

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MIKE HARRIS and JEFF DUNSTAN,
individually and on behalf of a class of similarly
situated individuals

Plaintiff,

v.

COMSCORE, INC., a Delaware corporation

Defendant.

CASE NO. 1:11-cv-5807

Judge Holderman

Magistrate Judge Kim

**COMSCORE'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL COMSCORE,
INC. TO RESPOND TO PLAINTIFFS' WRITTEN DISCOVERY**

Defendant comScore, Inc. ("comScore") respectfully submits this brief in response to Plaintiffs Mike Harris' and Jeff Dunstan's ("Plaintiffs") Motion to Compel comScore, Inc. to Respond to Plaintiffs' Written Discovery. (Dkt. No. 104) Plaintiffs' motion should be denied because comScore has fully responded to Plaintiffs' relevant written discovery, Plaintiffs seek documents and information not within the custody or control of comScore, and comScore produced documents as they are maintained in the usual course of business in accordance with Fed. R. Civ. P. 34.

I. INTRODUCTION

Plaintiffs ask this Court to order comScore to produce irrelevant information and documents, information and documents that it does not possess, and a "cheat sheet" to guide its review of documents produced by comScore in response to Plaintiffs' own document requests. In so doing, Plaintiffs mischaracterize comScore's production and ignore their own proposed class definitions. They also seek to get "blood from a stone" by requesting information that

comScore has already informed Plaintiffs it does not have. The Court should reject Plaintiffs' arguments and deny their motion to compel.

II. LEGAL STANDARDS

In accordance with Rule 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" Fed. R. Civ. P. 26(b)(1). Notably, however, the Court must limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii). Moreover, parties are not entitled to discovery that is nothing more than a fishing expedition. *Strait v. Mehlenbacher*, 526 F.Supp. 581, 584 (W.D.N.Y. 1981) (stating that using the discovery rules as "fishing expedition" to attempt to find a basis for a claim is plainly in violation of the Federal Rules).

In its Memorandum Opinion and Order issued March 2, 2012, the Court bifurcated class certification discovery and merits discovery, ordering the parties to conduct class certification discovery first. (Dkt. No. 88) Thus, the only relevant issues to be resolved at this stage of the litigation are those listed in Rule 23—whether:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Rule 34 governs the production and inspection of documents and things. In accordance with Rule 34, a producing party must "produce documents as they are kept in the usual course of

business or must organize and label them to correspond to the categories in the request. . . ."

Fed. R. Civ. P. 34(b)(2)(E)(i).

If the producing party produces documents in the order in which they are kept in the usual course of business, the Rule imposes no duty to organize and label the documents, provide an index of the documents produced, or correlate the documents to the particular request to which they are responsive.

MGP Ingredients, Inc. v. Mars, Inc., Case No. 06-2318, 2007 WL 3010343 at *3 (D. Kan. Oct. 15, 2007) (documents produced in the same order and grouping in which they were collected were produced in the usual course of business); *see also Morgan v. City of New York*, Case No. 00Civ.9172, 2002 WL 1808233 at *4 (S.D.N.Y. Aug. 6, 2002) (production of documents grouped in the readily identifiable categories in which they were kept in the usual course of business fulfilled the requirements of Rule 34). Finally, a responding party is only required to produce documents within its possession, custody, or control. Fed. R. Civ. P. 34(a)(1); *see also Am. Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 501-502 (D. Kan. 2001) (a party has actual possession, custody, or control under Rule 34 if it has actual possession, custody or control or the legal right to obtain the documents on demand).

III. ARGUMENT

Plaintiffs alternatively complain about being provided too little information and too many documents. However, as discussed below, Plaintiffs have received the discovery to which they are entitled. Plaintiffs are not permitted to embark on a fishing expedition, force comScore to create information and/or documents it does not possess, and lessen their burden in reviewing documents by improperly expanding the production requirements of Rule 34.

A. The Court Should Not Compel Production of Panelist Complaints Regarding comScore's Software because They Are Not Relevant to Class Certification

Plaintiffs' discovery requests regarding panelist complaints are irrelevant to the issue of class certification in light of the classes proposed by the Plaintiffs. Plaintiffs ask comScore to

"IDENTIFY the total number of complaints YOU received about YOUR PANELIST SOFTWARE (broken down by year)" and produce "ALL complaints about PANELIST SOFTWARE." (Ex. A, Plaintiff Mike Harris' First Set of Interrogatories to Defendant comScore, Inc., Interrogatory No. 8; Ex. B, Plaintiff Mike Harris' First Set of Requests for the Production of Documents to Defendant comScore, Inc., Request No. 34.) Plaintiffs seek to certify the following two classes in this action:

"The Surveillance Software Class: All individuals and entities in the United States that have had comScore's Surveillance Software installed on their computer(s).

