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.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS UNDER RULE 12(B)(3) OR, IN THE ALTERNATIVE, TO TRANSFER VENUE UNDER 28 U.S.C. 1404(A)

Table of Contents

Page

Table of Authorities

Page

CASES

Table of Authorities
(continued)

Page

STATUTES

OTHER

I. INTRODUCTION

Plaintiffs' Complaint should not be before this Court. In order to install the comScore Inc. ("comScore") software that is the subject of their claims, Plaintiffs were required to affirmatively agree to the terms and conditions of comScore's Privacy Statement and User License Agreement (hereinafter collectively "ULA"). This ULA includes a mandatory forum selection clause stated in capital letters, which provides:

> FOR ANY NON-ARBITRAL ACTION OR PROCEEDING ARISING OUT OF OR RELATED TO THIS PROGRAM OR THIS AGREEMENT, SOLE AND EXCLUSIVE JURISDICTION SHALL RESIDE WITH THE APPROPRIATE STATE COURT LOCATED IN FAIRFAX COUNTY, VIRGINIA OR FEDERAL COURT LOCATED IN ALEXANDRIA VIRGINIA.

Under established black-letter law, forum selection clauses such as comScore's must be enforced absent a showing of unusual facts sufficient to overcome the strong presumption of validity. There are no such circumstances alleged here; nor can Plaintiffs present any such facts to avoid the terms they affirmatively agreed to. The process by which comScore's contractual terms are presented, and by which users like Plaintiffs must affirmatively manifest consent by clicking, are in line with other online "click-through" agreements that have been routinely enforced by courts throughout the country, including this District. Moreover, even a cursory review of Plaintiffs' claims shows that they are encompassed by the forum selection clause, which applies broadly to all allegations "arising out of, or related to," comScore's data collection program and the ULA that governs the program.

Pursuant to the forum selection clause that they agreed to, Plaintiffs were required to file this action in Virginia state court or in the United States District Court for the Eastern District of Virginia. Accordingly, comScore respectfully requests that this court dismiss Plaintiffs'

Complaint under Rule 12(b)(3)[1] or, in the alternative, transfer this case to the Eastern District of Virginia.

II. BACKGROUND

A. comScore's Business Model

comScore is an Internet market research company that measures the online behavior of Internet users ("Panelists") who volunteer to participate in comScore's program in exchange for various benefits, such as the Trees for Knowledge program (where comScore works with Trees For The Future and pledges the planting of trees in Central America, Africa, and Asia in exchange for Panelists joining and remaining a part of the research panel), free third-party software applications (for example computer security software or screensavers), and the chance to win cash or prizes. (Declaration of John O'Toole [hereinafter "O'Toole Decl."], ¶ 3; Compl. ¶¶ 25, 32). To participate in these programs, Panelists must download and install comScore's proprietary software. (O'Toole Decl., ¶ 3; Compl. ¶ 25).

A prospective Panelist is presented with the opportunity to download the software when they join a panel directly through the panel's website (e.g., PermissionResearch.com or OpinionSquare.com) or through one of comScore's recruitment partners. (O'Toole, Decl., ¶ 4). Critically, comScore's software can *only* be installed if a prospective Panelist affirmatively clicks to acknowledge that he or she has "read [and] agree[d] to… the terms and conditions of the Privacy Statement and User License Agreement." *Id*. (emphasis added). For Panelists that join directly through a panel website, this acknowledgement is presented on a registration page that also displays the ULA, which includes the Privacy Policy and several other disclosures. *Id*. Panelists joining through recruitment partners, on the other hand, are provided with this acknowledgement on a Terms of Service dialog box that is presented before the installation

[1] All Rules references are to the Federal Rules of Civil Procedure unless noted otherwise.

process can occur. *Id*. Plaintiffs have attached a copy of the Terms of Service dialog box to their Complaint as Exhibit A. The terms read, in pertinent part:

> This software allows millions of participants in an online market research community to voice their opinions by allowing their online browsing and purchasing behavior to be monitored, collected, and once anonymized, used to create market reports, materials, and other forms of analysis that may be shared with our clients to help our clients understand Internet trends and patterns and other basic demographic information, certain hardware, software, computer configuration and application usage information about the computer on which you install [the software] . . . By clicking I agree, you acknowledge that you are 18 years of age or older, an authorized user of this computer, and that you have read, agreed to, and have obtained the consent to the terms and conditions of the Privacy Statement and User License Agreement from anyone who will be using the computer on which you install this application.

