

**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,)	
)	Case No.: 1:11-cv-5807
Plaintiffs,)	
)	Magistrate Judge Young B. Kim
v.)	
)	
COMSCORE, INC a Delaware corporation,)	
)	
Defendant.)	
_____)	

**PLAINTIFFS’ MOTION TO COMPEL COMSCORE, INC. TO RESPOND TO
PLAINTIFF’S WRITTEN DISCOVERY**

Plaintiffs Mike Harris and Jeff Dunstan (the “Plaintiffs”), by and through their undersigned counsel, hereby move this Court, pursuant to Federal Rule of Civil Procedure 37 and Local Rule 37.2, for an Order compelling Defendant comScore, Inc. (“comScore”) to produce all information within its possession or control that is relevant and responsive to Plaintiff’s outstanding Interrogatories and Document Requests and to otherwise supplement its document production so as to comply with Federal Rule of Civil Procedure 34. (A true and accurate copy of Plaintiff Mike Harris’ First Set of Interrogatories to Defendant comScore, Inc. [“Interrogatories”] and Plaintiff Mike Harris’ First Set of Requests for the Production of Documents to Defendant comScore, Inc. [“Document Requests”] are attached hereto as Exhibits 1 and 2, respectively.) In support of this motion, Plaintiffs state as follows:

INTRODUCTION

This lawsuit challenges comScore’s surreptitious and unauthorized collection and dissemination of Plaintiffs’ personal information via the Internet through its use of spyware. On March 2, 2012, this Court Ordered that discovery be limited to class certification issues. (Dkt.

No. 88.) Plaintiffs seek to compel comScore to provide full and adequate responses to Plaintiff's discovery requests to avoid delaying class certification briefing.

FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Allegations.

Plaintiffs allege that comScore causes "spyware" to be placed on its "panelists" computers. Once downloaded, the spyware surreptitiously collects sensitive data maintained on those computers without the "panelists" knowledge, much less their consent. (Compl., ¶¶ 1, 6, 7, 40, 69, 73.) Through its spyware, comScore retrieves a continuous stream of information about the activities conducted on an individual's computer system—all without the user's knowledge. (Compl., ¶ 7.) comScore accomplishes this by "bundling" its spyware with seemingly innocuous software that consumers download for free on the Internet (from comScore's third-party "bundling partners"), such as games and screensavers. (Compl., ¶¶ 33, 34.)

The spyware records and transmits virtually all information inputted into a web browser, including websites viewed, search queries, names, addresses, credit card numbers, usernames/passwords, and Social Security numbers, among others. (Compl., ¶¶ 7, 37.) The spyware also records and transmits information concerning all files on the user's computer, as well as all files located on other computers found on local networks, and intercepts data traversing nearby wireless networks. (Compl., ¶¶ 49-54.) Aggravating the problem, comScore designed its spyware so that it is difficult for consumers to locate and delete. (Compl., ¶¶ 49-54.) As a result, scores of consumers remain unwilling subjects of comScore's clandestine tracking. (Compl., ¶ 29.)

B. Plaintiff's Discovery Requests and comScore's Answers.

On December 16, 2011, Plaintiff Harris propounded his First Set of Interrogatories and

First Set of Document Requests on comScore. (*See* Declaration of Chandler R. Givens, ¶ 2, attached hereto as Exhibit 3 (“Givens Decl.”).) On March 2, 2012, this Court entered an order bifurcating discovery and directing comScore to answer certain of Plaintiff’s Interrogatories and Requests.¹ (Dkt. No. 88.) comScore responded—deficiently—to Plaintiff’s discovery on March 23, 2012, largely offering generic objections to each Interrogatory and Request identified by the Court and producing no documents. (Givens Decl. at ¶ 3.)

