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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: NICKELODEON CONSUMER PRIVACY LITIGATION	MDL No. 2443 Docket No. 2:12-cv-07829 (SRC)(CLW)
This Document Relates To: ALL CASES	ECF Case **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT VIACOM INC.'S MOTION FOR SUMMARY JUDGMENT** Oral Argument Requested

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Defendant Viacom Inc. ("Viacom") submits this memorandum in support of its motion for summary judgment pursuant to Fed. R. Civ. P. 56.

PRELIMINARY STATEMENT

After three court decisions at the motion to dismiss stage, this once wide-ranging class action has been reduced to a single New Jersey common law claim for "intrusion upon seclusion." The Third Circuit narrowly framed this surviving claim, focusing on an allegation that Viacom had falsely told "grown-ups" that it did not collect "personal information" of children who registered to use the Nick.com website. Assuming the allegation of falsity to be true (as is required on a motion to dismiss) the panel said the statement might be considered "duplicitous," and, if it was, then that could be deemed "highly offensive," which would satisfy one of the elements of the intrusion upon seclusion tort.

Now that this Court is free to consider evidence and not merely allegations, the Court should dismiss the case because, on the facts, ***Viacom spoke truthfully to parents about its privacy practices. There was no deception, no "highly offensive" conduct, and therefore no intrusion.*** The company clearly disclosed that it would collect anonymous details about Nick.com registrants and anonymous technical details necessary for site usage. It told registrants not to supply their names or other personal information. In short, Viacom did not collect any "personal information" that could be used to identify users in the real world. Not

only did Viacom act consistently with its disclosures, it acted without any intent to unlawfully intrude or any conscious awareness of wrongdoing. The time therefore has come to dismiss what is left of this case.

In sending this case back to this Court, the Third Circuit panel focused exclusively on the following two sentences on the registration form once used on Nick.com[1]:

> HEY GROWN-UPS: We don't collect ANY personal information about your kids. Which means we couldn't share it even if we wanted to!

The panel hypothesized that these two sentences (the "Hey Grown-Ups Statement") could, if false, be considered "highly offensive," and thus sufficient to support an intrusion claim at the pleading stage on the theory that Viacom might actually have been collecting "personal information." *See In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 294–95 (3d Cir. 2016).

In particular, the panel felt "compel[led]" to let the intrusion claim survive a motion to dismiss in light of *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125 (3d Cir. 2015). *In re Nickelodeon*, 827 F.3d at 295. In that case, Google Inc. ("Google") told users via its privacy policy that it would respect their browser settings with respect to cookies. But it was alleged that

[1] The Nick.com site has long since been completely redesigned, and this case deals exclusively with legacy practices.

Google surreptitiously used code to reinstate cookies even when users had set their browsers to reject them. Because Google allegedly had deceived its users, the *Google Cookie* panel found that that alleged deception satisfied the "highly offensive" element of the intrusion tort for motion to dismiss purposes.

On the facts, however, this case bears no resemblance to the allegations that drove the result in *Google Cookie*. Viacom asked children who registered with Nick.com to submit their gender and birthdate, explaining that the data would be used for general site development purposes. Children were instructed not to provide their real name or other real-world identifying information. The same instructions were visible to parents. Also available to parents was a detailed privacy policy, which made clear that Viacom would also collect ***anonymous technical details*** incidental to basic browsing activity, like the unique cookie identifier and browser settings of the user's web browser. Plaintiffs do not allege that Viacom's data collection exceeded the disclosures in its privacy policy.

In short, the totality of Viacom's disclosures made clear that, in the context of the Hey Grown-Ups Statement, the term "personal information" meant traditional real-world identifying information, such as name or street address. Plaintiffs do not allege or contend that Viacom collected any such information. That alone fully supports dismissal. Moreover, the undisputed facts set out in the supporting declarations of Viacom personnel, and in the Statement of Undisputed

Facts, make clear beyond doubt that Viacom was not collecting any personally identifying details about its child users or tracking their Internet behavior. Viacom's business practices thus were completely congruent with its disclosures.

Accordingly, there is no genuine issue of material fact on the sole claim remaining in this case. Nor is there any need for discovery. For this reason, summary judgment should be granted in Viacom's favor, and this case should be dismissed with prejudice.

PROCEDURAL HISTORY

This is a multidistrict class action. The first three of six class complaints against Viacom and Google were filed on December 21, 2013. The case was consolidated in this District by order of the Judicial Panel on Multidistrict Litigation, dated June 11, 2014. Plaintiffs filed their consolidated complaint in this Court on October 23, 2014. That complaint listed seven legal theories, contending there had been violations of the federal Video Privacy Protection Act ("VPPA"); Electronic Communications Privacy Act; Stored Communications Act; California Invasion of Privacy Act; New Jersey Computer Related Offenses Act; and both intrusion upon seclusion and unjust enrichment under New Jersey common law.

Defendants Viacom and Google moved in this Court under Rule 12(b)(6) to dismiss the complaint in its entirety for failure to state a claim. This Court granted the motion by opinion and order, dated July 2, 2014. The claims for the Electronic

Communications Privacy Act, Stored Communications Act, California Invasion of Privacy Act, New Jersey Computer Related Offenses Act, and the New Jersey common law unjust enrichment claim were dismissed with prejudice. Plaintiffs were allowed to replead the claims for VPPA, the New Jersey Computer Related Offenses Act, and the New Jersey common law of intrusion upon seclusion, and they did so on September 11, 2014.

