under the VPPA, but notes that he "reasserts such claim . . . for appeal
20 purposes only." Dkt. 63 at 18, n.7. Second, as part of the same cause of action, plaintiff
21 seeks to enforce the same provision of the VPPA through a different procedural vehicle.
22 Specifically, plaintiff alleges that 18 U.S.C. § 2707 (also referred to as the Stored
23 Communications Act, or "SCA") provides him with an independent means to seek damages
24 for VPPA violations, separate and apart from the VPPA's own damages provision. Finally,
25 plaintiff's third attempt to re-assert his retention claim is presented in the form of a breach
26 of contract claim. Plaintiff argues that the terms of the VPPA were implicitly incorporated
27 into a contract between the parties, and that defendants' alleged retention of plaintiff's PII
28 constituted a breach of that contract. Importantly, both plaintiff's SCA claim and breach of

1 contract claim involve the same factual allegations as the already-dismissed VPPA claim,
2 and both are premised on the same language from the VPPA².

3 Plaintiff's SCA claim is based on the following language: "[any] person aggrieved by
4 any violation of this chapter . . . may, in a civil action, recover from the person or entity . . .
5 which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2707(a).
6 Plaintiff notes that the VPPA is contained within the same chapter as the SCA, and thus
7 argues that the SCA provides an alternate means of enforcing the VPPA's ban on PII
8 retention. Defendants concede that both provisions are contained within the same literal
9 chapter, but point out that when the SCA was enacted, the VPPA did not yet exist. Thus,
10 any reference to "this chapter" should only be read as a reference to the remainder of the
11 SCA. Defendants also cite to the VPPA's own civil liability provision, which they argue
12 should trump the SCA's provision.

13 This court is not the first to consider the SCA's applicability to the VPPA. In a case
14 brought by the same plaintiffs' counsel that represent plaintiff Rodriguez, the Northern
15 District of Illinois faced the question presented here, and held that "[c]onsideration of the
16 language of section 2707 in the context of the statute leads the Court to conclude that
17 Congress did not intend for plaintiffs to be able to bring a VPPA retention claim under the
18 SCA." Sterk v. Redbox Automated Retail, LLC, 2012 WL 3006674, at *2 (N.D. Ill. July 23,
19 2012). The court noted that "[w]hen Congress originally enacted the SCA . . . it could not
20 have intended for the SCA's authorization of civil suits to apply to the VPPA, because the
21 VPPA did not yet exist" and further held that "[t]he fact that Congress included a provision
22 in the VPPA authorizing civil suits suggests that it did not think that the SCA's cause of
23 action provision applied to the VPPA." Id. The Sterk court then pointed to the Seventh
24 Circuit's opinion regarding plaintiffs' VPPA claims, and concluded that "[i]f Congress, as the
25 Seventh Circuit has determined, did not intend that plaintiffs have a cause of action for
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27 ²Specifically, the SCA and the breach of contract claims both seek to enforce the
28 retention-related provision of the VPPA, found at 18 U.S.C. § 2710(e) (also referred to as the
"Destruction of Old Records" provision).

1 retention under the VPPA, then it is unlikely that it intended for plaintiffs to have a remedy
2 under the more general and older SCA.” Id. at *3

3 The court finds the reasoning of Sterk to be persuasive, and adopts it here. Plaintiff
4 cannot be permitted to have a second bite at the VPPA apple, and his attempts to
5 repackage his VPPA claim as an SCA claim are rejected. Thus, the court hereby
6 DISMISSES plaintiff’s first cause of action for unlawful retention in full, and again, with
7 prejudice.

8 Plaintiff makes one more attempt to pursue his VPPA claim for unlawful retention.
9 Seeking a third bite of the VPPA apple, plaintiff asserts a breach of contract claim on behalf
10 of himself and two “unlawful retention” subclasses, alleging that he “entered into binding
11 contracts for movie/video game rentals and purchases,” and that “the laws existing at the
12 time and place of the making of a contract are incorporated into the contract.” See SAC at
13 ¶¶ 112-113. Specifically, plaintiff claims that defendants’ “failure to perform their
14 contractual obligations imposed by the VPPA . . . constitutes a material breach” of contract.
15 Id. at ¶ 115. In essence, plaintiff makes the same allegations here that he does in his first
16 cause of action, but claims that defendants’ alleged violations of the VPPA also constitute
17 breaches of contract. Critically, plaintiff does not point to any specific document as
18 memorializing the supposed contract between the parties, and specifically refutes the
19 suggestion that the PSN Terms of Service (“TOS”) served as the contract between the
20 parties. See Dkt. 67 at 24 (“Plaintiff’s allegations of breach do not refer to, rely upon, or
21 otherwise incorporate the PSN Privacy Policy and TOS documents”). Instead, plaintiff
22 claims that “all the terms of the contract between Plaintiff and SCEA are alleged through
23 the SAC and memorialized in the VPPA.” Id. Thus, plaintiff does not allege that the VPPA
24 was expressly incorporated into any contract between the parties, but instead appears to
25 be arguing that the VPPA itself created a contract between plaintiff and defendants. The
26 court views this cause of action as another end-run around plaintiff’s already-dismissed
27 VPPA claim. Having lost on the VPPA retention issue, plaintiff attempts to repackage the
28 exact same claim related to the exact same conduct, first as an SCA claim, and now as a

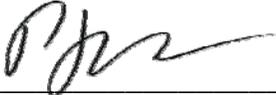
1 breach of contract claim. The Supreme Court has rejected similar attempts, holding that
2 when a plaintiff has no right to sue under a federal statute, it cannot bring a breach of
3 contract suit for the same conduct, alleging that the contract's terms are the same as that
4 of the statute. Astra v. Santa Clara County, 131 S.Ct. 1342, 1345 (2011). Because this
5 court has already determined that "the VPPA precludes claims premised solely on a
6 defendant's allegedly unauthorized 'retention' of information," it follows that Astra directly
7 applies here. Plaintiff has no right to sue under the VPPA for alleged unlawful retention,
8 and thus cannot bring the same substantive claim dressed in "breach of contract" clothing.
9 Thus, plaintiff's third cause of action is DISMISSED with prejudice.

10 Finally, plaintiff asserts one cause of action related to the alleged unlawful disclosure
11 of PII. The court again refers back to its previous dismissal order, which granted leave to
12 amend only "as to plaintiff's claim for unlawful disclosure to DOE defendants." Dkt. 59 at 2.
13 Leave to amend was not granted as to claims that SCEA disclosed PII to SNEI. Id.
14 However, plaintiff's second cause of action still relies on allegations of intra-Sony
15 disclosure, and does not allege that any disclosures were made to outside "Doe"
16 defendants. Thus, plaintiff's second cause of action fails to comply with the court's prior
17 dismissal order, and is hereby DISMISSED with prejudice for the reasons stated in the prior
18 order and at both hearings.

19 The Clerk shall close the file.

20
21 **IT IS SO ORDERED.**

22 Dated: September 25, 2012



PHYLLIS J. HAMILTON
United States District Judge