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,	)	
Plaintiffs,	)	Case No. 1:11-5807
v.	)	Hon. James F. Holderman
COMSCORE, INC., a Delaware corporation,	)	
Defendant.	)	

PLAINTIFFS MIKE HARRIS AND JEFF DUNSTAN'S MOTION AND SUPPORTING MEMORANDUM TO MODIFY SCHEDULING ORDER

Plaintiffs Mike Harris and Jeff Dunstan ("Plaintiffs"), by and through their counsel, and pursuant to Federal Rule of Civil Procedure 6(b), respectfully move the Court for an Order extending the Scheduling Order (Dkt. No. 98) deadlines by sixty (60) days. In support of this Motion, Plaintiffs state as follows:

I. INTRODUCTION

This case challenges Defendant comScore, Inc.'s ("comScore") unlawful disclosure of its customers' private information through the surreptitious installation of "spyware" on the computers of Plaintiffs and the putative class they seek to represent. At issue in this Motion is the need to modify the Court's Scheduling Order. Put simply, comScore's approach to discovery—where protracted motion practice, baseless objections, and incessant delay reign supreme—has made it impossible for Plaintiffs to complete discovery within the Scheduling Order's deadlines. On July 11, 2012, Plaintiffs' notified comScore that they would request a sixty-day extension to the remaining deadlines in the Scheduling Order and invited comScore to join this Motion. (Declaration of Rafey Balabanian at ¶ 19, a true and accurate copy of which is attached hereto as

Exhibit A ("Balabanian Decl.").) comScore eventually answered that it would oppose the Motion. (*Id.* at ¶ 20.)

As explained below, a sixty-day extension is plainly needed. comScore initially refused to produce any documents. After being ordered to produce materials relevant to class certification, comScore responded only with canned objections. Following another order specifically requiring comScore to produce responsive documents, comScore produced over 1 million "pages" of files and materials—most of which are useless without the software that comScore uses to view such information. This eleventh-hour production (which was dumped on Plaintiffs a mere 5 days before the scheduled Rule 30(b)(6) deposition) requires substantial time to review and has forced the Plaintiffs to reschedule comScore's Rule 30(b)(6) deposition.

Ultimately, while Plaintiffs have proceeded diligently to acquire the materials needed to present this Court with an adequate record upon which to decide class certification, more time is needed in light of comScore's refusal, at nearly every turn, to participate in the discovery process in good faith. Accordingly, and as explained more fully below, this Court should extend the Scheduling Order's deadlines by sixty (60) days.

II. PROCEDURAL HISTORY

A. *The Parties' early discovery efforts: comScore promises, then refuses, to respond.*

comScore has delayed discovery from the outset of this litigation. Plaintiffs propounded their first sets of interrogatories and document requests on December 16, 2012. (Balabanian Decl. at ¶ 3.) Shortly thereafter, this Court referred the Parties to Magistrate Judge Young B. Kim for the setting of a discovery schedule and resolution of discovery disputes. (Dkt. No. 61.) At the Parties' first appearance before Judge Kim, comScore indicated that it did not want to respond to the entirety of Plaintiffs' discovery requests, and instead, asked that the court

bifurcate discovery between class and merits issues. (Dkt. No. 64.) At that same hearing, comScore indicated to Judge Kim, without explanation, that it preferred that all discovery remained stayed during the pendency of its to-be-filed motion to bifurcate. (Balabanian Decl. ¶ 4.) That position came as a surprise to Plaintiffs, as comScore had acknowledged (both at and before the hearing) that it did not object to Plaintiffs' discovery requests related to class certification issues. (*Id.*)

B. *Judge Kim grants comScore's motion to bifurcate, but comScore still refuses to provide responses to class discovery.*