Defendants moved to dismiss again. This Court granted the motion again, this time with prejudice as to all remaining claims, on January 20, 2015.

Plaintiffs appealed. After full briefing and oral argument, the Third Circuit ruled on June 27, 2016. It sustained this Court's dismissal of the claims brought under the Electronic Communications Privacy Act, Stored Communications Act, California Invasion of Privacy Act, New Jersey Computer Related Offenses Act, and VPPA. *In re Nickelodeon*, 827 F.3d at 295. With respect to Plaintiffs' VPPA claims—which, given the $2,500 per violation statutory damages at issue, might fairly be regarded as their principal claim—the Third Circuit held:

> [Plaintiffs'] claim against Viacom [under the Video Privacy Protection Act] fails because the definition of personally identifiable information in the Act does not extend to the kind of static digital identifiers allegedly disclosed by Viacom to Google.

Id.

The panel reinstated just one of Plaintiffs' seven legal theories—the New Jersey common law claim for "intrusion upon seclusion." It explicitly noted that its decision was driven by *Google Cookie*:

> We recognize that some cases suggest that a violation of a technology company's privacy-related terms of service is not offensive enough to make out a claim for invasion of privacy. Even so, our decision in *Google* compels us to reach a different result. Just as *Google* concluded that a company may commit intrusion upon seclusion by collecting information using duplicitous tactics, we think a reasonable jury could reach a similar conclusion with respect to Viacom.

Id.

Viacom answered the complaint on August 11, 2016. Viacom brings this motion for summary judgment so that the Court, in light of the facts, may efficiently dispose of this case on a motion for summary judgment.

