IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MIKE HARRIS and JEFF DUNSTAN, Individually and on behalf of a class of similarly Situated individuals,	)	
Plaintiff,	)	Case No. 1:11-5807
v.	)	Hon. James F. Holderman
COMSCORE, INC., a Delaware corporation,	)	
Defendant.	)	

COMSCORE'S RESPONSE IN OPPOSITION TO PLAINTIFFS'

MOTION FOR LEAVE TO CONDUCT EXPEDITED DISCOVERY

I. INTRODUCTION

As an initial matter, Plaintiffs' Motion for Leave to Conduct Expedited Discovery (hereinafter "Motion") should be denied because Plaintiffs' contractual agreement with comScore Inc. ("comScore") precludes them from pursuing their claims in this forum. As explained in comScore's concurrently filed Motion to Dismiss or, in the Alternative, to Transfer Venue under 28 U.S.C. § 1404(a) (hereinafter "Venue Motion"), Plaintiffs are subject to a mandatory forum selection clause that designates the courts of Virginia as the exclusive forum for Plaintiffs' claims. Simply put, Plaintiffs filed this action in the improper court. It would put the cart before the horse to address a request for expedited discovery before the potentially dispositive issues in comScore's Venue Motion are resolved.

Even if the Court were to address the discovery motion on the merits, Plaintiffs have failed to justify the sweeping requests they seek to impose. Plaintiffs claim their requests are "narrowly tailored" and "extremely limited" in scope, but the proposed discovery at issue would compel comScore to disclose all of its current, former, *and prospective* customers for the express purpose of allowing Plaintiffs to serve subpoenas on every single entity comScore does, or might do business with. Plaintiffs make little effort to meet the heightened burden needed to justify this extraordinary request. Instead, they state in conclusory terms that some unidentified evidence in the possession of some unidentified third-parties could possibly be destroyed. This unsupported speculation falls far short of meeting Plaintiffs' burden.

In any case, Plaintiffs' purported concerns regarding the preservation of evidence are already resolved, as it is comScore's regular practice to retain and preserve all source data it provides to its customers. In addition to comScore's regular retention and preservation practices, it took specific action with respect to this lawsuit by implementing a litigation hold, which is currently in place.

For all these reasons, comScore respectfully requests that the Court deny Plaintiffs' Motion or, in the alternative, continue the hearing on this Motion until after the Court rules on comScore's pending Venue Motion.

II. ARGUMENT

A. Plaintiffs' Motion Should Not Be Considered Because They Filed This Case In The Improper Forum.

As discussed in comScore's Venue Motion, Plaintiffs are subject to a mandatory forum selection clause that designates certain courts in Virginia as the exclusive forum for their claims. Asking the Court to consider an expedited discovery motion at this juncture would result in a tremendous waste of judicial recourses, given the likelihood that the case will be dismissed, or transferred, on venue grounds. Allowing Plaintiffs to initiate the wheels of discovery, and empowering them with the unfettered ability to serve third party subpoenas, would cause unwarranted prejudice to comScore when the Venue Motion raising potentially dispositive issues remains pending. *In re African-American Slave Descendants' Litigation*, No. 1491, 02 C 7764, 2003 WL 24085346, at *2 (N.D. Ill. July 15, 2003) (motion seeking order to preserve evidence rejected, in part, because its timing "would place a great burden on the Defendants before they can even test the legal sufficiency of Plaintiffs' Consolidated Amended Complaint.").