On January 12, 2012, comScore filed its motion to bifurcate. (Dkt. No. 66.) During briefing, comScore admitted that several of Plaintiffs' discovery requests were relevant to class certification issues and, as such, were "appropriate for the initial phase of class certification discovery." (Dkt. No. 67 at 11.) Rather than respond to those requests, however, comScore again refused to respond—at all—and only indicated that it would "commit to meet and confer in good faith to determine the precise scope of responsive information and documents to be provided." (*Id.*)

Subsequently, over the next month, the Parties met and conferred on multiple occasions about Plaintiffs' requests. (Balabanian Decl. at ¶ 5.) During these meet and confers, comScore again committed to responding to a number of Plaintiffs' interrogatories and document requests as if the "stay of discovery does not apply" and memorialized this promise in a written letter dated February 16, 2012. (*Id.*) Notwithstanding these commitments, however, comScore decided not to "voluntarily" respond to any request until ordered to do so. (*Id.* at ¶ 6.)

On March 2, 2012, Judge Kim granted comScore's motion to bifurcate. (Dkt. No. 87.) Specifically, Judge Kim ordered comScore to respond to interrogatories and document requests relating to class certification issues by March 23, 2012, which included both those discovery

requests identified by the court and those to which "comScore [had previously] agreed to respond." (Dkt. No. 88 at 10-11, n. 2.) Based on Judge Kim's Order, and coupled with comScore's long-standing promise to provide responses to those requests to which it had never objected, Plaintiffs reasonably expected that comScore would fully respond by March 23rd.

C. *This Court's March 15, 2012 Scheduling Order.*

Shortly thereafter, and before the deadline for comScore's responses and production, the Parties appeared before this Court on March 15, 2012 for a scheduling conference. (Dkt. No. 98.) There, the Court set the operative Scheduling Order, the remaining dates from which are as follows:

Deadline for Plaintiffs' Fed. R. Civ. P. 26(a)(2) disclosures on class certification issues.	July 16, 2012
Deadline for Defendant's Fed. R. Civ. P. 26(a)(2) disclosures on class certification issues.	August 15, 2012
Deadline for class-based discovery.	September 14, 2012
Deadline for Plaintiffs to file their supplemental motion for class certification.	October 14, 2012
Status conference with the Court.	October 18, 2012

The deadline for comScore's responses to Plaintiffs' class-related discovery requests—i.e., March 23, 2012—followed. But rather than responding fully as ordered, comScore merely provided limited substantive responses hidden among a laundry list of boilerplate objections. (Balabanian Decl. at ¶ 7.) Indeed, despite its repeated indications that the class-related requests were "appropriate"—and apparently un-phased by Judge Kim's order that comScore *respond* (rather than object) to those requests—comScore failed to produce any documents. (*Id.*)

D. *comScore's document production prompts admonishment by Judge Kim.*

On March 28, 2012, the Parties again appeared before Judge Kim to report on the progress of discovery. (Dkt. No. 99.) Less than a minute into the hearing, and without any prompting from Plaintiffs, Judge Kim called out comScore's dilatory tactics:

> THE COURT: So the answers have not been completed yet?
>
> MR. SCHAPIRO: No, the responses have been completed and we are now gathering on a rolling basis the materials to provide, the documents.
>
> THE COURT: Well, it's not a two-stage process, you know. Requests are made, you file a response. It's a one-step process . . . if you're telling me that you have not complied with my order that the answers are provided by March 23rd, just say so.
>
> [. . .]
>
> THE COURT: But I think my order also covered the requests for production, right?
>
> MR. SCHAPIRO: Yes, and we answered the requests for production.
>
> THE COURT: You answered them by providing the responsive documents, right?
>
> MR. SCHAPIRO: No, your Honor, no.
>
> THE COURT: Let me ask you, when you're responding to a production request, the only response would be – I mean, a responsive response would be the responsive documents, right? And what you're saying is that you have not turned over the responsive documents yet or not completely.

