

**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 MODIFY
SCHEDULING ORDER**

Defendant comScore, Inc. ("comScore") respectfully submits this response to Plaintiffs Mike Harris' and Jeff Dunstan's ("Plaintiffs") Motion and Supporting Memorandum to Modify Scheduling Order. (Dkt. No. 113.)

I. INTRODUCTION

Plaintiffs' motion to modify the scheduling order should be denied. As the proceedings before Magistrate Judge Kim have confirmed, Plaintiffs long ago received all the discovery to which they are entitled. Plaintiffs still have almost two months left to finish whatever class-based discovery remains to be completed, and their motion fails to identify a single issue, topic, or area of discovery that requires time beyond the current September 14, 2012 deadline. There is no basis to extend the schedule.

As part of their Motion, Plaintiffs appear to seek an additional sixty days for class certification expert disclosures. Plaintiffs have not identified any reason it failed to meet the July 16, 2012 expert disclosure deadline and never requested any such extension from comScore.

Instead, Plaintiffs filed this omnibus Motion to modify the scheduling order on the day their expert disclosures were due. Plaintiffs have missed the July 16, 2012, deadline for Rule 26(a)(2) disclosures for class certification issues and should not be allowed to disclose experts for class certification out of time.

II. ARGUMENT

In its Order of March 15, 2012, this Court set the following deadlines:

- Plaintiff shall comply with FRCP 26(a)(2) on class certification issues by 7/16/2012.
- Defendant shall comply with FRCP 26(a)(2) on class certification issues by 8/15/2012.
- Class-based Discovery ordered closed by 9/14/2012.
- Supplemental class certification motion to be filed by 10/14/2012.

While this Court has broad discretion to control discovery, an extension of a deadline requires "good cause," which ordinarily means a showing that the deadline that "cannot be reasonably met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16(b)(4); 1983 Advisory Cmte. Note to Fed. R. Civ. P. 16. Plaintiffs have failed to meet their burden of demonstrating good cause for their request to extend discovery and for their failure to provide Rule 26(a)(2) disclosures as required.

A. Plaintiffs fail to explain why they cannot complete class certification discovery by September 14, 2012

Plaintiffs filed their request to extend the class certification discovery deadline two months before the deadline. Notably, however, Plaintiffs have failed to explain why they cannot complete discovery by the current deadline, September 14, 2012. It is undisputed that Plaintiffs have had the primary material that they need to make their class certification arguments—

comScore's source code—since *January 23, 2012*.¹ (Ex. A, Jan. 23, 2012 Receipt for comScore's source code.) comScore provided its written discovery responses as required on March 23, 2012 and produced all of its class-related documents on April 13, 2012.² Plaintiffs filed various motions to compel, but Magistrate Judge Kim denied those motions in all respects relevant here.³ Thus, Plaintiffs are (and have been for some time) in possession of all of the documentary discovery to which they are entitled.

All that remains of Plaintiffs' requested discovery is for the Plaintiffs to take their Rule 30(b)(6) deposition. That deposition is scheduled to take place on August 15, 2012, a date that was settled upon after Plaintiffs rejected (for scheduling and other reasons, including their desire to wait for Magistrate Judge Kim's ruling on their ultimately unsuccessful motions to compel) dates of April 18 (the date originally noticed by Plaintiffs), May 2, and July 19, 2012.

While this history belies Plaintiffs' unfortunate assertions of "dilatory tactics" on comScore's part, the important facts are that documentary discovery concluded months ago; the Plaintiffs have had comScore's source code for more than half a year; and the Rule 30(b)(6) deposition is set to take place on August 15—a full month before the deadline for the close of

¹ In January Plaintiffs represented to Judge Kim that they had already analyzed much of comScore's software. "Well, Your Honor, we—prior to even filing suit we had experts, forensic experts go in and figure out how the system works. That's why we're very confident about our facts." Jan. 5, 2012 Hr'g. Tr. at 9:16-19.

² comScore in good faith understood the March 23 deadline to have applied to responses to requests to produce, with actual production to follow. When Magistrate Judge Kim made clear that the production was to have been completed by that date, he set a new deadline twenty days hence, which comScore met. Plaintiffs seek to make much of that misunderstanding, without justification, but even on their terms that short delay back in the spring provides no basis for the extension they now seek.

³ The sole respect in which one of Plaintiffs' motions was granted in part pertained to Interrogatories 16 and 17. Magistrate Judge Kim directed comScore to investigate if any further information responsive to Plaintiffs' supplemental requests (regarding certain "legacy" fields in the source code) existed. comScore promptly investigated and on July 16, 2012 informed the Plaintiffs that nothing else exists that is responsive to their request.

class discovery. There is more than enough time remaining for Plaintiffs to finish up whatever might remain, and they offer no good reason for delay.