The Dunstan Subclass: All individuals and entities in the United States that have incurred costs in removing the Surveillance Software."

(Dkt. No. 1 at ¶ 74.)

Plaintiffs' proposed classes are not composed of panelists who complained about comScore's software. Rather, they are directed to all panelists who downloaded comScore's software on their computers and individuals who, instead of removing comScore's software through the obvious means of using the uninstall function, incurred costs to remove comScore's software. Plaintiffs' proposed classes are not dependent on a malfunction of comScore's software or even a panelist's unhappiness with comScore's software—Plaintiffs allege that comScore's functioning software is the culprit. comScore has already provided Plaintiffs with the total number of machines actively reporting data and the total number of installations of comScore's software. (Ex. C, Defendant comScore, Inc.'s First Supplemental Responses to Plaintiff Harris' First Set of Interrogatories, Response to Interrogatory No. 7.) Moreover, there is no accurate way to determine how many panelists uninstalled comScore's software by a method other than the provided uninstall feature. (Ex. D, Declaration of Brown at ¶ 3.)

Plaintiffs contend that the complaints they seek are directly relevant to numerosity, typicality, and commonality because they "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." (Dkt. No. 104 at 7.) These arguments are unpersuasive. The number of consumers "adversely" affected by comScore's software is not relevant because Plaintiffs allege the class consists of all individuals who downloaded comScore's software. The "common ways in which consumers were affected" is irrelevant for the same reason. Finally, complaints regarding comScore's software are not likely to show whether the named representatives' experiences were typical of all individuals who downloaded comScore's software. Presumably those panelists who were pleased with their experiences with comScore's software would not complain to comScore about the software. Plaintiffs seek nothing more than to improperly tilt the playing field in their favor by only considering individuals unhappy with comScore's software in their typicality analysis.

Plaintiffs also assert that panelists' complaints "may identify subclasses among the consumers affected by comScore's software." (Dkt. No. 104 at 7.) That statement suggests that what Plaintiffs actually want is to embark on a fishing expedition designed to identify additional class representatives. Notably, the case Plaintiffs cite for the proposition that such discovery is acceptable fails to support this proposition. In *United Nat'l Records, Inc. v. MCA, Inc.*, the court denied the Defendants' motion to vacate an already-granted motion to certify the class based on the potential for additional discovery to identify additional subclasses. *United Nat'l Records, Inc. v. MCA, Inc.*, 101 F.R.D. 323, 326 (N.D. Ill. 1984). In other words, identification of additional subclasses was not required for class certification. So too here.

Finally, as discussed by comScore's counsel at the April 17, 2012 hearing before the Court, comScore does not maintain separate files for panelist complaints. All communications from panelists would have to be reviewed, and a determination of what constitutes a "complaint" would require burdensome and sometimes difficult review. (Ex. E, April 17, 2012 Transcript at 6:8-23; Ex. D, Declaration of Brown at ¶ 4.)¹ Thus, even if the Court were to find panelists' complaints to be remotely relevant, the Court should not order production of the complaints under Fed. R. Civ. P. 26(b)(2)(C)(iii) because the burden to comScore greatly outweighs any potential relevance to this matter.

B. comScore Has Fully Responded to Interrogatory Nos. 16 and 17

Plaintiffs seek additional information in response to Interrogatory Nos. 16 and 17. Interrogatory No. 16 requests information regarding the "type of information that YOUR WINDOWS SOFTWARE monitors, collects, retains, and/or transmits from PC PANELISTS." (Ex. A, Plaintiff Mike Harris' First Set of Interrogatories to Defendant comScore, Inc., Interrogatory No. 16.) Interrogatory No. 17 requests the same information with respect to "YOUR MACINTOSH SOFTWARE" and "MAC PANELISTS." (Ex. A, Plaintiff Mike Harris' First Set of Interrogatories to Defendant comScore, Inc., Interrogatory No. 17.) Plaintiffs acknowledge that comScore attached a business document pursuant to Fed. R. Civ. P. 33(d) in response to Interrogatory No. 16. (Dkt. No. 104 at 8.) This document, comScore's official list of the online activity information collected by the comScore software, lists the elements of online activity information collected and provides a short description of each element. (Ex. D, Declaration of Brown at ¶ 5.) Thus, examination of this business record and comScore's source

¹ Plaintiffs' motion suggests that comScore's counsel has been less than forthright about its refusal to produce panelists' complaints. However, as can be seen from the April 17, 2012 transcript, comScore's counsel fully explained the situation to the Court. (Ex. E, April 17, 2012 Transcript at 5:15-7:10.)

code provides all of the information necessary to form a full and complete response to Interrogatory No. 16.