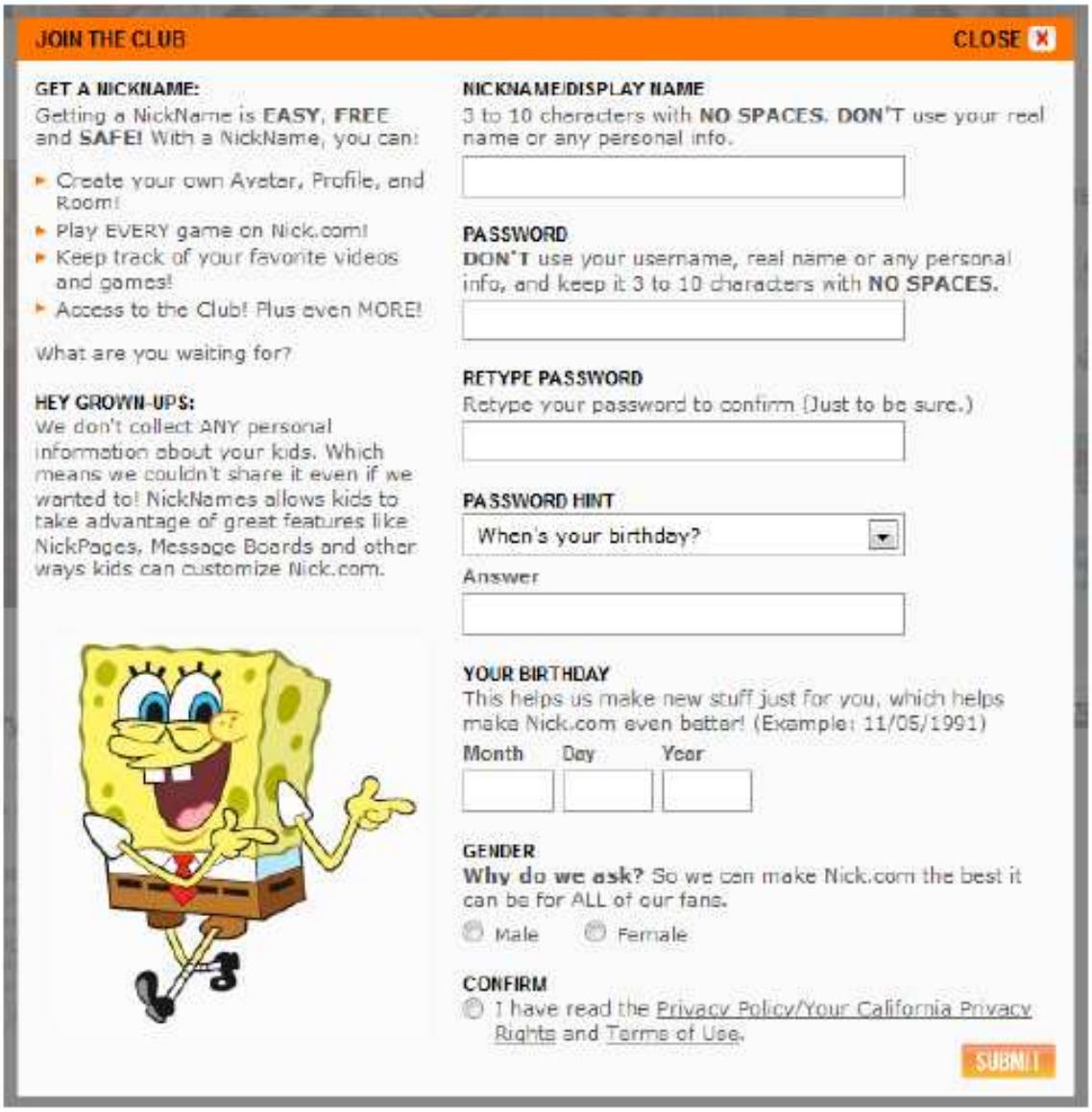
THE FACTS

This class action was brought on behalf of minor Plaintiffs who were users of Nick.com, a website owned and operated by Viacom in connection with Viacom's Nickelodeon television network. Second Consolidated Class Action Complaint (Dkt. 73) ("Complaint") ¶ 1. The named plaintiffs all registered for accounts on Nick.com. *See* Viacom's Statement of Undisputed Facts in Support of Motion for Summary Judgment ("SOF") ¶ 1. The registration function existed from approximately 2002 to 2014. *Id.* ¶ 2. Plaintiffs allege that Viacom used

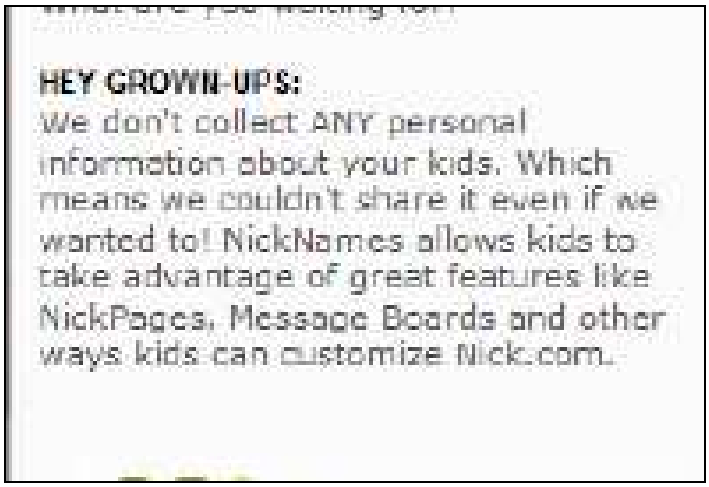
small text files called cookies to collect and disclose to Google various data points about them, including their usernames, gender and birthdate, IP address, browser settings, and anonymized unique device identifiers, and tracked their Internet browsing activity. Complaint ¶¶ 76–80.

I. Viacom's Data Collection Disclosures

When registering on Nick.com at the time the underlying complaints in this multidistrict case were filed, users were presented with the sign-up form shown below (the "Registration Form"). SOF ¶ 3.



The text in the left half of the form provided information about the registration process. At the bottom left, enlarged here for the convenience of the Court, was the Hey Grown-Ups Statement that drove the Third Circuit's intrusion analysis:



Id. ¶ 4.

As the text in the upper right portion of the form explained, the registration process required users to enter a unique, non-identifying username and password. Viacom warned: "**DON'T** use your real name or any personal info." *Id.* ¶ 5. Users were also asked to enter their birthday and gender, and were told why that information was being requested. For birthday: "This helps us make new stuff just for you, which helps make Nick.com even better!" For gender: "**Why do we ask?** So we can make Nick.com the best it can be for ALL of our fans." *Id.* ¶ 6.

The gender and birthday data provided by registrants on the sign-up form was used to create "Rugrat codes," which were unique codenames assigned to demographic groups (delineated by gender and age range). *Id.* ¶ 7. Rugrat codes were initially developed for potential research and advertising sales purposes, but they were actually never used for those purposes or any others. *Id.* ¶ 8.

The final step in completing Nick.com registration was clicking a button to confirm that the registrant had "read the Privacy Policy/Your California Privacy Rights and Terms of Use." The full text of the Privacy Policy was linked to directly underneath the confirmation button. *Id.* ¶ 9. The Privacy Policy included a short chart summarizing its key contents, then went into great detail on the types of information that Viacom might collect— including the user's birthdate and gender as well as the IP address and device identifier associated with the user's computer. *Id.* ¶ 10; *see* Declaration of Stephen Orlofsky ("Orlofsky Decl.") Ex. A "Summary" & § I.C .[2] The Privacy Policy also provided instructions for how a user could adjust browser settings if the user wanted to avoid cookies. SOF ¶ 11.

Consistent with its Privacy Policy, Viacom did ***not*** collect the real names, physical addresses, telephone numbers, Social Security numbers, or financial account information of its Nick.com users or their parents. *Id.* ¶ 12. Nor did it collect any other identifying details that allowed it to detect a child's real-world identity. *Id.*; *see also* Complaint ¶¶ 76, 103 (no allegation that Viacom collected

[2] This Court may take judicial notice of the operative Privacy Policy for Nick.com on the dates the underlying actions were filed (December 2012 through January 2013) as it is can be accurately and readily determined using a public source, the Internet Archive Wayback Machine. *See* Fed. R. Evid. 201. The archived Privacy Policy for the relevant time can be found at https://web.archive.org/web/20121226065716/http://www.nick.com/info/privacy-policy.html and https://web.archive.org/web/20130116122157/http://www.nick.com/info/privacy-policy.html.

such information). The technical information collected by Viacom (as outlined in the linked Privacy Policy, *see* Orlofsky Decl. Ex. A § I.C)—browser settings, city/state geolocation information, and unique cookie identifier—is all facially anonymous and Viacom has no capacity to tie it back to a particular identifiable human being. SOF ¶¶ 14–15, 27. These technical details are unique to a machine and not a user—that is, the same computer will have the same browser settings and browser cookie identifier whether it is being used by Jane Smith, her brother John Smith, their parents or a random visitor to the household. *Id.* ¶ 15.

