

**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 MEMORANDUM IN SUPPORT OF ITS MOTION FOR LEAVE TO
DEPOSE PLAINTIFF JEFF DUNSTAN**

Defendant comScore, Inc. ("comScore") respectfully submits this memorandum in support of its motion for leave to depose Plaintiff Jeff Dunstan ("Dunstan") for a second time.

I. FACTS

On August 23, 2011 Dunstan, along with co-Plaintiff Mike Harris, filed a purported class action lawsuit against comScore, alleging violations of certain federal statutes as well as the Illinois Consumer Fraud and Deceptive Practices Act ("CFDPA"). (Dkt. No. 1.) In support of these claims, Dunstan repeatedly alleged that comScore's software had debilitated his computer, which required the purchase of antivirus software to remove the comScore software and "fix" his computer. (Dkt. No. 1 at ¶¶ 15, 71-73, 114-119.) On March 9, 2012, comScore issued document requests seeking the production and inspection of Dunstan's computer to determine, *inter alia*, whether Dunstan had downloaded comScore's software and whether Dunstan's computer was fully functional before downloading comScore's software. (Ex. A, comScore's First Set of Requests for Production of Documents and Things, Request No 7.) Dunstan resisted this

request. (Ex. B, Plaintiffs Mike Harris and Jeff Dunstan’s Response to Defendant comScore, Inc’s First Set of Requests for Production of Documents, Request No 7.) Additionally, Dunstan produced a redacted anti-virus log, which redacted all entries except those purportedly related to comScore’s software. (Ex. C, Bowland Decl. at ¶ 3.) On the basis of an agreement between the parties wherein Dunstan’s attorneys agreed to provide certain registry information from Dunstan’s computer and to address Defendant’s concerns regarding the redacted anti-virus log, comScore withdrew its motion to compel an inspection of Dunstan’s computer. (Ex. D, May 18, 2012 Email from Swedlow to Givens.) Dunstan’s attorneys later represented to comScore’s attorneys on June 29, 2012 that they planned on dismissing Count IV, which related to the CFDPA, rather than producing the unredacted anti-virus logs. (Ex. C, Bowland Decl. at ¶ 4; Ex. E, July 2, 2012 Ltr from Balbanian to Bowland.) After several months of discussions regarding the form that the dismissal should take, including Dunstan’s counsel representing to the Court on more than one occasion that he planned on dismissing the count, Dunstan changed course and produced the unredacted anti-virus logs in lieu of amending its Complaint, as required by Judge Holderman to dismiss Count IV. (Dkt. No. 125; Ex. F, September 21, 2012 Email from Thomassen to Schapiro.) Dunstan’s counsel produced the unredacted anti-virus logs on September 21, 2012. (Ex. F, September 21, 2012 Email from Thomassen to Schapiro.) The unredacted logs list several non-comScore-related files detected on Dunstan’s computer on or about September 22, 2010 with a threat level of “high.”¹ (Ex. C, Bowland Decl. at ¶ 5.)

Meanwhile, comScore moved ahead with discovery based on Dunstan’s counsel’s representations regarding the expected dismissal of Count IV and the unredacted anti-virus log.

¹ Notably, the purported comScore-related entries on the log are all identified with “Info & Potentially Unwanted Applications” or “medium” threat levels. None have a threat level of “high.” (Ex. C, Bowland Decl. at ¶ 6.)

In particular, counsel for comScore deposed Dunstan on August 8, 2012. During the deposition, Dunstan testified that he had forgotten what information was redacted from his anti-virus log, but that he thought it only listed the removal of cookies. (Ex. G, Aug. 8, 2012 Dep. of Dunstan at 38:11-40:22.)

II. LEGAL STANDARD

Fed. R. Civ. P. 30(a) allows for parties to take a second deposition of a previously-deposed deponent with leave of the Court. The Court “must grant leave to the extent consistent with Rule 26(b)(2).” Fed. R. Civ. P. 30(a)(2). Fed. R. Civ. P. 26(b)(2) allows the Court to limit discovery if the discovery is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;” “the party seeking discovery has had ample opportunity to obtain the information;” or “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). Notably, information is relevant if it is “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

III. ARGUMENT

comScore seeks leave to depose Dunstan a second time on topics related to the recently-produced anti-virus logs that reveal Dunstan’s computer was likely infected by one or more computer viruses. Dunstan’s delay in producing the unredacted anti-virus logs necessitate this second deposition.

A. Dunstan’s Anti-Virus Logs and Related Testimony are Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Dunstan alleges that comScore’s software disabled his computer to such an extent that he had to purchase anti-virus software to restore his computer, and proposes a “Dunstan subclass” comprised of “All individuals and entities in the United States that have incurred costs in removing the Surveillance Software.” (Dkt. No. 1, ¶¶ 71-74.) Whether or not Dunstan incurred costs in removing comScore’s software, rather than correcting the effects of a computer virus, goes directly to at least the certification issues of typicality (i.e. was Dunstan’s experience with comScore’s software typical of other class members’ experiences), commonality, and predominance. Thus, the anti-virus logs and Dunstan’s testimony regarding the logs are reasonably calculated to lead to the discovery of admissible evidence.

B. comScore Cannot Obtain Information Regarding Viruses on Dunstan’s Computer from Any Source other than Dunstan

comScore can only obtain information regarding Dunstan’s anti-virus logs from the logs and Dunstan himself. Counsel’s refusal to produce Dunstan’s computer for inspection leaves only the logs and Dunstan as sources of information regarding potential viruses on Dunstan’s computer. Moreover, Dunstan is the only person with knowledge of how his computer allegedly malfunctioned, and what malicious files may have been on his system.

C. Plaintiffs Failure to Produce the Anti-virus Logs in a Timely Manner Precluded comScore from Obtaining Discovery Regarding the Same

To date, comScore’s efforts to procure the discovery regarding Dunstan’s anti-virus logs, discovery to which it is entitled, have been thwarted by counsel’s initial redaction of the logs, refusal to produce unredacted logs in favor of dismissing Count IV and all related allegations, and counsel’s belated production of unredacted logs *after* completion of Dunstan’s deposition. Dunstan was unable to provide comScore’s counsel information regarding the redacted portions

of his anti-virus logs during his deposition due to the redaction of the logs, even though comScore is entitled to such information. (Ex. G, Aug. 8, 2012 Dep. of Dunstan at 38:11-40:22.)

D. Any Purported Burden or Prejudice to the Plaintiffs Is of Their Own Making and Outweighed by the Prejudice to comScore Caused by Plaintiff's Failure to Timely Comply with Their Discovery Obligations

A second deposition of Dunstan is required due to the strategic decisions and delay of Plaintiffs' counsel. Any purported prejudice to Dunstan is significantly outweighed by comScore's need for information regarding the belatedly-produced antivirus logs.

IV. CONCLUSION

Defendant respectfully requests the Court grant leave for comScore to depose Plaintiff Dunstan for a second time.

DATED: October 12, 2012

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of **COMSCORE'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR LEAVE TO DEPOSE PLAINTIFF JEFF DUNSTAN** has been caused to be served on October 12, 2012 to all counsel of record via the Court's ECF filing system.

/s/ Robyn M. Bowland
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