(Compl., Exh. A (emphasis added)).

Exhibit A shows four separate options presented directly underneath this language: (1) "I Agree"; (2) "I Disagree"; (3) "Previous"; and (4) "Quit".[2] (Compl., Exh. A). Of these options, only the "I Agree" option will activate the "Next" button, also shown in Exhibit A, and allow the user to continue with the installation process of comScore's software. (O'Toole Decl., ¶ 5). The software is designed such that, if the computer user clicks any of the other options, comScore's software will not install. *Id*.

As indicated above, the Terms of Service dialog box presented to Panelists that join through a registration partner contains an explicit reference to "the Privacy Statement and User License Agreement." (O'Toole Decl., ¶ 6). This text is a hyperlink that, when clicked, takes a

[2] More typically, the following four options are presented to the user: (1) "I Accept"; (2) "I Decline"; (3) "Back"; and (4) "Cancel". (O'Toole Decl., ¶ 5). Although these labels are cosmetically different, the installation process functions in the same manner.

user to the full ULA.[3] *Id*. The ULA in effect at the time the Plaintiffs allege they downloaded the comScore software contains the following forum selection clause:

> FOR ANY NON-ARBITRAL ACTION OR PROCEEDING ARISING OUT OF OR RELATED TO THIS PROGRAM OR THIS AGREEMENT, SOLE AND EXCLUSIVE JURISDICTION SHALL RESIDE WITH THE APPROPRIATE STATE COURT LOCATED IN FAIRFAX COUNTY, VIRGINIA OR FEDERAL COURT LOCATED IN ALEXANDRIA VIRGINIA.[4]

Id., at ¶ 7, Exh. A.

B. Plaintiffs' Allegations

Plaintiffs both acknowledge that they "downloaded and installed" comScore's software. (Compl. ¶¶ 67, 70). However, they allege that comScore packages its data collection software in a manner that is confusing to consumers. *Id*. at ¶¶ 1, 4, 12, 30, 33, 39, 40, 117. Plaintiffs further allege that comScore's software modifies settings on Panelists' computers that could potentially expose those computers to future harm (such as infiltration by a third party hacker), although Plaintiffs do not allege that this actually happened to their computers. *Id*. at ¶¶ 6, 16, 64-66. Plaintiffs further allege that comScore's Terms of Service and ULA fail to adequately reflect the

[3] Through investigation, comScore has learned that, for a short period of time during the first half of 2010, one of comScore's registration partners employed a Terms of Service dialog box that failed to include a functioning hyperlink to the full ULA. (O'Toole Decl., ¶ 6). This only affected a small number of users who installed an experimental "beta" version of software comScore was testing to gauge whether it should extend its data collection program to the Macintosh platform. *Id*. Although it released a beta version of Mac-compatible software, comScore never sold, shared, or otherwise commercialized any of the data it collected from Macintosh users. *Id*. comScore ultimately chose not to include Macintosh users in it data collection program. *Id*. What matters here is that, even in the exceedingly small number of cases where comScore's Terms of Service failed to include a functioning hyperlink to the full ULA, computer users were still required to acknowledge that they had read and agreed to the terms of conditions of the ULA, or comScore's software would not have installed on their computers. *Id*. The acknowledgement clearly referenced the name of the panel to be PremierOpinion, and the full text of the ULA was, at all times, available at the PremierOpinion website (www.PremierOpinion.com). *Id*.