As a practical matter, this means that Viacom might have been able to associate a user with facially anonymous details such as a username or cookie identifier—but Viacom was not able to identify that user as Jane Smith of 8 Maple Street in Smalltown, New Jersey.

II. Viacom's Data Collection and Usage Practices On Nick.com

As disclosed in the Privacy Policy, Viacom used first-party cookies on Nick.com (Orlofsky Decl. Ex. A § I.C), but the only data stored on the Nick.com first-party cookies on Nick.com was anonymous information such as username (if the user was logged in), so that the user could stay logged in to her account during her session. SOF ¶¶ 19–20. Further, as described in the Privacy Policy, Viacom collected information about user browsing activity on the Nick.com website

(Orlofsky Decl. Ex. A § I.C), but this information was only viewed in the aggregate and never associated with any identifiable user. SOF ¶¶ 16–17.

The Privacy Policy also notified users that third parties may use cookies on Nickelodeon sites. *Id.* ¶ 22. Plaintiffs' allegations center around Viacom's alleged disclosures to Google via third-party cookies on Nick.com, but to be clear, Viacom permitted Google to place third-party cookies on Nick.com to facilitate advertising delivery. *Id.* ¶ 23. For these purposes, "Google" does not mean the familiar search engine at google.com, but Google's DoubleClick subsidiary.

DoubleClick is a major "ad server" company, meaning that it acts as a sort of clearinghouse for Internet advertising—receiving ads from advertisers, and making sure that those ads then are delivered to users of the websites where the advertisers have purchased space. The placement of DoubleClick cookies is required for digital advertising to appear on Nick.com. This is because, in the ordinary operation of the Internet, advertisements typically are streamed to the user's screen from the ad server (DoubleClick) and not from the website publisher (Viacom). *Id.* Viacom did not use DoubleClick cookies to collect, view, or track individual users' Internet communications or browsing history on Nick.com or any other website. *Id.* ¶ 24. As noted in the Privacy Policy, Viacom did not have control of any information gathered by Google using its DoubleClick cookies. *Id.* ¶ 25.

Contrary to the allegations of the complaint (¶ 76), the information available to Google's DoubleClick ad server did not include registered users' gender or age (though even if it had, that information would have been anonymous and no more than the user had provided to Viacom). SOF ¶ 26. The information available to Google did include Viacom's internal "Rugrat code" —which, as discussed above, was merely an encoded shorthand for the user's age range and gender. Viacom did not provide Google or any third party with the information necessary to decode the Rugrat codes. *Id.* Plaintiffs also allege that Viacom transmitted a user's video viewing activities to Google's DoubleClick ad server (Complaint ¶¶ 76, 110–11). However, as shown in Plaintiffs' allegation at paragraph 111 of the Complaint, all that is transmitted is the URL of the webpage being requested by the user at the time—which, in fact, must be passed to permit the ad server to deliver an advertisement to that page—and not a history of the user's viewing activity.

Viacom had a variety of partnerships with third-party firms intended to enhance its advertising offerings. These included a program with Adobe called "Surround Sound" that was discussed publicly at a conference in 2012 by Josh Cogswell, then a senior vice president of the company. The Complaint (¶ 64(a)) cherry-picks certain words and phrases from Mr. Cogswell's remarks to make it seem as if Viacom was tracking children's behavior on Nick.com or other children's sites in the Viacom portfolio, or was aware of the real-world identities

of the children who visited such sites. That is simply not true and Plaintiff's characterization is disingenuous.

Accompanying this motion is a declaration from Mr. Cogswell, together with a video and a transcript containing his full remarks. As the declaration, video and transcript make clear, Viacom did not collect or track children's activity for advertising purposes, and Mr. Cogswell did not state otherwise. SOF ¶ 29. To the extent that the programs described by Mr. Cogswell referenced any ability to track users for the benefit of advertisers, his statements referred only to Viacom's websites for adults, and then only to circumstances where privacy requirements were satisfied by user permission or otherwise. Viacom did not track users of Nick.com or any other children's website for advertising purposes.[3] *Id*.

LEGAL STANDARD

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If this showing is made, Rule 56 then "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (internal quotation marks omitted). If

the non-moving party claims to need access to "essential [facts]" in order to oppose the motion, then it must justify that need "by affidavit or declaration . . . for specified reasons." Fed. R. Civ. P. 56(d).

The Third Circuit decision in this case was expressly driven by the legal standards applicable to considering a motion to dismiss, where it is necessary to accept as true all the allegations in the complaint. *In re Nickelodeon*, 827 F.3d at 267 n.2; *see, e.g.*, *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 604 (3d Cir. 1998) ("When considering a Rule 12(b)(6) motion, we accept as true all the allegations set forth in the complaint, and we must draw all reasonable inferences in the plaintiff's favor.").

