

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,	)	
	)	
Plaintiffs,	)	No. 11 C 5807
	)	
v.	)	Judge James F. Holderman
	)	
COMSCORE, INC., a Delaware corporation,	)	Magistrate Judge Kim
	)	
	)	
Defendant.	)	
	)	

**MEMORANDUM IN OPPOSITION TO  
PLAINTIFF JEFF DUNSTAN'S MOTION TO  
VOLUNTARILY DISMISS COUNT IV OF THE COMPLAINT**

Defendant comScore, Inc. ("comScore") respectfully submits this Memorandum of Law in Opposition to Plaintiff Jeff Dunstan's Motion to Voluntarily Dismiss Count IV of the Complaint. Defendant states as follows:

**I. Introduction**

Plaintiff Jeff Dunstan alleged and realleged in numerous paragraphs in the complaint that the comScore program downloaded onto his computer caused his computer to become "entirely debilitated," forcing him to purchase a \$40 anti-virus software program to get rid of it. comScore's program does not cause the problem of which Dunstan complains. As a consequence, comScore believes that it is likely Dunstan inadvertently downloaded a virus from some source other than comScore or Dunstan's antivirus software malfunctioned. comScore requested and needs Dunstan's anti-virus logs, which Dunstan refuses to produce,

in order to defend itself and respond to the inaccurate factual allegations. Thus, in an effort to moot the request, the Plaintiffs seek to dismiss a single count, Court IV, which is premised upon the Illinois Consumer Fraud Act.

## **II. Argument**

### **a. Dunstan's Motion Fails To Withdraw The Factual Allegations**

#### **Underlying Count IV**

Dunstan's request to voluntarily withdraw and dismiss Count IV of the class action complaint ("the Complaint") fails to address the necessary amendment and/or removal of certain factual allegations throughout the Complaint that relate to Dunstan's damages. In support of Count IV, brought under the Illinois Consumer Fraud and Deceptive Practices Act (the "ICFA"), Plaintiffs assert that Dunstan's computer was "debilitated" and that he was "forced to spend \$40 on third party software." (Compl. ¶ 118.) These allegations are pervasive throughout the Complaint and are incorporated into the three remaining counts (even though it is these factual allegations that are being abandoned by Plaintiffs). For example, in paragraph 71, Plaintiffs allege, "After installation, Dunstan's firewall detected the re-routing of his Internet traffic to comScore servers, and in response, effectively disabled his computer from accessing the Internet. In fact, Plaintiff Dunstan's computer became entirely debilitated in reaction to the Surveillance Software operating on his computer." (Compl. ¶ 71.) This is untrue. However, the critical point for this opposition is that Plaintiffs are abandoning this factual allegation, and it must be removed from the Complaint through the filing of an amended complaint. Going further, Plaintiffs assert, "Eventually,

Plaintiff Dunstan had to pay forty dollars (\$40) for third-party anti-virus software to entirely remove the software from his computer and restore it to a functioning state." (Compl. ¶ 73.)

Though Dunstan has moved the court to "dismiss [Count IV] and drop the associated subclass," Plaintiffs have not sought to also withdraw the factual allegations regarding the purported debilitation of Dunstan's computer, as they must. Indeed, the dismissal of Count IV without amendment of the Complaint would leave intact allegations relating to the "debilitation" of Dunstan's computer and the alleged cost of purchasing antivirus software. For example, in Count III, which is premised upon an alleged violation of the Computer Fraud and Abuse Act, the Plaintiffs allege, "Plaintiff Dunstan spent \$40 to purchase a spyware removal program to fully remove the program and restore his computer to a functioning state." (Compl. ¶ 107.) Thus, even if Count IV were dismissed, Count III and paragraph 107 would remain. These allegations of damages must be removed from the Complaint. The most efficient mechanism for the Complaint to be modified is to require Plaintiffs to file an amended complaint to properly (and entirely) dismiss Count IV and the related factual allegations.

**b. Dunstan's Motion Deprives comScore Of Its Ability To Respond To An Amended Complaint**

Dunstan's request to voluntarily dismiss Count IV is actually just an attempt to deprive comScore of any opportunity to respond to an amended complaint. To circumvent this opportunity, Plaintiffs seek to abandon Count IV while continuing to leave in the Complaint the factual allegations related to that Count. Such allegations are not removed from the Complaint until Plaintiffs file an amended complaint.

An amended complaint would permit comScore to review and evaluate the revised factual allegations. If the amended complaint substantively changes the allegations of the remaining counts, comScore should have the opportunity to answer or otherwise respond. Absent the filing of an amended complaint, comScore would be denied this opportunity.