(March 28, 2012 Hearing Trans. at 2:20-3:6, 3:22-4:8, a true and accurate copy of which is attached hereto as Exhibit B.) Judge Kim ultimately admonished comScore that "[w]hen [the court sets] a deadline for responding, it's a deadline to respond, not to say 'Response will be forthcoming.' That's not a response in my book." (Ex. B at 12:5-8.) Judge Kim further instructed comScore to seek leave of court before unilaterally expanding its own deadlines. (*Id.* at 12:5-15.) Judge Kim thereafter instructed the Parties to return on April 17, 2012, when comScore was to report on the status of its document production. (*Id.* at 13:10-17.)

On April 13, 2012—four days before the Parties' scheduled status hearing and nearly a month after its original deadline—comScore finally produced documents and files to the Plaintiffs. (Balabanian Decl. at ¶ 10.) The production raises several issues. First, the size and content of the production present their own inherent challenges. While the Bates-stamped range of comScore's production extends up through document number 16,872, an actual page-by-page printout of that production spans over a million pages in length. (*Id.* at 11.) Further, and by

comScore's own estimation, "probably over 90 percent of the production or more" consists of "tickets"—each of which contains technical discussions of comScore's software and refers, attaches, or otherwise links to the coding itself, which was also produced. (*See* July 5, 2012 Hearing Trans. at 21:4-17, a true and accurate copy of which is attached hereto as Exhibit C.) As such, the volume and highly technical nature of comScore's production demands significant time for review.

Second, the manner in which comScore produced documents causes additional difficulties. As stated above, the vast majority of the documents consists of "tickets" that track changes made to comScore's software, and almost every ticket references, attaches, or includes a hyperlink to other documents, including portions of software code. (Balabanian Decl. at 12.) While viewing such data on comScore's specialized ticketing software—called "Jira"—would allow a user to quickly navigate to and between such references, attachments, or hyperlinks, such interaction is impossible using the processed documents given to Plaintiffs.[1] (*Id.*) Recognizing this issue, Judge Kim acknowledged that the information produced to Plaintiffs "[may not be] all that useful because the data is categorized and organized in a certain fashion so that [only] the software running the data is able to produce something that's useful." (Ex. C at 18:15-19:4.)

In response, comScore's counsel suggested this was a non-issue because the production can be "search[ed] if [Plaintiffs] are looking for words." (*Id.* at 21:21-22.) But while the production *can* be searched on a document-level, this actually solves nothing. First, as mentioned above, it is extremely difficult, if not impossible, to understand how each individual document

[1] comScore's counsel described this inherent limitation at the Parties' July 5, 2012 hearing before Judge Kim, by explaining that the manner of comScore's production means that "[Plainiffs] can't click on links. What they can't do . . . if I'm understanding this correctly, that comScore can do, the same way if you if you were looking at an Internet page, you could click on a link and it would take you to another page." (Ex. C at 21:23-22:1.)

relates to others without the ability to actually "click" on hyperlinks or open individual ticket attachments—which would, in contrast, be possible using comScore's Jira software. (Balabanian Decl. at 12.) Accordingly, because each "ticket" links to or attaches other documents, Plaintiffs' ability to perform word searches is of little use without the ability to understand which "tickets" correlate to specific attachments or hyperlinked documents.

Third, Plaintiffs cannot conduct word searches on a page-by-page basis, despite comScore's counsel's demonstrably false representation to Judge Kim that its document production "[has] been OCR'd." (Ex. C at 12:20.) Rather, comScore's production is searchable at a *document* level. (Balabanian Decl. at 13.) To briefly highlight the difference, OCR text (which relies on data extracted directly from individual pages) would allow comScore's production to be searchable on a page-by-page level—i.e., a search for "virus" would show which of comScore's approximately 17,000 Bates-stamped pages contained the searched-for term. Document-level text, in contrast, only allows the production to be searched on a document-by-document level. This difference is highly significant. For instance, the very first "document" produced by comScore is nearly *one thousand five hundred* (1,500) "pages" long. (*Id.* at ¶ 13.) Under these circumstances, then, running the same search for "virus" shows that the term appears six (6) times in comScore's first "document," but does not show which individually Bates-stamped pages any of those six hits appear on.[2] (*Id.*)