At the summary judgment stage, the facts control. *See* 10 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2721 (4th ed. 2016) (on a Rule 56 motion, the court "examine[s] the pleadings to ascertain what issues of fact they present and then consider[s] the affidavits, depositions, admissions, interrogatory answers and similar material to determine whether any of those issues are real and genuine . . . . Given this process, the court is obliged to take account of the entire setting of the case.").

Summary judgment is properly granted where, as here, there is no genuine dispute of material fact as to the elements of the claim at issue. *See Burton v.*

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[3] *See infra* note 5.

Teleflex Inc., 707 F.3d 417, 425 (3d Cir. 2013). A fact is only "material" if it "could affect the outcome" of the case, and a dispute is only "genuine" if "the evidence is sufficient to permit a reasonable jury to return a verdict for the non-moving party." *Lamont v. New Jersey*, 637 F.3d 177, 181 (3d Cir. 2011).

The disclosure documents relied on by Viacom in its motion—the complete Nick.com registration form and the associated Privacy Policy—are public documents. Summary judgment can be granted based on that evidence and the declarations accompanying this motion, without any additional discovery.[4] *See CBS Interactive Inc. v. Nat'l Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 420 (D. Minn. 2009) (granting partial summary judgment "although no discovery on the merits ha[d] occurred" because "[c]ourts have declined to grant a Rule 56(f)

[4] On September 13, 2016, the New York Attorney General announced a settlement with Viacom on issues that relate to children's Internet privacy but not to this case. As Attorney General Schneiderman explained in announcing the settlement, the issue behind the investigation was whether third-party advertisers had, without Viacom's knowledge or awareness, used certain tracking technologies on Viacom sites—an issue that was legally relevant under the federal Children's Online Privacy Protection Act, or "COPPA" (15 U.S.C. §§ 6501–06), which imposes strict liability on site operators like Viacom and does not create a private right of action. *See A.G. Schneiderman Announces Results of "Operation Child Tracker," Ending Illegal Online Tracking of Children at Some of Nation's Most Popular Kids' Websites*, N.Y. St. Office Att'y Gen. (2016), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-results-operation-child-tracker-ending-illegal-online. As the focus of the NYAG settlement was on third-party behavior, it is not relevant to the intrusion claim and does not warrant discovery here.

continuance to allow for discovery when the information sought to be discovered was publicly available."); *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F. Supp. 869, 894 (S.D.N.Y. 1997) ("Relief under Rule 56(f) is not appropriate where the discovery allegedly desired pertains to information already available to the non-moving party.") (internal quotation marks and brackets omitted). The Dhimiter Bozo and Josh Cogswell declarations serve to confirm that Viacom's actual data collection and usage practices were consistent with the policies set forth in the Privacy Policy and the Nick.com registration form. Though Plaintiffs no doubt will argue that additional discovery is necessary, it would only result in a fishing expedition that will not yield any genuinely disputed material facts.

In sum, because "discovery . . . is irrelevant to [this] court's consideration of [Viacom's] motion, summary judgment can and should be granted without discovery." Wright & Miller, § 2718 n. 1 (citing *Walker v. U.S. Envtl. Prot. Agency*, 802 F. Supp. 1568, 1576 (S.D. Tex. 1992)). That approach is well supported as a general matter under the precedents of this Circuit and District. *See Gold Fuel Serv., Inc. v. Esso Standard Oil Co.*, 195 F. Supp. 85, 89–90 (D.N.J. 1961), *aff'd*, 306 F.2d 61 (3d Cir. 1962) (granting summary judgment despite the fact that "[n]o discovery proceedings [we]re in the official file" and noting that "[w]hat plaintiff might ultimately have caught through a discovery fishing expedition is irrelevant."); *see also Electro-Catheter Corp. v. Surgical Specialties*

Instrument Co., 587 F. Supp. 1446, 1457 (D.N.J. 1984) (partial summary judgment granted prior to discovery); *Int'l Union of Elec., Radio & Mach. Workers v. ITT Fed. Labs.*, 232 F. Supp. 873, 880 (D.N.J. 1964) (summary judgment granted after denial of defendant's Rule 12(b) motion but prior to discovery); *Ryans v. Fed. Reserve Bank of Phil.*, No. 11-7154, 2013 WL 706053, at *1 (E.D. Pa. Feb. 27, 2013) (summary judgment granted prior to discovery based on evidence in "supporting affidavits and other documents"). The application of these principles is well supported on the facts of this case.

ARGUMENT

The intrusion upon seclusion claim here fails because neither of the two essential elements of the tort can be met on the facts. There is a tortious intrusion only if (1) the act is highly offensive to a reasonable person and (2) it is an intentional intrusion upon the solitude or seclusion of the plaintiff's private affairs or concerns. *See Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 94–95 (1992) (citing Restatement (Second) of Torts, § 652B (1977)) (setting forth elements). There can be no genuine factual dispute that Viacom's conduct was neither highly offensive nor intentional.

I. The Intentional Intrusion Claim Fails Because, On The Facts, The Hey Grown-Ups Statement Plainly Was Not "Highly Offensive"

Plaintiffs' claim fails because, on the facts, Viacom's conduct was not "highly offensive to the ordinary reasonable man." *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 317 (2010). Whether conduct is "highly offensive" presents "[a] high threshold [that] must be cleared." *Id.* at 316–17. An objective standard is used to assess such conduct, and "a plaintiff's subjective belief . . . is irrelevant." *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 872 F. Supp. 2d 369, 373 (D.N.J. 2012) (allowing intrusion claim to survive motion to dismiss based on allegations of unauthorized access to plaintiffs' social networking posts); *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659 (D.N.J. 2013) (granting summary judgment in same case where evidence later showed there had been no such unauthorized access).