[4] Although Plaintiffs failed to attach the ULA, or the forum selection clause contained therein, the Court may consider it, or any other admissible evidence, in connection with a Rule 12(b)(3) motion to dismiss. Even if this were a Rule 12(b)(6) motion, the Court could still consider the ULA because Plaintiffs repeatedly reference it in their Complaint, and Exhibit A to the Complaint expressly refers to it. (Compl. ¶¶ 37, 103, Exh. A); *DeJohn*, 245 F.Supp.2d at 916, n. 2 ("Generally, in deciding a motion to dismiss under Rule 12(b)(6), the court is limited to the four corners of the complaint. [citation.] However, the Seventh Circuit has recognized a narrow exception to this rule: where a complaint or an attachment to the complaint expressly refers to another document, such as a contract, the court can consider the referenced contract.").

breadth of data collected. (*id.* at ¶¶ 10, 11, 17, 37, 49-52, 54). Plaintiffs also claim that comScore's Terms of Service and ULA are not displayed prominently enough during the installation process or, alternatively, that comScore makes it too hard for users to access the full terms of the ULA.[5] *Id*. at ¶¶ 12, 30, 33, 38-40, 117. Plaintiffs further allege that, once installed, comScore's software is difficult to remove. *Id*. at ¶¶ 14, 15, 47, 55, 57, 58, 117. As a consequence of all of the above, Plaintiffs allege that comScore obtained, intercepted, or accessed data in violation of various statutes. *Id*. at ¶¶ 89-91, 98, 104-106, 117,121.

Notwithstanding some of its wilder assertions, the Complaint is more notable for what is missing than what is alleged. Among other things, Plaintiffs makes no effort to dispute that they were presented with comScore's Terms of Service; nor do they dispute that they completed the normal process to download comScore's software, which requires prospective users to affirmatively agree to the terms of the ULA. To the contrary, Plaintiffs confirm that they "downloaded and installed" comScore's software, and they attach the Terms of Service as an Exhibit to their Complaint. (Compl. ¶¶ 67-68, 70-71, Exh. A).

III. ARGUMENT

A. The Forum Selection Clause Is Presumptively Valid And Should Be Enforced.

Under established Supreme Court precedent, forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). The burden to overcome this presumption of validity is a "heavy" one. *Id.* Under these standards, parties cannot overcome the presumption of enforceability merely by claiming that a

[5] In Paragraph 38 of the Complaint, Plaintiffs allege that "[o]ften, comScore's TOS do not display an actual reference to Defendant's full license agreement whatsoever," and attach Exhibit A as an example of this alleged practice. But Exhibit A actually contradicts Plaintiffs allegation. The exhibit clearly and expressly references the ULA. (Compl., Exh. A).

forum selection clause is part of an adhesion contract that is not subject to negotiation. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-595 (1991) ("we do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining").[6] Nor can they claim they did not subjectively understand or wish to be bound by terms to which they objectively manifested agreement. (*See* Section III.B below.)

The same presumption of enforceability applies in the context of online "click-through" agreements. *See, e.g., DeJohn v. The .TV Corporation Int'l*, 245 F.Supp. 913, 918-19 (N.D. Ill. 2003) (finding that an online User Agreement was enforceable because the user "expressly indicated that he read, understood, and agreed to those terms when he clicked the box on [the defendant's] website," and the user "always had the option to reject [the defendant's] contract and obtain. . .services elsewhere."); *Forrest v. Verizon Comm'n Inc.*, 805 A.2d 1007, 1010-1011 (D.C. 2002) (enforcing a forum-selection clause in an online User Agreement because "[a] contract is no less a contract simply because it is entered into via a computer."); *Nazaruk v. eBay Inc.*, No. 2:06 CV 242 DAK, 2006 WL 2666429, *3 (D. Utah Sept. 14, 2006).

Moreover, the fact that the actual text of a forum selection clause is provided through a hyperlink is no defense to its enforcement. In *DeJohn*, the plaintiff, DeJohn, sought to register several domain names with the defendant, an Internet domain name registrar. *DeJohn*, 245 F.