After the Court explained that a full response to Plaintiff’s requests included the production of documents (*Id.* at ¶ 4), comScore produced thousands of electronic files, each of which it labeled with an individual bates number.² (*Id.* at ¶ 6) Those files, in turn, are organized into folders that roughly correspond with a range of bates numbers found in each folder—i.e., the first 1,494 files, labeled CS000001-CS0001494, appear in a folder labeled “001.” (*Id.*) As Plaintiffs’ counsel explained at the April 17th status hearing, comScore has not matched its voluminous document production to Plaintiff’s individual document requests (e.g., by indicating that a certain bates range is responsive to a certain request). (*Id.* at ¶¶ 5-10.) Rather, flouting this request, comScore indicated—through its answers to Plaintiff’s document requests—that either

¹ Specifically, comScore was ordered to answer both those interrogatories and requests it had agreed to respond to, along with certain interrogatories and requests identified by Judge Kim. All told, comScore was ordered to answer Interrogatory Nos. 1-8, 11-17, and 22, and Request Nos. 1, 2, 13, 15, 18, 21-26, 34, 35, and 40-42. (Dkt. No. 88, at 10-11.) Despite that Order and its earlier representations, comScore recently indicated that it would not respond to Interrogatory No. 8 or Request No. 34. (Givens Decl. at ¶ 5.)

² As both parties explained to the Court during the April 17, 2012 status hearing, the documents—printed out—span over a million pages. (A true and accurate copy of the Transcript of Proceedings—Status—Before the Honorable Young B. Kim, Magistrate Judge is attached hereto as Exhibit 4, at 2:16-18.) Further, and as explained in more detail *supra* § IV, those files predominately consist of non-searchable Tagged Image File Format (“TIFF”) files (16,872 in number), with less than half of those additionally reproduced in “native” format, which was the format requested by Plaintiff. (Givens Decl. at ¶ 7.) A large number of the files only contain the text “unsupported file type.” (*Id.*)

all or some of its document production is responsive to each of Plaintiff's Requests. (*See, e.g.*, Defendant comScore, Inc.'s Responses to Plaintiff Harris' First Set of Requests for Production of Documents and Things, Answer to Request No. 1, a true and accurate copy is attached hereto as Exhibit 5.)

C. Plaintiffs' Attempts To Meet and Confer Have Fallen Flat.

Counsel for the Parties have met and conferred, both in person and telephonically, on at least three occasions in an attempt to resolve these issues. Counsel engaged in such discussions on April 10th, 20th, and again on April 25th. The Parties also exchanged several letters outlining their discovery disputes. After much consultation, and notwithstanding their good faith attempts to resolve their differences on each of these issues, the Parties have been unable to reach an accord.

Despite the Plaintiffs' continued requests and this Court's specific instructions, comScore still refuses to answer certain discovery and has withheld information critical to this case. Specifically, Plaintiffs seek information relating to: (1) customer complaints received by comScore about the panelist software (Interrog. No. 8 and Request No. 34), (2) the specific material collected by comScore's Windows and Macintosh panelist software (Interrog. Nos. 16-17), and (3) how comScore purportedly obtains consent from prospective panelists to install its software (Interrog. No. 13). Additionally, Plaintiffs seek to bring comScore's document production in line with Federal Rule 34 and compel comScore to either produce documents as they are kept in the ordinary course of business, or organize and label its production to correspond to Plaintiff's Requests.

ARGUMENT

A party may "obtain discovery regarding any non-privileged matter that is relevant to any

party's claim or defense." Fed. R. Civ. P. 26(b)(1). Discoverable information is not limited to admissible evidence. *MSTG, Inc. v. AT & T Mobility LLC*, 08 C 7411, 2011 WL 221771, at *2 (N.D. Ill. Jan. 20, 2011). Instead, information is discoverable "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* (citation omitted).

Courts have extremely broad discretion in controlling discovery, *see Zimnicki v. Gen. Foam Plastics Corp.*, 09 C 2132, 2011 WL 833601, at *3 (N.D. Ill. Mar. 3, 2011) (*citing In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 331, 336 (N.D.Ill.2005)), and may compel a party to respond to requests under Rule 37 of any matter that is relevant. *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 235 F.R.D. 447, 450 (N.D. Ill. 2006). In ruling on motions to compel discovery, "courts have consistently adopted a liberal interpretation of the discovery rules." *Wilstein v. San Tropai Condominium Master Association*, 189 F.R.D. 371, 375 (N.D.Ill.1999). Courts, for example, have compelled discovery "where another party fails to respond to a discovery request or where the party's response is evasive or incomplete." *Kodish*, 235 F.R.D. at 450 (*citing* Fed. R. Civ. P. 37(a)(2)-(3)). The burden rests on the objecting party to show why a particular request is improper. *Rubin v. Islamic Republic of Iran*, 349 F.Supp.2d 1108, 1111 (N.D. Ill. 2004).