The Third Circuit articulated only a single reason why—accepting the allegations of the complaint—a reasonable factfinder might be able to conclude that Viacom's alleged conduct was highly offensive. According to the panel, the Hey Grown-Ups Statement could have "encouraged parents to permit their children to browse [Nick.com] websites under false pretenses" through the use of "duplicitous

tactics," given that Viacom collected various forms of information about its child users that was potentially "personal." *In re Nickelodeon*827 F.3d at 295.[5]

The Hey Grown-Ups Statement was not duplicitous because it was true: no "personal information" was collected by Viacom. As described below, both within the Hey Grown-Ups Statement and in direct conjunction with it, Viacom made clear to parents that it would collect information about child users that was facially anonymous. Such information—such as a username—could be associated with a user but was not "personal information" as that term was used in the Hey Grown-Ups Statement.

First, just to the right of the Hey Grown-Ups Statement and within the same registration box, Viacom explicitly instructed the user to create a username (without "your real name or any personal info"); to create a password, also without personal info; and to input the month, day and year of their birth ("This helps us make new stuff just for you, which helps make Nick.com even better!") as well as their gender ("**Why do we ask?** So we can make Nick.com the best it can be for ALL of our fans."). SOF ¶¶ 5–6. Collecting such information just inches from the statement that "[w]e don't collect ANY personal information" was plainly a disclosure that Viacom was indeed collecting anonymous data that was specific to

[5] There is no allegation in the complaint that any parents, whether of the named plaintiffs or other class members, actually read and relied on the Hey Grown-Ups Statement as conjectured in the Third Circuit opinion.

a given child, but that this anonymous data was not "personal information" that could be associated with an actual, identifiable user. The plain instruction to not "use your real name or any personal info" informed parents what "personal information" meant in the context of the Hey Grown-Ups Statement: *i.e.*, information that would allow identification of the child in the real world.

Second, at the bottom of the same registration form—directly above the "Submit" button and, again, cheek by jowl with the Hey Grown-Ups Statement—Viacom linked to its Privacy Policy and Terms of Use. *Id*. ¶ 9. These documents are directly on point, given the Third Circuit's suggestion, in *Google Cookie*, that it was the contrast between a company's online privacy policy and its actual conduct that can give rise to an intrusion claim. *See* 806 F.3d at 150–51.

The Privacy Policy described Viacom's data collection and use practices in detail. It stated that interacting with Viacom's Nickelodeon websites could result in collection of certain types of data—such as the data collected on Nick.com—that could not be used to personally identify individual users. That made those users anonymous to Viacom. In the summary found on the Privacy Policy's first page, Viacom further explained to users that it could collect three categories of information: (1) information the consumer actively provides during registration, (2) information collected automatically about users' computers or wireless devices, and (3) information collected from third parties. SOF ¶ 10.

In the first category, "Registration Information," the Privacy Policy notified users that Viacom may collect "(a) birthdate, (b) gender, (c) country, (d) state, (e) zip code, (f) user name and password, (g) wireless telephone number, (h) email address, and (i) other profile information." Orlofsky Decl. Ex. A § I.A. On Nick.com, only birthdate, gender, username, and password (all provided by users) were actually collected during registration. SOF ¶ 13. Gender and birthdate data were never linked to the user's real-world identity and could not be so linked because users did not supply their real-world identity. In any event, such data was used to create "Rugrat codes;" these codes, which did not include users' real-word identities, were never used on Nick.com and would have been incomprehensible to anyone outside Viacom. *Id.* ¶¶ 8, 26.

In the second category, "Computer Information Collected by Us," users were told that Viacom might collect (Orlofsky Decl. Ex. A § I.C):

> information from . . . computers or mobile devices, such as the type of computer operating system . . . , the visitor's IP address, the web browser . . . , UDID (for mobile devices), information about the websites visited before and after visiting the Site, the web pages and advertisements viewed and links clicked on within the Nickelodeon Sites, interactions with e-mail messages sent by a Site or the Viacom family of companies . . ., information collected through the use of unique identifiers such as cookies . . ., information regarding the Internet services provider, and other standard server log information.

The Privacy Policy further noted that Nick.com might use "***cookies, web beacons, or similar technologies (collectively referred to as 'Tracking***

Technologies')" for a variety of purposes that are intrinsic to basic website functionality:

> to help tailor our content, allow users to move between certain Nickelodeon Sites without logging into each Site, . . . understand Site and Internet usage, improve or customize the content, offerings or advertisements on this Site, personalize your experience on the Site . . ., understand your interactions with email messages originating from Nickelodeon Sites or the Viacom family of companies . . . , save your password, save your online game or video player settings, enable you to use shopping carts, help us offer you products, programs or services that may be of interest to you, deliver relevant advertising, maintain and administer the Nickelodeon Sites.

Id. (emphasis added).

