

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James F. Holderman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	11 C 5807	DATE	9/13/2012
CASE TITLE	Dunstan et al. vs. comScore, Inc.		

DOCKET ENTRY TEXT

Motion hearing held. For the reasons explained in the Statement section of the order, the plaintiffs' "Motion to Voluntarily Dismiss Count IV of the Complaint" [122] is denied. The court grants leave to the plaintiffs to file an amended complaint, if they desire, by 9/20/12. If defendant comScore desires to file a motion to dismiss in response to the amended complaint, it shall file that motion by 10/4/12 and notice it before the court for 10/9/12 at 9:00 am. If comScore files a motion to dismiss, comScore should address the standards of Fed. R. Civ. P. 12(g)(2), which the court will evaluate to determine whether the defenses comScore raises were "available to the party but omitted from its earlier motion." Status hearing set for 10/9/12 at 9:00 a.m.

■ [For further details see text below.]

Docketing to mail notices.

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STATEMENT

In an attempt to avoid defendant comScore's discovery request for plaintiff Jeff Dunstan's computer anti-virus logs, the plaintiffs have moved the court to allow them to voluntarily dismiss Count IV of the Complaint (according to plaintiffs, the only count that makes the anti-virus logs relevant). (Dkt. No. 122.) The Rule governing voluntary dismissals is Fed. R. Civ. P. 41(a), which allows voluntary dismissal in these circumstances of "an action" through a "court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). The law is clear, however, that "Rule 41(a) may not be employed to dismiss fewer than all of the claims against any particular defendant," as plaintiffs are attempting to do here. 8 *Moore's Federal Practice - Civil* § 41.21 (3d ed. rev. 2012) (citing, *inter alia*, *Albrecht v. Opler*, No. 92 C 5158, 1993 U.S. Dist. LEXIS 11633, at *40-41 (N.D. Ill. Aug. 20, 1993); *Loutfy v. R.R. Donnelley & Sons, Co.*, 148 F.R.D. 599, 602 (N.D. Ill. 1993); *United States v. Outboard Marine Corp.*, 104 F.R.D. 405, 414 (N.D. Ill. 1984), *aff'd*, 789 F.2d 497 (7th Cir. 1986)). "This is because a voluntary dismissal under Rule 41(a)(1) or (2) terminates an *action*, which means the totality of all component *claims*, i.e. legal causes of action, asserted against a single defendant." *Id.*

Instead, the only way to withdraw a single claim against a defendant when other claims remain pending against that defendant is through an amended complaint under Fed. R. Civ. P. 15(a)(2). The plaintiffs express concern in their motion that if they file an amended complaint, comScore will be allowed to file an additional motion to dismiss that it would not otherwise be able to file. A defendant does not automatically gain the opportunity to file an additional motion to dismiss upon the filing of an amended complaint, however, because "amending a complaint does not revive omitted defenses or objections that the defendant could have raised in response to the original complaint." 8 *Moore's Federal Practice - Civil* § 12.21 (citing, *inter alia*, *Harris Bank Naperville v. Pachaly*, 902 F. Supp. 156, 157 (N.D. Ill. 1995) (amended complaint does not revive right to present defenses that were available before amendment but not asserted)); *see also* Fed. R. Civ. P. 12(g)(2) ("Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under

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this rule raising a defense or objection that was available to the party but omitted from its earlier motion.”).

Accordingly, the plaintiffs’ motion to voluntarily dismiss Count IV (Dkt. No. 124) is denied. The court grants leave to the plaintiffs to file an amended complaint, if they desire, by 9/20/12. If comScore desires to file a motion to dismiss in response to the amended complaint, it shall file that motion by 10/4/12. If comScore files a motion to dismiss, comScore should address the standards of Fed. R. Civ. P. 12(g)(2), which the court will evaluate to determine whether the defenses comScore raises were “available to the party but omitted from its earlier motion.”

James F. Holdeman