B. Plaintiffs' request for expedited discovery fails on the merits

As courts in this District have recognized,"[e]xpedited discovery is not the norm. Plaintiff must make some *prima facie* showing of the *need* for the expedited discovery." *Merrill Lynch, Pierce, Fenner & Smith v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000) (emphasis in original); *see also Lamar v. Hammel*, No. 08-02-MJR-CJP, 2008 WL 370697, at *2 (S.D. Ill. 2008) ("while the court has discretion to permit discovery outside the timing prescribed by Rule 26(d)(1), 'only the most obviously compelling reasons are sufficient to justify a departure from the rule.'") (quotation and citation omitted). In determining whether a plaintiff has met its burden to pursue expedited discovery, some courts have required a showing that irreparable harm

would result absent the discovery requested. *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982). Other courts require a showing that expedited discovery is "necessary" *and* that the potential harm to plaintiffs outweighs the prejudice to the responding party if discovery is expedited. *Vance v. Rumsfeld*, No. 06 C 6964, 2007 WL 4557812, at *5-6 (N.D. Ill. 2007). Here, Plaintiffs fail to meet their burden under any standard.

The thrust of Plaintiffs' Motion is that early discovery is needed to ensure that comScore's current, former, and future customers preserve potentially relevant evidence.[1] Paying lip service to the applicable burden of proof, Plaintiffs state in conclusory terms that the potential destruction of relevant evidence would constitute "immediate and irreversible" and "irreparable" harm. (Mem. P. & A., at 2, 6). But other than speculating about these risks, Plaintiffs fail to show that there actually are any such risks here. Plaintiffs make no attempt to explain what evidence they believe comScore's customers might possess, why they fear its destruction, or how the hypothetical evidence might affect their claims.

In any event, Plaintiffs' purported concern is easily assuaged because, as a regular business practice, comScore retains and preserves all of the data that it uses to generate customer reports. (Declaration of John O'Toole, attached hereto as Exhibit "1" [hereinafter "O'Toole Decl."], ¶ 3). In addition to comScore's regular retention and preservation practices, it has already implemented a litigation hold to further ensure the preservation of potentially relevant data. *Id*. Consequently, there is no material risk that any such evidence will be destroyed, obviating Plaintiffs' only stated "need" for expedited discovery.

[1] Although Plaintiffs frame their Motion as a request for leave to conduct expedited discovery, they only advance one reason for purportedly needing expedited discovery – to ensure that evidence is preserved. What Plaintiffs seek, in effect, is a preservation order. However, "'[a] motion to preserve evidence is an injunctive remedy and should issue only upon an adequate showing that equitable relief is warranted.'" *In re African-American Slave Descendants' Litigation*, No. 1491, 02 C 7764, 2003 WL 24085346, at *2 (N.D. Ill. July 15, 2003) (citations omitted). A plaintiff seeking such an order must: (1) demonstrate that the subject of the order will destroy necessary documentation without a preservation order; (2) show that they will suffer irreparable harm if a preservation order is not entered; and (3) show that their need for a preservation order outweighs the burdens it would impose on those subject to the order. *Id*. at *2-*4. As noted above, and discussed below, Plaintiffs have failed to make the threshold showing for any of these criteria.

Plaintiffs further contend that expedited discovery *may* be needed in connection with a *future* preliminary injunction motion. (Mem. P. & A., at 4 ("Plaintiff seeks limited, expedited discovery . . . in order to . . . evaluate whether Plaintiff needs to seek a preliminary injunction to protect the interests of the putative class")); *Momenta Pharmaceuticals, Inc. v. Teva Pharmaceuticals Industries Ltd.*, No. 10-12079-NMG, 2011 WL 673926, *2-*3 (D. Mass Feb. 18, 2011) (rejecting argument that plaintiff needed expedited discovery "in order to decide whether to move for a preliminary injunction" and noting that "[t]he majority of courts have held [] that the fact that there was no pending preliminary injunction motion weighed against allowing plaintiff's motion for expedited discovery."). This not only shows that expedited discovery is unnecessary, but also shows that Plaintiffs currently have no reason to believe they or the putative class need a preliminary injunction, or are otherwise in danger of any imminent or irreparable harm. Plaintiffs have clearly not suffered any such harm themselves, or they would have already brought a preliminary injunction motion.