[6] The Seventh Circuit has not yet settled "whether state or federal law applies in a dispute over a forum selection clause when the case is dismissed rather than transferred pursuant to 28 U.S.C. § 1404(a)." *Kochert v. Adagen Medical Int'l, Inc.*, 491 F.3d 674, 677 (7th Cir. 2007) (quoting *Muzumdar*, 438 F.3d at 761 n.2). Although it has not decided the issue, the Seventh Circuit has suggested that the law of the jurisdiction whose law governs the rest of the contract in which the forum selection clause appears governs, which here is Virginia. A*bbott Laboratories v. Takeda Pharmaceutical Co. Ltd.*, 476 F.3d 421, 423 (7th Cir. 2007). Virginia law applies the same presumption of enforceability as federal law. *Rice Contracting Co. v. Callas Contractors, Inc.*, No. 1:08cv1163 (LMB), 2009 WL 21597, at *3 (E.D. Va. Jan. 2, 2009) (finding it "irrelevant" whether federal or Virginia law applies when deciding whether to enforce a forum selection clause "because the federal and Virginia standards are substantially the same"); *Corrosion Technology Intl., LLC v. Anticorrosive Industriales LTDA*, No. 1:10-cv-915 (AJT/TCB), 2011 WL 3664575, *2, n.5 (E.D. Va. Aug. 19, 2011) (accord).

Supp. 2d at 915. As the court explained, "[t]he electronic format of the contract required DeJohn to click on a box indicating that he had read, understood, and agreed to the terms of the contract in order to accept its provisions and obtain the registration or reject the provisions and cancel the application." *Id*. at 915-916. The "actual text" of the Services Agreement, which contained a forum selection clause, "was provided through a hyperlink available directly above the box." *Id*. at 916. This incorporation by hyperlink did not deter the court from enforcing the forum selection clause, where "[t]he only logical reading of [DeJohn's] allegations and the complaint as whole is that DeJohn clicked on the click wrap agreement, *which incorporated the [Services] Agreement*." *Id*. at 916, n.2, 921 (emphasis added).

B. Plaintiffs Agreed To The Forum Selection Clause And Cannot Overcome The Presumption Of Enforceability.

There are no grounds here for Plaintiffs to overcome the strong presumption of validity favoring enforcement of the forum selection clause at issue. As discussed above, the process for installing comScore's software *requires* a user to affirmatively acknowledge by clicking that he or she has "read [and] agreed to… the terms and conditions of the Privacy Statement and User License Agreement" *before* the software can be installed. (O'Toole Decl., ¶¶ 4-5). This requirement was in place at the time when Plaintiffs allege they installed comScore's software on March and September of 2010, respectively. *Id*.; (Compl. ¶¶ 67, 70). As such, Plaintiffs could *not* have downloaded the software they are now complaining about *unless* they affirmatively acknowledged that they had "read" and "agreed to" comScore's ULA and the forum selection clause contained therein.[7] (O'Toole Decl., ¶¶ 5-4); (Compl., Exh. A).

[7] Plaintiffs' allegations that comScore's Terms of Service appear "during, and not before the installation process," or that the existence of comScore's data collection software "is only disclosed . . . after the installation process has already begun," (¶¶ 39, 33 (emphasis added)), are straw man arguments. What matters is whether the software will install at all – not whether the process initiates – absent an acknowledgment that the user has read and agreed to the terms and conditions in comScore's ULA. It will not. (O'Toole Decl., ¶¶ 4-5).

This is precisely the type of "click-wrap" agreement that courts have routinely deemed to be enforceable. See *DeJohn*, 245 F. Supp. 2d at 915 (confirming enforceability of online contract that "required DeJohn to click on a box indicating that he had read, understood, and agreed to the terms of the contract" and provided hyperlink to the complete contractual terms); *Specht v. Netscape Comms. Corp.*, 306 F.3d 17, 22 (2d Cir. 2002) (addressing click-wrap agreement that "presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the ... agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked.")

Tellingly, Plaintiffs do not dispute that they went through the normal click-through process to agree to comScore's ULA prior to downloading the comScore software. Nowhere do Plaintiffs allege that they were able to install comScore's software without navigating through comScore's Terms of Service. Indeed, they attach the Terms of Service as an Exhibit to their Complaint.