Additionally, Plaintiffs state that Judge Kim “indicated that he understood the need for more time and advised the Plaintiffs to seek the extension through this Court.” (Dkt. No. 113 at 9.) Although Judge Kim informed the Plaintiffs that any extension would need to be granted by Your Honor, he did not indicate that “he understood the need for more time:”

MR. BALABANIAN: I don't think we're going to make the current class discovery cutoff of September 14th. I will say I think the parties have been very diligent in meet and conferring. We've had a bunch. We continue to do so, and I think they've all been very professional in tone, but I don't think we're going to make it at this rate, and I need to flag that issue for the Court because I don't want two months from now –

THE COURT: I appreciate that.

MR. BALABANIAN: -- you to be sitting there warning me I should have –

THE COURT: I mean, I myself took some time with this motion, too, so -- go ahead.

MR. BALABANIAN: How should we address that, in a motion before your Honor or in front of Judge Holderman? I guess Judge Holderman set the schedule, right, but –

THE COURT: If Judge Holderman set the schedule, then it would be up to him to move.

MR. BALABANIAN: He set it, right? Yeah, okay.

THE COURT: So if it is his deadline, he should move it. If it's something that I set, come to me.

July 5, 2012 Hr'g Tr. at 28:2-22.

B. Plaintiffs' complaints about Defendants' production are without merit

Plaintiffs suggest that the size and complexity of comScore's discovery should justify additional time. Plaintiffs *requested* all of the information that they have been provided, and

comScore duly produced these responsive documents after attempting to limit Plaintiffs' overbroad document requests. Plaintiffs requested all of these documents; they cannot now complain that comScore provided too much information. There is no reason why comScore's production of requested documents should entitle Plaintiffs to an extension of class certification discovery. In fact, Judge Kim rejected Plaintiffs request that comScore reorganize its production. (*See* Dkt. Nos. 104, 108, 112.) Judge Kim ruled that comScore's production was "in compliance with Rule 34." July 5, 2012 Hr'g. Tr. at 22:21-22. He also, at Plaintiffs' request, asked comScore to meet with Plaintiffs to answer their questions about the production. July 5, 2012 Hr'g. Tr. at 23:24-24:13. To that end, comScore has provided a description of the documents it produced and participated in a meet and confer on July 24, 2012. Plaintiffs, by their own admission, have been in possession of comScore's full document production for over three months. (Dkt. No. 113 at 5.) This production was provided in a form that complies with Fed. R. Civ. P. 34 and in a form wherein Plaintiffs can electronically search for words and terms within the documents.⁴ (Dkt. No. 112; Dkt. No. 113 at 7.) Plaintiffs have no legitimate basis to complain.

Nor is there any support for Plaintiffs' assertion in their briefing that comScore engaged in "dilatatory" actions by filing a motion to bifurcate class and merits-based discovery as well as resisting Plaintiffs' motion to compel. As a threshold matter, comScore prevailed on both of

⁴ Plaintiffs' contention that OCR'd text would result in page-by-page search results, the basis for their contention that comScore's representation that the production was OCR'd was "demonstrably false" is, itself, false. (Dkt. No. 113) Typically, OCR'd searching pulls up *documents* containing the searched term, not pages. Moreover, most commercially available document review software platforms provide a "go to the next hit" function which would allow a searcher to jump to the next hit of the term within the document. In any event, Plaintiffs' contention that searchable results must provide page-by-page results is new, and therefore likely nothing more than an attempt to justify their motion to extend the Court's class certification discovery deadline.

these motions. Further, the Court did not set the deadlines Plaintiffs seek to extend until *after* Judge Kim ruled that class certification and merits-based discovery should be bifurcated. Thus, any reliance Plaintiffs' place on comScore's supposed "dilatory" tactics before this Court set the schedule is misplaced.⁵ *See also* July 5, 2012 Hr'g Tr. at 28:2-9 (Plaintiffs' counsel informing Judge Kim that the parties had been "very diligent in meet and conferring. We've had a bunch, and I think they've all been very professional in tone")

III. CONCLUSION

Plaintiffs' motion should be denied because: 1) Plaintiffs have not identified any reason they cannot complete the class certification discovery they claim is required by September 14, 2012 (the current deadline for class-based discovery), and 2) comScore has not engaged in any "dilatory" actions.

DATED: July 25, 2012

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⁵ Although not relevant to this motion, Plaintiffs state that the parties have come to an agreement regarding Plaintiffs' outstanding discovery requests and that Plaintiffs have voluntarily produced materials. (Dkt. No. 113 at 8.) comScore disagrees with this characterization, particularly with respect to Plaintiff Dunstan's unredacted antivirus logs.

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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 MODIFY THE SCHEDULING ORDER** has been caused to be served on July 25, 2012 to all counsel of record via the Court's ECF filing system.

/s/ Robyn Bowland
Robyn Bowland