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4 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
5 AT SEATTLE

6 CHAD EICHENBERGER,  
7 individually and on behalf of all others  
8 similarly situated,

9 Plaintiff,

C14-463 TSZ

10 v.

MINUTE ORDER

11 ESPN, INC., a Delaware corporation,

Defendant.

12 The following Minute Order is made by direction of the Court, the Honorable  
13 Thomas S. Zilly, United States District Judge:

14 (1) Defendant's Motion to Dismiss Plaintiff's First Amended Complaint, docket no.  
15 31, is GRANTED without prejudice, with leave to amend. Plaintiff must amend within  
16 30 days from the date of this Minute Order.

17 In ruling on a motion to dismiss, the Court must assume the truth of the plaintiff's  
18 allegations and draw all reasonable inferences in the plaintiff's favor. Usher v. City of  
19 Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). "A claim has facial plausibility when  
20 the plaintiff pleads factual content that allows the court to draw the reasonable inference  
21 that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662,  
22 678 (2009). This "plausibility standard is not akin to a 'probability requirement,' but it  
23 asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting  
Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)). Although a complaint  
challenged by a Rule 12(b)(6) motion to dismiss need not provide detailed factual  
allegations, it must offer "more than labels and conclusions" and contain more than a  
"formulaic recitation of the elements of a cause of action" in order "to raise a right to  
relief above the speculative level." Twombly, 550 U.S. at 555.

1 Plaintiff's factual allegations in this case are too speculative to meet the  
2 Iqbal/Twombly plausibility standard. Plaintiff has failed to allege sufficient facts that  
3 ESPN violated the Video Privacy Protection Act, 18 U.S.C. § 2710 ("VPPA"), by  
4 transmitting his personally identifiable information ("PII") to a third party. Because the  
5 information allegedly disclosed is not PII (i.e., Plaintiff's Roku device serial number and  
6 his viewing records), Plaintiff's legal theory fails. Although ESPN could be found liable  
7 under the VPPA for disclosing both "a unique identifier and a correlated look-up table"  
8 by which Plaintiff could be identified as a particular person who watched particular  
9 videos, Plaintiff does not allege sufficient facts to support his theory that Adobe already  
10 has a "look-up table." See In re Hulu Privacy Litig., No. C 11-03764 LB, 2014 WL  
11 1724344, at \*11 (N.D. Cal. Apr. 28, 2014). Even if Adobe does "possess a wealth of  
12 information" about individual consumers, it is speculative to state that it can, and does,  
13 identify specific persons as having watched or requested specific video materials from the  
14 WatchESPN application.

15 When the Court dismisses the complaint or portions thereof, it must consider  
16 whether to grant leave to amend. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).  
17 "Futility of amendment can, by itself, justify the denial of a motion for leave to amend."  
18 Gonzalez v. Planned Parenthood of Los Angeles, 759 F.3d 1112, 1116 (9th Cir. 2014),  
19 quoting Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). Even though Plaintiff's  
20 current theory fails as alleged, the Court is not convinced that further amendment would  
21 be futile.

22 (2) The Clerk is directed to send a copy of this Minute Order to all counsel of  
23 record.

Dated this 24th day of November, 2014.

William M. McCool  
Clerk

s/Claudia Hawney  
Deputy Clerk