Finally, any claim of an exigent need for discovery is belied by Plaintiffs' own conduct. Plaintiffs first brought their potential claims to comScore's attention in April 2011, yet waited until August 23, 2011, more than five months later, to file their Complaint. Plaintiffs waited another 21 days before bringing the instant Motion. Clearly, Plaintiffs would not have sat on this Motion for six months if they were truly concerned about imminent harm. See, e.g., *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 13 F.Supp.2d 417, 419 (S.D.N.Y. 1998) ("courts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months"); *Protech Diamond Tools, Inc. v. Liao*, No. C 08-3684 SBA, 2009 WL 1626587, at *6 (N.D. Cal. June 8, 2009).

C. Plaintiffs' proposed discovery is prejudicial to comScore.

Plaintiffs seek to paint their discovery requests as "limited" and innocuous when they are anything but. Plaintiffs' proposed discovery would require comScore to identify *all* of its current and former customers, and any and all employees of such customers who "ha[ve] or had" access

to information comScore provided the customer.[2] (Mem. P. & A., Exh. A, Proposed Interrogatory No. 1). Plaintiffs additionally seek to pry into comScore's potential business relationships by asking comScore to identify any business prospects to whom it "intends" to provide consumer data, including employees of those prospects. *Id*., at Proposed Interrogatory No. 2. Whether or not it is their intent, Plaintiffs' sweeping discovery requests appears to be aimed more towards intruding upon comScore's customer relationships than to serving any legitimate evidentiary concerns.[3]

Plaintiffs' request is also prejudicial because it seeks entirely open-ended authority to issue third party subpoenas. Plaintiffs make no attempt to explain, or circumscribe, the scope of the subpoenas they seek permission to issue. Indeed, Plaintiffs make no bones about their intention to serve subpoenas on "all" of the current, former, and prospective customers comScore identifies. (Mem. P. & A., at 7.) Plaintiffs' requests thus raise the very real possibility that comScore will have to address an unknown, but admittedly large, number of subpoenas to prevent the disclosure of confidential or trade secret information, or information that implicates the privacy rights of third parties. There is no reason why comScore should have to waste its resources, or the resources of this Court, litigating over such subpoenas in the shadow of an impending dismissal for improper venue

Plaintiffs' request is further prejudicial because it not only asks for expedited discovery, but also seeks to compel comScore to respond to that discovery within fourteen days. (Mem. P. & A., at 7.) This is less than half of the response time prescribed by the Federal Rules. FRCP 33(b)(2). Plaintiffs fail to address this additional request in their moving papers and, instead, first mention it in the order they request from the Court. (Mem. P. & A., at 7.)

[2] Plaintiffs limit their request to August 23, 2009, to the present. (Mem. P. & A., Exh. A, at 4).
[3] Moreover, comScore's customer list, and information concerning comScore's future business prospects, is highly proprietary, and comScore has no reason to believe it would be treated as such by Plaintiffs absent a protective order, which the parties do not have in place.

For these reasons, the balance of factors weighs against expedited discovery. Plaintiffs have not demonstrated any need, much less shown any exigency, to justify expedited discovery, and their decision to wait six months before filing this Motion only reinforces the point.

D. Plaintiffs' authorities do not support their position.

None of the cases Plaintiffs cite support their position. In the first case, *Vance*, the plaintiffs, American citizens who had been detained by the military, sought expedited discovery "to determine the identities of the unknown individuals responsible for their arrest, interrogation, mistreatment, and detention." 2007 WL 4557812, at *3. Plaintiffs needed this information on an expedited basis so they could name these individuals as defendants before the statute of limitations expired. *Id*. At the hearing, the Judge ordered the United States (the defendant), to conduct an inquiry into the identity of these individuals. *Id*. Nearly a year elapsed, and the United States had still not provided plaintiffs with the information sought. *Id*. Plaintiffs thus refiled their expedited discovery motion on the grounds that "delaying discovery would cause them irreparable harm because of the looming statute of limitations deadline." *Id*. at *5. The court granted the request based on the particular timing circumstances of that case. *Id*. at *5. Cleary, *Vance* turned on exigencies not present here, and involved a unique situation where more than a year had elapsed since plaintiffs filed their complaint, yet discovery had still not commenced.