Plaintiffs complain that comScore failed to respond fully with respect to previous information collected, citing the "Legacy" fields noted in the attached business document.² However, as previously explained to Plaintiffs, comScore does not maintain a list of "Legacy" data fields, nor can comScore easily compile such a list. (Ex. F, April 27, 2012 Email from Bowland to Balabanian; Ex. D, Declaration of Brown at ¶¶ 7-8.) In order to provide the information Plaintiffs seek, comScore would have to engage several of its employees in a needle-in-a-haystack search through old source code and other related documentation in an attempt to find the previous descriptions of the "Legacy" fields. (Ex. D, Declaration of Brown at ¶ 8.) Such an investigation is not guaranteed to result in identification of all Legacy fields, nor is it likely to be completely accurate. (Ex. D, Declaration of Brown at ¶ 8.) comScore is not required to create documents and cannot provide Plaintiffs with information it does not have—no matter how many times Plaintiff requests it.

Additionally, Plaintiffs complain that comScore failed to respond fully to Interrogatory No. 17 by referring to the business document produced in response to Interrogatory No. 16. However, as previously relayed to Plaintiffs, comScore does not currently collect information regarding Mac panelists. (Ex. F, April 27, 2012 Email from Bowland to Balabanian.) The "beta" Macintosh software previously employed by comScore was designed to collect the information listed in the business record provided by comScore. (Ex. F, April 27, 2012 Email

² When comScore, for any reason, decides to no longer collect a certain piece of information from its panelists but wishes to maintain the placeholder for compatibility purposes, it zeros out the value of the information and changes the description of the information to "Legacy field." (Ex. D, Declaration of Brown at ¶ 6.)

from Bowland to Balabanian.)³ The Mac software was not commercially implemented, and there is no separate list of data collected by Mac software. (Ex. D, Declaration of Brown at ¶ 5.) Once again, comScore has provided Plaintiffs all of the information it has regarding this Interrogatory. It cannot provide more; the Court should deny Plaintiffs' motion to compel.

C. comScore Has Also Fully Responded to Interrogatory No. 13

Plaintiffs also complain that comScore has not fully responded to Interrogatory No. 13 on the basis of comScore's supposed failure to provide screenshots of all of the dialog boxes used by all of comScore's third party partners at any point in time. However, Interrogatory No. 13 does not request this information. Interrogatory No. 13 asks comScore to "IDENTIFY and DESCRIBE the different ways in which YOU obtain consent from YOUR PANELISTS to install the PANELIST SOFTWARE." (Ex. A, Plaintiff Mike Harris' First Set of Interrogatories to Defendant comScore, Inc., Interrogatory No. 13.) In comScore's supplemental response to this Interrogatory, comScore provided nearly two pages of written response describing how comScore obtains consent from prospective panelists, as well as screenshots comScore collected from each of its active third party U.S. partners on or around October 2011 as examples of the dialog boxes shown to prospective panelists. (Ex. C, Defendant comScore, Inc.'s First Supplemental Responses to Plaintiff Harris' First Set of Interrogatories, Response to Interrogatory No. 13.) Each and every one of these screenshots were included as part of Exhibit

³ Upon further investigation while preparing this motion, comScore determined that the only the information listed under the following headers in the business record were collected by the beta Macintosh software, although the software was designed to eventually collect all of the information in the business record: (1) DB Source 8 (ci=1): Basic Content Information; (2) DB Source 6 (ci=3): Application Usage Data; (3) DB Source 4 (ci=4): AOL Proprietary & IM Event Logging ContentID; (4) DB Source 5 (ci=6): Secure ContentID; (5) DB Sources 3 & 7 (ci=7): Non-Secure Web Traffic; (6) DB Source 13 (ci=8): Snippet Data; and (7) DB Source 15 (ci=10): Biometrics Data. comScore will supplement its response to Interrogatory No. 17 to clarify this issue no later than May 24, 2012.