I. THE COURT SHOULD COMPEL COMSCORE TO ANSWER PLAINTIFF'S INTERROGATORY AND REQUEST RELATING TO COMPLAINTS RECEIVED ABOUT THE PANELIST SOFTWARE.

Interrogatory No. 8 and Request No. 34 seek relevant information and documents of complaints received by comScore regarding its panelist software and, as such, must be answered. As reflected in this Court's bifurcation Order (Dkt. No. 88, at 10 n.2), and as explained by comScore's counsel at the April 17th status hearing (Ex. 4, at 5:15-7:9), comScore previously agreed to both identify the total number of complaints received by comScore about its panelist software, broken down by year (Interrog. No. 8), and produce copies of those complaints (Req.

No. 34). However, comScore has since retreated from that promise. Presently, comScore’s responses to that Interrogatory and Request provide no information, and instead, simply repeat its litany of non-specific, boilerplate objections. (*See* Defendant comScore Inc.’s Responses to Plaintiff Harris’ First Set of Interrogatories, Resp. to Interrog. No. 8, a true and accurate copy is attached hereto as Exhibit 6; *see also* Ex. 5, Resp. to Req. No. 34.) comScore has since claimed that information relating to these complaints is “outside the scope” of this Court’s bifurcation Order and “may . . . [be] relevant at the merit stage . . . [but] is not relevant for class cert.” (*See* Defendant comScore Inc.’s First Supplemental Responses to Plaintiff Harris’ First Set of Interrogatories, Suppl. Resp. to Interrog. No. 8, a true and accurate copy is attached hereto as Exhibit 7; *see also* Ex. 4, at 6:24-7:1.)

comScore’s central position—that customer complaints are not relevant to class certification issues—is incorrect. Federal courts have routinely held that “[d]ocuments reflecting complaints by other consumers are directly relevant to numerosity, commonality, and typicality which plaintiff must show for class certification.” *See, e.g., Thompson v. Jiffy Lube Int’l, Inc.*, 05-1203-WEB, 2006 WL 1174040, at *4 (D. Kan. May 1, 2006) (after “strongly disagree[ing]” that consumer complaints “have very little relevance to the class certification determination,” ordering the defendant to “promptly produce what it describes as ‘over 100 boxes of hard copy documents’ concerning consumer complaints”); *see also Burkhart-Deal v. Citifinancial, Inc.*, 8-1289, 2009 WL 1750915, at *2 (W.D. Pa. June 19, 2009) (in an unpaid overtime class action, holding that “[c]omplaints statewide are unquestionably relevant to certification issues in this case, and bear on issues of numerosity, typicality, and commonality”); *Kreger v. Gen. Steel Corp.*, CIV.A. 07-575, 2008 WL 490582, at *2 (E.D. La. Feb. 19, 2008) (rejecting defendant’s “characteriz[ation of plaintiff’s] request for customer complaints as ‘merits-oriented discovery’

[and] not relevant for class certification”).

This case is no different. Consumer complaints (and the number of them) regarding comScore’s panelist software are directly relevant to numerosity, typicality and commonality. For example, those complaints would potentially show: how many consumers were adversely affected by comScore’s software, the common ways in which consumers were affected, and whether the named representatives’ experiences are typical of other putative class members. (*See* Ex. 4, at *8:1-8.) Additionally, trends among customer complaints in comScore’s possession may identify subclasses among the consumers affected by comScore’s software. *See United Nat. Records, Inc. v. MCA, Inc.*, 101 F.R.D. 323, 326 (N.D. Ill. 1984) (agreeing that if discovery showing “individual claims regarding defendants’ [challenged] return policies” may define “appropriate subclasses”) (citing 3B Moore's Federal Practice, *supra*, ¶ 23.45 [2], at 23–334); *McArdle v. AT & T Mobility LLC*, C 09-1117 CW (MEJ), 2010 WL 1532334 (N.D. Cal. Apr. 16, 2010) (“discovery is warranted where it will resolve factual issues necessary for the determination of whether the action may be maintained as a class action, such as whether a class or set of subclasses exists.”) (citing *Kamm v. California City Development Co.*, 509 F.2d 205, 210 (9th Cir.1975)).