Under these circumstances, the Court should give little weight to Plaintiffs' bare allegation that "[they] did not agree to comScore's Terms of Service . . ." (Compl. ¶¶ 69, 73).[8] Plaintiffs' conclusory assertion is not supported by any facts and need not be considered by the Court. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (court need not accept the truth of legal conclusions couched as factual allegations); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (court need not consider "labels and conclusions" or "naked assertions devoid of further factual

[8] Plaintiffs' assertion is belied by other allegations in their Complaint. For example, Paragraph 103 alleges that comScore "breached its own Terms of Service and Privacy Policy" by accessing Plaintiffs' computers. Plaintiffs cannot allege that comScore breached the ULA, on the one hand, then allege that they are not parties to the ULA, on the other. Similarly, in Paragraph 105 of the Complaint, Plaintiffs allege that comScore "accessed Plaintiffs' computers, in the course of interstate commerce and/or communication, in excess of the authorization provided by plaintiffs . . ." (Emphasis added). Thus, Plaintiffs admit that they authorized comScore to collect data, which would have required them to make an electronic representation that they "agreed to" comScore's contractual terms. (O'Toole Decl., ¶¶ 4-5).

enhancement").[9] At most, Plaintiffs appear to be claiming that they should not be bound by the ULA because they apparently failed to read it or did not understand it – even though they manifested agreement to it through the click-through process described above. Courts have routinely rejected similar arguments to escape the application of a forum selection clause. See, e.g., *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) (enforcing forum selection clause that was written in German and was not mentioned in the underlying contract because "a party who agrees to terms in writing without understanding or investigating those terms does so at his own peril"); *see also Schwarz v. Sellers Markets, Inc.*, No. 11 C 501, 2011 WL 3921425, at *3-*4 (N.D. Ill. Sept. 7, 2011) (court enforced a forum selection clause that was "buried" in 182 pages of "complex legalese," was "not highlighted and no attention [was] drawn to it," explaining that "a party to a contract has an obligation to read its provisions" and "a person who signs a contract is presumed to know its terms and consents to be bound by them.") (internal quotations and citations omitted); *Montgomery v. Corinthian Colleges, Inc.*, No. 11 C 365, 2011 WL 1118942, at *4 (N.D. Ill. March 25, 2011).

C. The forum selection clause applies to Plaintiffs' claims.

The forum collection clause at issue states, in clear and conspicuous capital letters, that:

> FOR ANY NON-ARBITRAL ACTION OR PROCEEDING **ARISING OUT OF OR RELATED TO** THIS PROGRAM OR THIS AGREEMENT, **SOLE AND EXCLUSIVE** JURISDICTION SHALL RESIDE WITH THE APPROPRIATE STATE COURT LOCATED IN FAIRFAX COUNTY, VIRGINIA OR FEDERAL COURT LOCATES IN ALEXANDRIA, VIRGINIA.

(O'Toole Decl., ¶ 7, Exh. A (emphasis added)).

[9] *Twombly* and *Iqbal* address the pleading standard plaintiffs must meet to survive a motion to dismiss under Rule 12(b)(6). This Court is not constrained to the face of the pleadings as it would be on an Rule 12(b)(6) motion. *DeJohn*, 245 F. Supp. 2d at 916, n. 2. Accordingly, Plaintiffs' conclusory allegations should be subject to even greater scrutiny here.

All of Plaintiffs' claims fall under the scope of the forum selection clause because they all arise out of or relate to comScore's data collection program. Specifically, all of the wrongful conduct alleged in the Complaint relates to: (1) the manner in which comScore's Terms of Service and ULA are displayed to Panelists; (2) the operation of comScore's data collection program; (3) difficulty Plaintiffs allegedly encountered in trying to uninstall comScore's software to cease participation in the program; and (4) the ULA's alleged failure to accurately reflect the breadth of data collected as part of the program. Because all of this conduct arises from comScore's data collection program, and/or the ULA that governs that program, the forum selection clause encompasses Plaintiffs' claims in their entirety.