A to comScore's Supplemental Interrogatory Responses. (Ex. D, Declaration of Brown at ¶ 10.) comScore has provided all of the information it has—Plaintiffs are not entitled to more.⁴

In addition, the Court should reject Plaintiffs' improper attempt to expand Interrogatory No. 13 beyond the specific request. Plaintiffs make the bold claim that comScore "must disclose those third-party partners whose dialog boxes were not produced." (Dkt. No. 104 at 11.) However, Plaintiffs *did not request this information as part of Interrogatory No. 13*. If Plaintiffs desire the names of third-party partners whose dialog boxes were not produced, they should serve an additional Interrogatory directed to this information rather than attempt to circumvent the limits on the number of Interrogatories allocated to Plaintiffs in this action.⁵

D. Plaintiffs Mischaracterize comScore's Production and Misstate the Law in an Improper Attempt to Have comScore Review the Documents Requested by Plaintiffs for Plaintiffs

Plaintiffs' motion is replete with incorrect statements regarding comScore's production. First, comScore produced a combination of .tif files and native files. (Ex. G, Declaration of Bowland at ¶ 4.) Native files were produced only when producing .tif files was unfeasible due to the length of the native files. (Ex. G, Declaration of Bowland at ¶ 4.) comScore did not, as Plaintiffs claim, reproduce any documents produced as .tifs as native files. (Ex. G, Declaration of Bowland at ¶ 5.) Rather, the .tif files labeled "unsupported file type" that Plaintiffs complain about are placeholder documents for the native files. (Ex. G, Declaration of Bowland at ¶ 5.) Contrary to Plaintiffs' claims, the .tif files were produced in an electronically searchable format and with metadata. (Ex. G, Declaration of Bowland at ¶ 6.) Specifically, comScore produced

⁴ Plaintiffs do not complain that comScore's written response is deficient, only that comScore failed to provide documents it does not possess in response to Interrogatory No. 13.

⁵ Plaintiffs claim that comScore represented it has all of the documents maintained by its third party partners is unsupported and untrue. Although comScore maintains all of the information relevant to class certification in one form or another, it obviously does not maintain the exact same information as all of its third party vendors.

the following metadata for each file (if available): Custodian, Recordtype, SourceApp, BegDoc, EndDoc, Attachment Folder Name, Filename, Docext, DateCreated (MMDDYYYY), DateLastMod (MMDDYY). (Ex. G, Declaration of Bowland at ¶ 7.) Such information provides the custodian of the document, the source application from which the document was collected, the date the document was created, and the attachment folder name, among other things. To be charitable, it appears that Plaintiffs do not understand the technical details surrounding comScore's production. Although this may explain their misguided insistence that comScore did not produce documents as maintained in the usual course of business, it does not explain why Plaintiffs failed to raise these issues with comScore during any of the parties' meet and confers or in response to comScore's offer to help Plaintiffs with technical difficulties contained in the letter producing the documents in question. (Ex. H, April 13, 2012 Letter from Bowland to Scharg.)

Turning to the issue at hand, Plaintiffs contend that comScore failed to produce documents in accordance with Rule 34. That is incorrect: comScore produced documents as they are maintained in the usual course of comScore's business. The majority of comScore's production (and therefore, the majority of documents Plaintiffs complain about) is comprised of documents pulled from the JIRA database comScore uses to manage software development and trouble-shooting. (Ex. G, Declaration of Bowland at ¶ 8.) Because the tickets are stored in database form, the user at comScore views data pulled from the database in an organized and readable form. However, without the JIRA software, the data stored in the database would be unorganized and difficult to understand.⁶ (Ex. G, Declaration of Bowland at ¶ 9.) Thus, in order

⁶ In order to view the JIRA tickets and attachments produced in the form Plaintiffs request, Plaintiffs' counsel must have the same JIRA and database software configured in the same way as comScore's software. (Ex. G, Declaration of Bowland at ¶ 9.) This would require

to produce documents from the JIRA database in a reasonably useable format, comScore provided each ticket as a comScore user would view the ticket on his or her computer as well as the corresponding attachments to the ticket. Notably, comScore did not reorder the tickets or attachments or otherwise deliberately mix critical documents with others in the hope of obscuring the significance of the critical documents, activities which Fed. R. Civ. P. 34 was designed to prevent. *See Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 63 (Fed. Cl. 2003) (citing the 1980 Advisory Committee Note to Rule 34(b)).⁷ Each attachment is associated with a folder named for the ticket to which the attachment corresponds. (Ex. G, Declaration of Bowland at ¶ 10.) Documents produced in the order they are kept are deemed produced in the usual course of business under Rule 34, and the rule imposes no obligation on the producing party to organize and label the documents. *In re GI-Holdings Inc.*, 218 F.R.D. 428, 439 (D.N.J. 2003). The receiving party's need for organization due to the sheer volume of documents produced does not require the producing party to index or label documents produced as kept in the usual course of business. *GI-Holdings Inc.*, 218 F.R.D. at 440; *Renda*, 58 Fed. Cl. at 64. Because comScore produced all of its documents grouped and ordered in the way the documents are maintained and were collected, they were produced as kept in the usual course under Rule 34, and comScore is not obligated to identify the Document Requests to which each document is responsive.

licenses to both commercially-available pieces of software as well as significant Information Technology assistance. comScore sees no need to burden the parties with such difficulties when the same information is available in a complete and easily producible and reviewable format such as the one provided Plaintiffs.