Accordingly, comScore should be compelled to provide substantive answers to Interrogatory No. 8 and Request No. 34.

II. COMSCORE SHOULD BE COMPELLED TO IDENTIFY AND DESCRIBE EACH TYPE OF INFORMATION THAT ITS SOFTWARE “MONITORS, COLLECTS, RETAINS, AND/OR TRANSMITS” FROM PANELISTS.

Interrogatory Nos. 16 and 17 ask comScore to “identify and describe each type of information” monitored, collected, retained and/or transmitted by the Windows and Macintosh panelist software, respectively. This Court recognized that “[w]hether comScore collected the

same, or substantially the same, types of content from the panelists is relevant to the commonality prong of the class certification analysis,” and, as such, ordered comScore to answer those Interrogatories. (Dkt. No. 88, at 10-12.) This Court also disagreed with comScore’s representation that its own “commitment to produce the relevant source code ‘addresses’” Interrogatory Nos. 16 and 17—even assuming the source code “would likely enable Plaintiffs to access the information sought.” (*Id.* at 12 n.3.)

Despite this Court’s instruction that “Plaintiffs are entitled to [this] discovery now,” comScore has yet to fully answer either Interrogatory. *See also Am. Reserve Corp. v. Holland*, 86 C 833, 1991 WL 172011, at *3 (N.D. Ill. Aug. 30, 1991) (quoting Fed. R. Civ. P. 33) (“under Rule 33 of the Federal Rules of Civil Procedure ‘each interrogatory shall be answered separately and fully.’”). Instead, comScore has: (1) produced one document “identifying the types of information comScore’s Windows software monitors, collects, and/or retains from PC panelists” (the “Windows Software List”), (2) re-stated that “the type of information collected can be discerned from the previously produced source code,” and (3) indicated that “the Mac software was *designed* to collect the same types of data being collected by the Windows software.” (Ex. 7, Suppl. Interrog. Resp. Nos. 16 and 17) (emphasis added).

As illustrated by the following, comScore has intentionally avoided answering Plaintiff’s requests in any meaningful way. First, the Windows Software List produced by comScore only details information *presently* collected by its software—but Plaintiff’s Interrogatories seek information relating to comScore’s current and past collection. (Ex. 1, ¶¶ 1-29.) Plaintiffs know this to be true because the Windows Software List includes several fields listing “Legacy” values in place of information that was previously collected by comScore’s Window’s software, but is

not currently collected.³ Further, comScore has indicated that it “does not maintain a list of the data that used to be collected in these Legacy fields, and therefore cannot readily provide such a list.” (Ex. 8.) But whether or not comScore maintains a ready-to-produce “list” of the data that used to be collected is inconsequential—what Plaintiffs seek, and what comScore has been ordered to produce, is a description of *each type* of information collected by its panelist software throughout the relevant time period.

Second, comScore cannot refer Plaintiffs to its source code so as to avoid fully responding to Interrogatory Nos. 16 and 17. This Court already rejected that approach, and the Court’s directives are controlling.

Third, comScore’s latest supplemental response—that “the Macintosh software was designed to collect the same data collected by comScore’s PC-based software” and that, once again, comScore does not maintain a “list” of that data—is non-responsive. (*See* Ex. 7, Suppl. Interrog. Resp. No. 17.) Stated plainly, Interrogatory No. 17 seeks the identification and description of the types of data collected by (and not information relating to its design) comScore’s panelist software.⁴ comScore should be compelled to provide a straightforward and responsive answer to Plaintiff’s Interrogatories. Explaining the *intended design* of the Mac software is wholly different than explaining how the software operated in practice. The fact comScore does or does not have ready-made “lists” to produce in response is irrelevant.

³ comScore confirmed that “Legacy fields are fields that represent data that used to be collected, but is no longer collected.” (*See* April 27, 2012 Correspondence, a true and accurate copy is attached hereto as Exhibit 8.)