**c. Rule 41(a) Is Inapplicable To Dunstan's Motion**

Dunstan's motion declines to set forth the Federal Rule of Civil Procedure under which it is brought. On page 8 of his motion, Dunstan hints that perhaps Rule 41 may come into play. Rule 41(a)(2) states that "an *action* may be dismissed at the plaintiff's request only by court order . . . ." (Emphasis added). Plaintiffs do not wish to dismiss their action, they wish to dismiss a single count. Thus, Rule 41(a)(2) is inapplicable. In *Chavez v. Illinois State Police*, 1999 WL 754681 (N.D. Ill. 1999), Judge Manning correctly stated the law:

Rule 15(a) provides that, after the parties are at issue, a party may amend its pleading 'only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.' . . . This definition illustrates a basic premise underlying Rule 15(a): amendment of a complaint is worthwhile when it cures defective allegations or *red-lines legally deficient claims in the context of an ongoing lawsuit.*

\* \* \*

In contrast, after the parties are at issue and a plaintiff seeks to dismiss a case, as opposed to individual claims, and all parties do not stipulate to dismissal, Rule 41(a)(2) comes into play. That rule provides that 'an action shall not be dismissed at the plaintiff's insistence save upon order of the court and upon such terms and conditions as the court deems proper. . . . (Emphasis added)

Similarly, in *Transwitch Corp. v. Galazar Networks, Inc.*, 377 F.Supp.2d 284 (D. Mass. 2005), the Court stated:

By its terms, Rule 41(a)(2) applies to the dismissal of 'an action. . . . Consequently, the weight of authority is that Rule 15(a), as opposed to

Rule 41(a)(2), applies to an amendment which drops some but not all of the claims in an action. *Addamax Corporation v. Open Software Foundation, Inc.*, 149 F.R.D. 3, 5 (D.Mass.1993) (Rule 15(a) 'is the proper vehicle to drop some but not all claims against a defendant or defendants'); *accord Gronholz v. Sears, Roebuck and Co.*, 836 F.2d 515, 517-518 (Fed.Cir.1987); *Chavez v. Illinois State Police*, 1999 WL 754681 at \* 2 (N.D.Ill. Sept.9, 1999) ('focusing on the distinction between dismissing a claim and an entire case, courts have approved the use of Rule 15(a), rather than Rule 41(a)(2), to dismiss 'a claim, as opposed to an action'); *Bragg v. Robertson*, 54 F.Supp.2d 653, 660 (S.D.W.Va.1999) (Rule 15 applies when the plaintiff seeks to dismiss only some counts against the defendant); *Bibbs v. Newman*, 997 F.Supp. 1174, 1177 (S.D.Ind.1998) (parenthetically quoting treatise that 'Rule 41(a) applies only to the dismissal \*289 of all claims in an action' whereas a 'plaintiff who wishes to drop some claims but not others should do so by amending his complaint pursuant to Rule 15').

Because Plaintiffs cannot use Rule 41 as the basis for Dunstan's instant motion, Plaintiffs should be seeking relief under Rule 15(a)(2). However, Plaintiffs are seeking to avoid having to live with the consequences of Rule 15. (Plaintiffs' Motion at 7-8).

comScore submits that the appropriate action on Dunstan's motion is to deny it without prejudice and to allow Plaintiffs a short period in which, under Rule 15(a)(2), to file a motion for leave to file an amended complaint. If the Plaintiffs decline to file such a motion, they must be prepared to proceed with their case as is, no matter how uncomfortable it may be for them.

### **III. Conclusion**

For the foregoing reasons, comScore respectfully requests that the Court deny Dunstan's motion to voluntarily dismiss Count IV of the Complaint.

DATED: September 11, 2012

By /s/ Paul F. Stack

---

Paul F. Stack  
pstack@stacklaw.com  
Mark William Wallin  
mwallin@stacklaw.com  
STACK & O'CONNOR CHARTERED  
140 South Dearborn Street  
Suite 411  
Chicago, IL 60603  
Telephone: (312) 782-0690  
Facsimile: (312) 782-0936

Andrew Schapiro  
Email: andrewschapiro@quinnemanuel.com  
Stephen Swedlow  
Email: stephenswedlow@quinnemanuel.com  
Robyn Bowland  
robynbowland@quinnemanuel.com  
QUINN EMANUEL URQUHART &  
SULLIVAN, LLP  
500 West Madison Street, Suite 2450  
Chicago, Illinois 60661  
Telephone: (312) 705-7400  
Facsimile: (312) 705-7499

Attorneys for Defendant comScore, Inc.