D. Considerations Of Convenience Favor Enforcement Of The Forum Selection Clause.

While practical considerations have little bearing on the legal enforceability of a forum selection clause, these factors further support enforcement of comScore's ULA. First, the Eastern District of Virginia is a more convenient forum for this dispute considering that comScore's headquarters are located in that district and most, if not all, of the relevant witnesses and documents are located there. (O'Toole Decl., ¶¶ 8-9). Moreover, because this lawsuit purports to be a nationwide class action, any inconvenience Plaintiffs claim could not possibly rise to the level of depriving Plaintiffs of their day in court. *See Paper Exp.*, 972 F.2d at 758 (enforcing forum selection clause requiring litigation to take place in Germany). Likewise, there is no inconvenience to counsel that could warrant overcoming the strong presumption of enforceability. The firm maintains offices in New York, Denver, California, and Florida, and routinely handles litigation in states where it does not appear to maintain offices, including Massachusetts, Pennsylvania, Missouri, and Nevada. (Declaration of Ray Sardo ["Sardo Decl."], ¶¶ 3-5, Exhs. A-D).

In sum, the forum selection clause is valid and enforceable and should be enforced according to its terms. Accordingly, Plaintiffs' Complaint should be dismissed for improper venue so that Plaintiffs can pursue their claims in the forum that they contractually agreed to.

E. Alternatively, This Action Should Be Transferred to The Eastern District Of Virginia Under 28 U.S.C. § 1404(a).

Apart from a motion to dismiss, a forum selection clause may be invoked through a motion to transfer under 28 U.S.C. § 1404(a). "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

The "presence of a forum selection clause" in a contract is a "significant factor that figures centrally in the district court's calculus" of the factors governing motions to transfer under Section 1404(a). *Stewart Org., Inc. v. Ricoh Corp.*, 487 U. S. 22, 29 (1988). Other factors include: "(1) plaintiff's choice of forum; (2) the situs of material events; (3) the relative ease of access to sources of proof; (4) the convenience of the witnesses; and (5) the convenience of the parties of litigating in the respective forums." *Hanley v. Omarc, Inc.*, 6 F. Supp. 2d 770, 774 (N.D. Ill. 1998). Here, the forum selection clause and the balance of the factors strongly support transfer to the Eastern District of Virginia.

First, Plaintiffs' choice of forum is entitled to little weight because Plaintiffs expressly agreed to the forum selection clause, and because they have chosen to bring their claims as a class action. *See Stewart Org., Inc.*, 487 U.S. at 29; *Georgouses v. NaTech Resources, Inc.*, 963 F. Supp. 728, 730 (N.D. Ill. 1997) ("(B)ecause plaintiff alleges a class action, plaintiff's home forum is irrelevant."); *Genden v. Merrill Lynch Pierce Fenner & Smith*, 621 F.Supp. 780, 782 (N.D. Ill. 1985) (the location of the main class representative is not relevant to a Section 1404(a) determination); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (accord). Indeed, Plaintiffs

are precluded from asserting inconvenience as a basis to resist transfer given their agreement to the forum selection clause. *FUL Inc. v. Unified School Dist. No. 204*, 839 F. Supp. 1307, 1311 (N.D. Ill. 1993) (party to forum selection clause has waived the right to assert its own inconvenience as a reason to transfer the case).

Second, all of the relevant events underlying this action occurred in Reston, Virginia. That is where comScore is headquartered, and where comScore's software was developed. (O'Toole Decl., ¶¶ 8-9). It is also the location from which comScore oversees the distribution of its software, and is therefore the situs of the alleged conduct giving rise to Plaintiffs' claims. *Id*. Finally, Reston, Virginia is where comScore drafted its ULA, and where the ULA was allegedly breached. *Id*. Given the above, it is clear that the vast majority of witnesses and documents relevant to this action are located in Reston, Virginia, making transfer to the Eastern District of Virginia appropriate. *See e.g. Hanley*, 6 F. Supp. 2d at 775-77 (transfer to New Jersey was appropriate where negotiations, agreements, employees, and alleged breach were all located or occurred in New Jersey); *Int'l Star Registry of Illinois v. Omnipoint Marketing, LLC*, No. 05 C 6923, 2006 WL 2598056, at *5-6 (N.D. Ill. Sept. 6, 2006) (factor favors transfer where "most evidence for this litigation" and the "situs of material events" is in the target forum); *New Hampshire Ins. Co. v. Green Dragon Trading Co.*, No. 08 C 1326, 2008 WL 2477484, at *7 (N.D. Ill. Jun. 17, 2008).