⁴ In the Parties’ last meet and confer, Plaintiffs’ counsel explained this very issue to comScore’s counsel—i.e., the difference between “information collected” and “software design”—and indicated that comScore’s answer regarding the Macintosh software’s “design” was non-responsive. (Givens Decl. at ¶ 11.) comScore’s counsel agreed to address these concerns, but then essentially re-stated its prior response about the “design” of the Macintosh software. (*Id.* at ¶ 9; Ex. 7, Suppl. Interrog. Resp. No. 17.)

Therefore, comScore should be compelled to fully answer Interrogatory Nos. 16 and 17.

III. COMSCORE SHOULD BE COMPELLED TO PROVIDE PLAINTIFFS WITH A COMPLETE LIST OF THE TERMS DISPLAYED IN DIALOG BOXES TO PUTATIVE CLASS MEMBERS.

Interrogatory No. 13 seeks information relating to “the different ways in which [comScore] obtains consent from [its] panelists to install the panelist software” on their computers. (Ex. 1, Interrog. No. 13.) In its supplemental response, comScore indicated that those “prospective panelists” who install the panelist software through comScore’s third-party bundling partners are presented with one of many “dialog box[es],” which “contain comScore’s Terms of Service.” (Ex. 7, Suppl. Interrog. Resp. No. 13.) Tacitly acknowledging that the content of those dialog boxes is highly relevant to Plaintiffs’ claims, comScore attached, as Exhibit A to its Supplemental Interrogatory Responses, the supposed “screen captures for *each* dialog box for *each* third party partner.”⁵ (See Exhibit A to Defendant comScore Inc.’s First Supplemental Responses to Plaintiff Harris’ First Set of Interrogatories, a true and accurate copy is attached hereto as Exhibit 7-A. (emphasis added).)

However, and as Plaintiffs’ counsel indicated during the Parties’ April 25, 2012 meet and confer, comScore’s supplemental production of “each” dialog box from “each” of its third party partners is plainly incomplete. The reason we know this to be true is because the dialog box attached to the Complaint, (Dkt. No. 1, Ex. A), and dialog boxes uncovered during Plaintiffs’ pre-suit investigation, were not included among the dialog boxes produced by comScore, which—according to comScore’s answer—represented the universe of dialog boxes from comScore’s third party bundling partners. (Givens Decl. at ¶ 12.) Backtracking from its

⁵ Among other reasons, the information contained in those dialog boxes—i.e., what a particular class member may have seen before the panelist software was installed on his/her computer—is clearly relevant to both typicality and commonality issues.

supplemental response, comScore subsequently explained that:

The screenshots attached as Exhibit A were collected by comScore in approximately October 2011. Copies of screenshots used by comScore's third party partners are not kept by comScore in the ordinary course of business. Thus, screenshots of every dialog box used by comScore's third party partners during the relevant time period are not in comScore's custody and control.

(Ex. 8.) This second supplemental response to Interrogatory 13 clearly runs counter to comScore's prior representation that it produced "each" dialog box from "each" of its third party partners.⁶

Plaintiffs' are entitled to the information requested—i.e., copies of the information displayed to putative class members before installing comScore's software. Accordingly, comScore must clarify whether it does not have this information at all or whether it simply does not have "screenshots" of the information as its answer implies. Of course, if comScore possesses the information, it must be produced. Alternatively, if such information is truly not in comScore's possession, custody or control, then it must disclose those third-party partners whose dialog boxes were not produced. Armed with that information, Plaintiffs would then be able to seek third-party discovery to obtain the information, as it is critical to a class certification analysis.

⁶ comScore's supplemental response to Interrogatory 13 is troubling for another reason: comScore represented that discovery into the identities of and with its third party bundling partners was neither relevant nor necessary because comScore supposedly was in possession of all potentially relevant information that its bundling partners had. Thus, both Plaintiffs and the Court were lead to believe that discovery vis-à-vis these third party bundling partners was not appropriate at this point. Now that information has come to light proving that comScore does not possess this highly relevant information, it is evident that discovery into the identities of the third party bundling partners, as well as discovery directed to them, is both relevant and necessary, and Plaintiffs request that the Court compel comScore to turn over this information.