In the third category, "Computer Information Collected By Others," Viacom informed users that "Third Party Advertising Service Providers . . . may themselves set and access their own Tracking Technologies. . . and may collect aggregate log data separately and independently." *Id.* § I.D. Viacom further advised:

> These Third Party Advertising Service Providers do not have access to Tracking Technologies set by the Nickelodeon Sites except to the extent necessary to provide services to the Nickelodeon Sites. The Third Party Advertising Service Providers, as well as advertisers, may themselves set and access their own Tracking Technologies on your device if you choose to have Tracking Technologies enabled in your browser (or, for Flash cookies, if you have not removed them) and/or they may otherwise have access to Other Information about you.

Id. None of the Tracking Technologies was used to collect "personal information" that Viacom could use to associate with real-world users.

Here, based on the indisputable facts, there was no duplicitousness and, therefore, no "highly offensive" conduct. Both on the Registration Form and in the Privacy Policy to which that form linked, Viacom disclosed that it would collect certain details that, although they were associated with the child registrant, did not reveal the registrant's personal identity to Viacom. Because the users were always anonymous to Viacom, the information Viacom collected was not "personal," in the context of the Hey Grown-Ups Statement. Accordingly, the gap that the Third Circuit credited in the 12(b)(6) context between the Hey Grown-Ups Statement and Viacom's alleged practices evaporates in light of the facts as to Viacom's actual data collection practices.

The Third Circuit suggested that if there was a discrepancy between the Hey Grown-Ups Statement and Viacom's actual practices, then that would constitute duplicitousness. To assess whether Viacom acted duplicitously, the law of fraud is instructive. There, it is blackletter law that the purported deceptiveness of a statement is not measured in the abstract, but in the full context in which the statement is made. *See In re U.S. Interactive, Inc.*, No. 01-CV-522, 2002 WL 1971252, at *7 (E.D. Pa. Aug. 23, 2002) ("Courts must avoid examining the alleged misstatements in isolation 'because accompanying statements may render [them] immaterial as a matter of law.'") (*quoting EP Med Systems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 873 (3d Cir. 2000)); *see also In re Aetna, Inc. Sec.*

Litig., 617 F.3d 272, 282–83 (3d Cir. 2010) (alleged misrepresentation was not misleading because other statements in SEC filings provided "clear warning" to investors); *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762–63 (2d Cir. 1991) (alleged misrepresentation in prospectus was not materially misleading when read in context with other direct, relevant language in the prospectus); *In re Nice Sys., Ltd. Sec. Litig.*, 135 F. Supp. 2d 551, 576 (D.N.J. 2001) (alleged misrepresentations were not actionable based on the context in which they were made); *Castlerock Mgmt. Ltd. v. Ultralife Batteries, Inc.*, 114 F. Supp. 2d 316, 327– 27 (D.N.J. 2000) (alleged misrepresentation not actionable as a matter of law because the "total mix" of information provided to investors was not materially misleading).

The same principles should determine whether a statement was duplicitous so as to be potentially "highly offensive" in the context of the intrusion tort. On its evaluation of this Court's grant of the motion to dismiss that claim, the Third Circuit focused exclusively, and in isolation, on the first sentence of the Hey Grown-Ups Statement. Rule 56, however, requires consideration of the totality of facts, which, here, include the disclosures adjacent and linked to the Hey Grown-Ups Statement.

Applying that analysis, the term "personal information" cannot be read by a reasonable fact-finder to include data that, when collected by Viacom, maintained

users' anonymity. Viacom expressly asked users for birthdate and gender; it warned them not to supply their real names; and it informed parents through the Privacy Policy of the range of technical and other information it might collect—none of which in fact revealed to the company its users' real-world identities.

Given the record now before the Court, there are no facts to support the Third Circuit's hypothetical concern that Viacom's Hey Grown-Ups Statement was "duplicitous." *See Deering v. CenturyTel, Inc.*, No. CV-10-63-BLG-RFC, 2011 WL 1842859, at *2 (D. Mont. May 16, 2011) (finding no intrusion upon seclusion "when a plaintiff has been notified [via an online terms of use/privacy policy] that his Internet activity may be forwarded to a third party to target him with advertisements."); *cf. C.N. v. Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528, 539 (D.N.J.), *aff'd in part, rev'd in part*, 281 F.3d 219 (3d Cir. 2001) (where defendant school officials "attempted to collect personal information [via a survey of students] in an anonymous fashion which would be used to analyze the resulting data in the aggregate," and parents were accurately advised in advance that the data collection was voluntary and anonymous, the constitutional "claim for 'unreasonable intrusion into the households' of the respective plaintiffs" could not be maintained).

As the Third Circuit aptly noted, there is no single definition of "personal information" in the law; rather, the definition depends on context. The panel held

that the VPPA claim in this case failed because, in that context, Congress defined "personal information" in a way that excluded facially anonymous data. *In re Nickelodeon,* 827 F.3d at 295. Through the disclosures discussed above, Viacom defined "personal information" in essentially the same way for Nick.com. Any contrary definition Plaintiffs might propose after the fact is irrelevant because only Viacom's definition was used in context. The intrusion claim accordingly should be dismissed because, by any objective measure, the test for the "highly offensive" element set out by the Third Circuit is not satisfied on the undisputed facts.