Plaintiffs next cite *Ervine v. S.B.*, No. 11 C 1187, 2011 WL 867336, at *1 (N.D. Ill. 2011). In that case, plaintiff alleged he had been defamed by certain web postings, and sued three individuals by their initials, rather than their full names. *Id*. After reviewing the complaint, this Court requested that plaintiff either identify the defendants by their actual names, or explain why only abbreviations were used. *Id*. In response to the Court's request, plaintiff explained that he did not know the identity of the defendants because they only used initials to identify themselves on their web postings. *Id*. Thereafter, plaintiff filed a motion for limited discovery "<u>for purposes of identifying the Defendants</u>. Specifically, Ervine requests leave of the court to

issue subpoenas to the website-hosting companies and related third parties to obtain 'information that would tend to identify the Defendant[s] . . .'" *Id*. at * 2 (brackets in original) (emphasis added). This court granted the motion "for purposes of identifying the Defendants." *Id*.

Ervine is materially distinguishable, as it focused on the district court's authority to permit a plaintiff who is "ignorant of the defendants' true identity" to obtain their identity through discovery. *Ervine*, 2011 WL 867336, at *1-2. Plaintiffs' requests here, seeking disclosure of *all* of comScore's current and potential customers, bears no resemblance to the limited discovery permitted in *Ervine*.

Plaintiffs also cite *O'Connor*, 194 F.R.D. at 623, but in that case, the court denied the plaintiffs' request for expedited discovery altogether, finding that it was made in bad faith.

Plaintiffs cite four additional cases from outside of Illinois, none of which is binding on this Court, and none of which help Plaintiffs. *Sheridan v. Oak Street Mortgage, LLC*, 244 F.R.D. 520, 521 (E.D. Wis. 2007) (allowing discovery prior to a Rule (26)(f) conference because defendant "has defaulted, has not entered an appearance in this action, and there is no known authorized representative with whom to confer pursuant to Rule 26(f)."); *Interscope Records v. Does 1-14*, No. 5:07:-4107-RDR, 2007 WL 2900210, at *1 (D. Kansas 2007) (granting expedited discovery so plaintiffs could determine identities of Doe defendants in copyright infringement case); *Ellsworth Associates, Inc. v. United States*, 917 F.Supp. 841, 844 (D.D.C. 1996) (granting expedited discovery because it "would expedite resolution of [plaintiff's] claims for injunctive relief"); *Pod-Ners, LLC v. Northern Feed & Bean of Lucerne LTD. Liability Co.*, 204 F.R.D. 675, 676 (D. Colo. 2002) (allowing for inspection, sampling, and testing of agricultural "commodity" prior to Rule 26(f) conference because commodity was "subject to sale, resale, and consumption or use with the passage of time . . . Further passage of time under the unique facts of this case makes discovery concerning the beans and plants unusually difficult or impossible.").

These cases reinforce that, absent highly unusual circumstances, expedited discovery is traditionally reserved for cases where a preliminary injunction is pending, where the identity of

Doe or other unidentified defendants needs to be ascertained, or in cases involving claims of copyright, trademark, or patent infringement. See, e.g., *Momenta Pharmaceuticals*, 2011 WL 673926, at *2-*3 (expedited discovery not indicated in the absence of a pending preliminary injunction motion); *Edudata Corp. v. Scientific Computers, Inc.*, 599 F.Supp. 1084, 1088 (D. Minn. 1984) (expedited discovery allowed because further development of record before preliminary injunction hearing would better enable the court to judge the parties' interests and respective chances for success on the merits). The case at bar presents none of these circumstances, and Plaintiffs have failed to show any other highly unusual circumstances that would justify expedited discovery in this case.

III. CONCLUSION

For all the foregoing reasons, comScore respectfully requests that the Court decline Plaintiffs' Motion.

Dated: September 28, 2011

Respectfully submitted,

COMSCORE, INC.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that he or she caused a copy of the foregoing document to be served on counsel listed below via the Court's CM/ECF online filing system this 28th day of September, 2011.

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