IV. COMSCORE SHOULD BE COMPELLED TO BRING ITS DOCUMENT PRODUCTION IN LINE WITH RULE 34(b)'S BASIC REQUIREMENTS.

As described, comScore produced its documents in one massive and undifferentiated serving of nearly 17,000 individually stamped files. (Givens Decl. at ¶ 6.) Each file has been produced in TIFF format, with a portion (less than half) reproduced in purported “native” form. (*Id.* at ¶ 7.) Critically, *none* of the files have been produced in a manner allowing the files to be searched electronically or inspected in an alternative efficient manner other than printing out each document—which would, as described by comScore’s counsel, produce over a million pages of material. (*Id.* at ¶ 6; *see also* Ex. 4 at 2:16-18.) Further, comScore has not labeled its production to correspond to Plaintiff’s Requests—leaving Plaintiffs to guess how any given file might, in fact, be responsive.

In the end, comScore has neither produced its documents as they are kept in the usual course of business, nor has it organized and labeled its production. As such, comScore has ignored Rule 34(b)’s requirements and, instead, leaves Plaintiffs to search for the proverbial needle in the haystack.

A. Under Rule 34, a responding party may either produce documents as they are kept in the usual course of business or organize and label them according to a requesting party’s document requests.

Rule 34 provides a party responding to a document request the choice of “produc[ing] documents as they are kept in the usual course of business or . . . organiz[ing] and label[ing] them to correspond to the categories in the request.” Fed. R. Civ. P. 34(2)(E)(i). Under the Rule, a “responding party cannot attempt to hide a needle in a haystack by mingling responsive documents with large numbers of nonresponsive documents.” *Hagemeyer N. Am., Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 598 (E.D. Wis. 2004) (citing *Bratka v. Anheuser-Busch Co., Inc.*, 164 F.R.D. 448, 462-63 (S.D. Ohio 1995); *see also In re Sulfuric Acid Antitrust*

Litig., 231 F.R.D. 351, 363 (N.D. Ill. 2005). The rationale underpinning the “usual course of business” option recognizes that “[a] business has an obvious incentive to keep needed documents in a way that maximizes their usefulness in the day-to-day operations of the business.” *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. at 363. Accordingly, producing documents as they are usually kept “precludes artificial shifting of documents.” *Id.*

Importantly, once documents are “no longer kept in the ‘usual course of business . . . the option granted by the first clause of Rule 34(b) no longer exists.”⁷ *Id.* In such circumstances, the producing party is obliged “to ‘organize and label’ the documents to correspond to the document requests.” *Id.* (citing *City of Wichita, Kansas v. Aero Holdings, Inc.*, 2000 WL 1480499, at *1 (D.Kan. May 23, 2000); *Stiller v. Arnold*, 167 F.R.D. 68, 71 (N.D. Ind. 1996) (noting that “[p]roducing 7,000 pages of documents in no apparent order does not comply with a party’s obligation under Rule 34(b)”). Further, and specific to the circumstances surrounding comScore’s document production, courts in this district have held that the conversion of electronic files “into [TIFF format [for the purposes of production] . . . essentially creat[es] new documents.” *See Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, No 04-c-3109, 2006 WL 665005, at *2 (N.D. Ill. March 8, 2006). This conversion process not only implicates Rule 34(b)—and, as here, requires that a party organize and label its production accordingly—but also destroys information that would otherwise be found in electronic files as they are kept in the ordinary course of business, depriving a requesting party of potentially relevant information. *Id.* at *3 (discussing that “TIFF documents do not contain information such as the creation and modification dates of a document, e-mail attachments and recipients, and metadata”)

⁷ Courts routinely draw a distinction between documents kept in the usual course of business—i.e., as they might be used by a business on a day-to-day basis—and documents kept “in the usual course of storage”—i.e., as they might exist once transferred to a storage facility. *See, e.g., In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 363 (N.D. Ill. 2005).