Summary judgment is fully supported solely on the basis of Viacom's adjacent and linked disclosures, which defined "personal information" in these circumstances. *See*, *e.g.*, *Pittsburgh Rys. v. Equitable Life Assurance Soc'y*, 288 F.2d 640 (3d Cir. 1961) (affirming grant of summary judgment based on court's construction of documents; "[i]t should be kept in mind, too, that the construction of documents and other writings had from time beyond which the memory of man runneth not to the contrary been a matter for the judge"); *Thornley v. C.I.R.*, 147 F.2d 416, 420 (3d Cir. 1945) (reversing decision of Tax Court after review of the "various writings" related to the transaction at issue; "[i]t is well-settled that 'judicial questions also include questions of construction of documents'") (citation omitted); *McIntyre v. Phila. Suburban Corp.*, 90 F. Supp. 2d 596, 599–600 (E.D. Pa. 2000) (in executive compensation dispute, granting summary judgment based

on construction of the relevant documents). Full consideration of these materials is the province of summary judgment. That the Third Circuit did not consider them, instead confining itself to the fragment of the registration form (the Hey Grown-Ups Statement) that favored Plaintiffs' position, as required on a 12(b)(6) motion, in no way bars this Court from reviewing them in the context of this motion.

Though Viacom's disclosures alone are dispositive, summary judgment is also appropriate based on Viacom's actual business practices, which are described in the accompanying Declarations of Dhimiter Bozo and Josh Cogswell, Viacom executives with knowledge of the company's technical practices.

Viacom did not collect information about what websites or advertisements individual Nick.com users viewed, either within or outside Nick.com, nor did it collect any other Nick.com user information using cookies. SOF ¶¶ 17–18, 27. Viacom could view, in the aggregate, the Nick.com videos or games that users accessed, but it did not track Nick.com user activity on an individual basis. *Id.* ¶ 17. Google utilized its third-party cookies in order to provide advertising on Nick.com, but Viacom did not have any control of any of the information collected using Google's DoubleClick cookies. *Id.* ¶ 25.

For his part, Mr. Cogswell confirms that the tracking technologies used on Viacom's adult sites were not in use on Nick.com or other sites for children. *Id.* ¶ 29. Plaintiffs' citations in the Complaint to public remarks by Mr. Cogswell are

selective and distorted. As the video and transcript of Mr. Cogswell's remarks confirm, he never said that Viacom was tracking children. Cogswell Exs. A–B.

Viacom's collection of information from Nick.com registered users thus comported completely with the Privacy Policy and the full text of the registration form. The facts in this case are unlike those in *Google Cookie*. Because there was nothing "duplicitous" about the Hey Grown-Ups Statement, there was nothing "highly offensive" about Viacom's conduct and, accordingly, summary judgment is in order.

II. The Intentional Intrusion Claim Fails Because, On The Facts, Viacom Did Not Act With The Required Awareness Of Its Purported Wrongdoing

As the Third Circuit has confirmed in this very litigation, New Jersey law requires not only that the purported intrusion be an intentional act, but also that the defendant carry out that act with a conscious awareness of wrongdoing:

> an actor commits an ***intentional*** intrusion ***only if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act***.

In re Nickelodeon, 827 F.3d at 293 (emphasis added) (citing *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989)). The requirements of intent and conscious awareness of wrongdoing plainly are not met here.

Far from acting with any intent to unlawfully intrude or having any conscious awareness of acting with wrongdoing, Viacom took steps to tell parents

what data it was collecting and how that data was used. It did so through the Hey Grown-Ups Statement, the Registration Form of which it was a part, and the Privacy Policy that was a click away. Viacom's collection of data was lawful and done with the express permission of parents. At all times, the data that was collected maintained the anonymity of users. Rather than harboring some secret intent to deceive parents or a "substantial[] certain[ty]" that it was doing so, *id.*, Viacom's clear disclosures described what information Viacom was collecting. Furthermore, it acted consistently with those disclosures, as the accompanying declarations of Viacom's executives make apparent. Bozo Decl. ¶ 19; Cogswell Decl. ¶ 4; *see City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc.*, No. 10-2788, 2011 WL 3695897, at *3 (3d Cir. Aug. 24, 2011) ("statements of executive officers may be attributed to a corporation when they are made pursuant to their positions of authority within the company") (emphasis and internal quotation marks omitted). The *mens rea* necessary to support a New Jersey intrusion claim cannot be demonstrated.

The Third Circuit's panel opinion in this case notes that the intent requirement cannot be satisfied unless the defendant believed it lacked either "personal permission" or "legal permission." In this case, "personal permission" was undoubtedly given in some cases because a certain number of parents (rather than their children) must have clicked the button signaling agreement to the

Privacy Policy, as was necessary to complete a registration on Nick.com. Regardless, Viacom's disclosures plainly gave it the necessary "legal permission," and any effort to show through discovery that Viacom believed otherwise would be a pointless fishing expedition. *Cf. Vespa v. Safety Fed. Sav. & Loan Ass'n*, 219 Kan. 578, 582 (1976) (permission need not be express in order to defeat an intrusion claim). Ultimately, it does not matter whether the parties have different interpretations of the term "personal information." Because a conscious awareness of wrongdoing is required for an intrusion tort, Viacom's belief that the data collection practices on Nick.com adhered to its disclosed policies is dispositive.

CONCLUSION

This Court should grant summary judgment in favor of Viacom, dismiss the intrusion claim with prejudice, and close this case.

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Respectfully submitted,

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