At the Parties' July 5, 2012 hearing, and in light of these issues—several of which were addressed by the court directly—Judge Kim instructed the Parties to meet and confer regarding

[2] To put the difference in context, comScore's production includes nearly 17,000 Bates-stamped pages produced through over 8,700 documents. (Balabanian Decl. at ¶ 14.) To further complicate matters, the 17,000 Bates-stamped pages do not account for those hundreds of files that were additionally produced in native format, many of which can extend for hundreds of printed pages. (*Id.*)

comScore's document production. Judge Kim further explained that in similar cases he's "asked the party with the information to share the database . . . [and specialized] software at the party's site." (Ex. C at 19:13-21, 23:11-16 (also suggesting that "the next step in the process might be that you just do an on-site inspection and examination of the database").) Plaintiffs anticipate working through these issues with the cooperation of comScore's counsel over the coming weeks.[3] In the event comScore refuses to cooperate, however, another discovery-related motion to resolve these issues may become necessary. (Balabanian Decl. at ¶ 20.)

E. ***The Parties' competing motions to compel.***

At the April 17, 2012 hearing before Judge Kim, counsel for both Parties generally identified and discussed outstanding discovery issues, indicating their intention to meet and confer prior to filing any motions to compel. (Balabanian Decl. at ¶ 15.) After several such conferences, the Parties filed their respective motions to compel on May 4, 2012. (Dkt. Nos. 102, 104.) Following those filings and through further meetings, the Parties reached an agreement with respect to comScore's motion to compel and stipulated that comScore should withdraw it without prejudice. (Dkt. No. 107.) In response to those efforts and Plaintiffs' willingness to voluntarily produce materials that comScore had requested, Judge Kim encouraged the Parties to continue their efforts to resolve discovery issues without court intervention. (Dkt. No. 109.) Judge Kim further scheduled a July 5, 2012 motion hearing on Plaintiffs' motion to compel. (Dkt. Nos. 110, 111.)

At the July 5, 2012 hearing, Judge Kim granted in part and denied in part Plaintiffs' motion and specifically ordered comScore to "conduct an exhaustive search" so as to completely respond to certain interrogatories by July 20, 2012. (Ex. C at 11:2-12.) Judge Kim also set a

[3] To that end, on July 13, 2012, Plaintiffs requested a meet and confer for the week of July 16, 2012 to discuss their issues with analyzing comScore's production.

status hearing for July 26, 2012 (Dkt. Nos. 112), and additionally suggested that, following Defendant's completion of that search and supplemental production, the Parties should work together to identify and describe the various "codes or categories" of information prevalent throughout Defendant's produced source code. (Ex. C at 13:25-14:6.)

Further, at the same hearing, Plaintiffs' counsel advised Judge Kim that they would likely require an extension of the discovery schedule. (*Id.* at 28:2-9.) In turn, Judge Kim indicated that he understood the need for more time and advised the Plaintiffs to seek the extension through this Court. (*Id.* at 28:10-22.)

F. *Scheduling of comScore's Rule 30(b)(6) Deposition.*

While these discovery issues were ongoing, Plaintiffs initially propounded their Rule 30(b)(6) deposition notice on March 28, 2012, which identified six deposition topics. (Balabanian Decl. at ¶ 8.) At that time, the deposition was noticed for April 18, 2012—based largely on Plaintiffs' assumption that comScore would produce documents, in an appropriate and useful form, within a week of the then-overdue deadline set by Judge Kim. (*Id.*) On April 3, 2012, comScore agreed to produce its designee on April 18, 2012. (*Id.* at ¶ 9.)

comScore, however, waited until April 13, 2012—*five* days before the scheduled Rule 30(b)(6) deposition—to produce over one million pages of documents. (*Id.* at ¶ 10.) Given the challenges stemming from the method of its production—to say nothing of its size—Plaintiffs informed comScore that they could not proceed with the Rule 30(b)(6) deposition on April 18th. (*Id.*)