B. Because comScore did not produce documents as they are maintained in the ordinary course of business, it must organize and label them to correspond to Plaintiff's document requests.

comScore must organize and label its documents to correspond to Plaintiff's Requests. At the outset, it is apparent that comScore's current production—produced without any index or other tool to guide Plaintiffs to responsive documents—does not reflect the manner in which comScore keeps its own files in the usual course of its business. Here, and like the defendants in *Hagenbuch*, comScore chose to primarily produce its documents as converted TIFF files.⁸ (Givens Decl. at ¶ 7.) Those files are neither searchable nor organized in any discernable fashion. (*Id.* at 6.) Instead, each folder, labeled 001-016, simply contains an arbitrary number of individual files labeled and organized by a consecutive bates number. (*Id.*) Numerous courts have found that such a “blanket ‘dump’ of documents is ‘deficient.’” *See Alford v. Aaron Rents, Inc.*, 3:08-CV-683 MJR-DGW, 2010 WL 2765260 (S.D. Ill. May 17, 2010) *report and recommendation adopted in part*, 08-CV-683MJR, 2010 WL 2720798 (S.D. Ill. July 8, 2010) (“Court's have found a party's acts did not meet Rule 34 standard when ‘the documents were not accompanied by any indices or other tool to guide ... [the opposing party] to the responsive documents.’”) (quoting *Graske v. Auto Owners Ins. Co.*, 647 F.Supp. 2d 1105, 1108 (D.Ne. 2009)). Here, it is entirely unrealistic to believe that comScore keeps its files in one large, disorganized, unsearchable morass, without any indexes.

Because it has not produced documents as they are kept in the usual course of business, comScore must “organize and label them to correspond to the categories in [Plaintiff's] request[s].” Fed. R. Civ. P. 34(b)(E)(i). Anything short of such organization—including

⁸ The fact that comScore re-produced a number of these files in their apparent native format—less than half of its total production—does not make its overall production any more manageable, or change the fact that the document production cannot reflect the way in which comScore maintains its files in the usual course of its business. (Givens Decl. at ¶ 7.)

comScore's latest offer to make a portion of its documents electronically searchable—is insufficient. (Givens Decl. at ¶ 13.)

Accordingly, the Court should compel comScore to bring its massive document production in line with Rule 34 by either producing those documents as they are kept in the usual course of business, or organizing and labeling them pursuant to Plaintiff's Requests.⁹

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order (1) compelling comScore to produce all relevant information responsive to Interrogatory Nos. 8, 13, 16, and 17 and Request No. 34, (2) compelling comScore to organize and label its document production to respond to Plaintiff's Requests, (3) awarding Plaintiffs their reasonable expenses and attorney's fees in bringing this motion, pursuant to Rule 37(a)(4), and (4) providing such further relief that the Court deems equitable and just.

⁹ In the event comScore claims that its current production is, somehow, organized the way that those files are maintained in the usual course of business, comScore should be compelled to "provide information 'regarding its search for the documents, including where the documents produced were maintained, whether they came from a single source or file or from multiple points of origin, the identity of the record custodians, and the manner in which they were organized.'" *See Century Jets Aviation LLC v. Alchemist Jet Air LLC*, 08 CIV. 9892 GBDKNF, 2011 WL 724734 (S.D.N.Y. Feb. 8, 2011) (citing *Pass & Seymour*, 255 F.R.D. 331, 334 (N.D.N.Y. 2008)). Without such labeling, Plaintiffs' task of sorting and categorizing the 1,000,000+ pages of material produced in comScore's lump production will be made impossible.

Dated: May 4, 2012

Respectfully submitted,

MIKE HARRIS AND JEFF DUNSTAN,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,

By: /s/ Rafey S. Balabanian
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LR 37.2 CERTIFICATION

Pursuant to Local Rule 37.2, the undersigned certifies that the Parties met and conferred telephonically at 2:00 PM (C.S.T.) on the 10th, 20th, and 25th of April 2012, and despite their good faith efforts to resolve the discovery issues now in dispute, were unable to reach an accord.

/s/ Rafey S. Balabanian

CERTIFICATE OF SERVICE

I, Rafey S. Balabanian, an attorney, hereby certify that on May 4, 2012, I served the above and foregoing ***Plaintiffs' Motion to Compel comScore, Inc. to Respond to Plaintiff's Written Discovery*** by causing true and accurate copies of such paper to be transmitted to all counsel of record via the Court's CM/ECF system on this the 4th day of May, 2012.

/s/ Rafey S. Balabanian _____