⁷ Plaintiffs seemingly complain that comScore has produced too many documents responsive to Plaintiffs' requests. However, each of the documents produced are relevant to one of Plaintiffs' extremely broad requests. Plaintiffs requested the documents; it cannot now complain that it received too many in response to its requests and force comScore to provide an index based on the volume of documents alone. *See GI-Holdings Inc.*, 218 F.R.D. at 440; *Renda*, 58 Fed. Cl. at 64.

Plaintiffs broadly claim that the conversion of electronic files into .tif files, the format most documents are currently produced in, “essentially creates new documents.” (Dkt. No. 104 at 13.) But the case Plaintiffs cite for this claim base the “new documents” reasoning on several factors not applicable here, namely that the .tif files did not contain the same information as the original documents and did not include metadata necessary to determine what files were attachments, where files started and stopped, and when the documents were created, among others. *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.*, Case No. 04 C 3109, 2006 WL 665005 at *2 (N.D. Ill. March 8, 2006) (“The parties do not dispute that the TIFF documents differ in design and content from the materials Plaintiff designated, are not identical to the documents shown to Plaintiff, and contain less information (especially about the documents themselves) than the originals.”). In contrast, comScore has produced .tif documents with metadata and has not altered the documents other than to add Bates labels to each image and redact privileged information. (Ex. G, Declaration of Bowland at ¶ 14.) Notably, the *Hagenbuch* court suggested that protection of privileged or confidential information is a legitimate reason for producing .tifs rather than native files. *Hagenbuch*, 2006 WL 665005 at *2 (noting that “[the producing party] does not suggest that the changes were made to protect confidential or privileged information. . .”). In contrast, production of documents as .tif files was required to allow comScore to redact privileged information. (Ex. G, Declaration of Bowland at ¶ 12.)

All of the other cases cited by Plaintiffs deal with documents produced out of storage rather than documents produced in the usual course of business, failure to follow a court order requiring an index, or failure to allow inspection of documents as required by Rule 34. *See Hagemeyer N. Am., Inc. v. Gateway Data Sci. Corp.*, 222 F.R.D. 594, 598 (E.D. Wis. 2004)

(holding documents clearly labeled and organized in storage, and produced as such, were produced as kept in the usual course of business); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 358 (N.D. Ill. 2005) (documents stored for seven years in Toronto); *Alford v. Aaron Rents, Inc.*, Case No. 08-cv-683, 2010 WL 2720798 at *3 (S.D. Ill. July 8, 2010) (requiring producing party to state whether documents were produced from a storage facility, which would require an index under Rule 34, or were produced from active files, in which case they were produced as kept in the usual course of business and did not require an index); *City of Wichita v. Aero Holdings, Inc.*, Case No. 98-1360, 2000 WL 1480499 at *1 n.2 (D. Kan. May 23, 2000) (failure to provide an index where the court directed the parties to provide an index before production occurred); *Stiller v. Arnold*, 167 F.R.D. 68, 70-71 (N.D. Ind. 1996) (refusing to allow inspection of documents before requesting party copied the documents). comScore did not produce any documents maintained in a storage facility; indeed, all of the documents produced by comScore were collected from comScore's company servers. (Ex. D, Declaration of Brown at ¶ 11; Ex. G, Declaration of Bowland at ¶ 3.) Moreover, the parties were not ordered to produce an index with their documents.

comScore produced documents in the groupings and order in which they were collected from comScore's active company servers. Documents produced as .tif files in comScore's production are electronically searchable and contain all relevant metadata. Additionally, some documents produced as .tif files include redactions for privilege that could not be performed on a native database file. Thus, comScore produced its documents as kept in the usual course of business, and the production of .tif files does not change this fact. The Court should not grant Plaintiffs' motion seeking to reduce their document review burden by forcing comScore to review its documents for Plaintiffs.

IV. CONCLUSION

For the foregoing reasons, comScore respectfully requests that the Court deny Plaintiffs' Motion to Compel comScore, Inc. to Respond to Plaintiff's Written Discovery.

DATED: May 18, 2012

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of **COMSCORE'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL COMSCORE, INC. TO RESPOND TO PLAINTIFFS' WRITTEN DISCOVERY** has been caused to be served on May 18, 2012 to all counsel of record via the Court's ECF filing system.

/s/ Robyn Bowland

Robyn Bowland