On May 31, 2012, Plaintiffs' counsel requested new dates for the Rule 30(b)(6) deposition. (*Id.* at ¶ 16.) Over one month later, and only moments before the Parties' July 5, 2012 hearing before Judge Kim, comScore suggested a new date—July 19, 2012—for the

deposition. (*Id.* at 17.) But in light of comScore's July 20th deadline to supplement its discovery responses pursuant to Judge Kim's ruling on Plaintiffs' motion to compel (along with the other issues discussed herein), Plaintiffs informed comScore on July 11, 2012 that the July 19th date was not workable. (*Id.* at ¶ 18.) Plaintiffs proposed alternative dates—August 8th or 9th, 2012, or at some point during the following two weeks—for the deposition. (*Id.*) comScore has since confirmed its availability on August 15, 2012. (*Id.*) As a result, more time is needed to not only complete written discovery but oral discovery as well.

III. ARGUMENT

Plaintiffs bring this Motion to Modify Scheduling Order to ensure there is adequate time to complete discovery relating to class certification issues and to meet the other deadlines set in this case. District courts enjoy broad discretion in controlling discovery. *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 336 (N.D. Ill. 2005); *see United States v. Bartesch*, 110 F.R.D. 128, 129 (N.D. Ill. 1986) (district courts have "wide discretion to fashion discovery schedules in individual cases"). To that end, good cause to extend a deadline exists when the deadline "cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 Advisory Comm. Notes (1983 Am.).

In this case, the facts demonstrate that the requested sixty-day extension is not brought for the purposes of delay (although it is a direct result of comScore's dilatory tactics, including its initial failure to produce documents and subsequent refusal to provide the information in a reasonably useable form). Rather, the extension will provide Plaintiffs the much-needed time to work through the remaining issues attendant with comScore's document production, complete all necessary depositions, meet their Rule 26(a)(2) obligations, and ensure there is a fully developed record to support their motion for class certification.

Additionally, and as described above, the fact that comScore was ordered to exhaustively investigate and respond to certain interrogatories—coupled with the fact that Plaintiffs have been diligently trying to schedule and take comScore's Rule 30(b)(6) deposition—further supports the need for an extension. Finally, the extension sought—the first requested in this case—is modest and will in no way prejudice either Party. This is supported by Judge Kim's recent instruction that the Parties cooperatively address the above-discussed (and remaining) issues stemming from comScore's large and complex document production.

IV. CONCLUSION

The requested extension: (1) will allow the Parties' to resolve all remaining issues relating to class-related discovery, (2) is necessary despite Plaintiffs' diligence in litigating issues relating to that discovery, and (3) will enable Plaintiffs to competently meet the case deadlines enumerated in the Scheduling Order set by this Court. As such, this Court should grant the sixty-day extension.

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WHEREFORE, Plaintiffs respectfully request that the Court extend the remaining deadlines by sixty (60) days, and modify the Scheduling Order as follows:

Deadline for Plaintiffs' Fed. R. Civ. P. 26(a)(2) disclosures on class certification issues.	September 14, 2012
Deadline for Defendant's Fed. R. Civ. P. 26(a)(2) disclosures on class certification issues.	October 15, 2012
Deadline for class-based discovery.	November 13, 2012
Deadline for Plaintiffs to file their supplemental motion for class certification.	December 13, 2012
Status conference with the Court.	December 17, 2012

Dated: July 16, 2012

Respectfully submitted,

By: /s/ Rafey S. Balabanian

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CERTIFICATE OF SERVICE

I, Benjamin S. Thomassen, an attorney, hereby certify that on July 16, 2012, I served the above and foregoing ***Plaintiffs Mike Harris' and Jeff Dunstan's Motion to Modify the Scheduling Order*** by causing true and accurate copies of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system, on this the 16th day of July, 2012.

/s/ Benjamin S. Thomassen