Third, this action lacks any meaningful connection to the Northern District of Illinois. *See Hanley*, 6 F. Supp. 2d at 775 ("[W]here the plaintiff's chosen forum lacks any significant contact with the underlying cause of action, the plaintiff's chosen forum is entitled to less deference."); *Chicago, R.I. & P.R. Co. v. Igoe*, 220 F.2d 299, 304 (7th Cir. 1955) (grant of writ of mandamus to compel transfer where "there is no controverted question which depends on any

event occurring in the Northern District of Illinois.") While plaintiff Mike Harris allegedly resides in Illinois[10], the fact that he is but one of purportedly "hundreds of thousands, if not millions" of putative class members makes his connection to this forum immaterial.[11] And while plaintiffs' counsel maintains an office in Chicago (among other cities), the convenience or location of counsel is not typically relevant to a transfer under 1404(a). *Los Angeles Memorial Coliseum Comm'n v. NFL*, 89 FRD 497,502-512 (C.D. Cal. 1981), affd, 726 F.2d 1381, 1399-1400 (9th Cir. 1984).

The final factor to be considered is whether the transfer will serve the interest of justice. "The interest of justice component embraces traditional notions of judicial economy, rather than the private interests of litigants and their witnesses." *Hanley*, 6 F. Supp. 2d at 776-77 (citations omitted). "The administration of justice is served more efficiently when the action is litigated in the forum that is closer to the action." *Id*. (citations omitted). Courts may also consider, as part of the interests of justice component, "the speed at which the case will proceed to trial." *Bryant v. ITT Corp.*, 48 F.Supp.2d 829, 835 (N.D. Ill. 1999).

Here, the Eastern District of Virginia is the forum closest to the action and transfer will not result in any prejudicial delay to Plaintiffs. As of September 30, 2010, the median months from filing to trial in the Northern District of Illinois is 28.2 months. Sardo Decl., ¶¶ 6-7, Exhs. E and F. In comparison, as of the same date, the median months from filing to trial in the Eastern District of Virginia is 9.3 months. *Id*. Thus, Plaintiffs will not suffer any prejudicial delay if this action is transferred to the Eastern District of Virginia.

For all of the above reasons, Plaintiffs' action should be transferred to the Eastern District

[10] It is not even clear whether Plaintiff Mike Harris resides in the Northern District of Illinois. He merely alleged that he is a "citizen of the State of Illinois." (Compl. ¶ 20).

[11] The other named plaintiff in this case Jeff Dunstan, claims to be a resident of California. (Compl. ¶ 21). The fact that he chose to litigate his claims in the Northern District of Illinois belies any claims that Plaintiffs will be inconvenienced by having to litigate their claims in the Eastern District of Virginia.

of Virginia under 28 U.S.C. 1404(a) if it is not dismissed outright under Rule 12(b)(3).

F. Plaintiffs' Motion for Expedited Discovery is Not Properly Before the Court

Plaintiffs recently filed a motion for leave to conduct expedited discovery and assert, as grounds for the motion, a purported concern that comScore is causing "immediate and irreversible harm to consumers," and "fearful[ness] that key evidence in the possession of unknown third parties may be destroyed." comScore has filed, concurrently with this motion, an Opposition to Plaintiffs' discovery motion. Here, comScore simply notes that it would be improper to entertain Plaintiffs' discovery motion when this action should not even be before this Court.

IV. CONCLUSION

Plaintiffs entered into a contract with comScore that contains a mandatory Virginia forum selection clause. Plaintiffs' Complaint should be dismissed for improper venue under Rule 12(b)(3) because Plaintiff breached that clause. Alternatively, this action should be transferred to the Eastern District of Virginia in the interest of justice under 28 U.S.C. § 1404(a).

Dated: September 28, 2011

RESPECTFULLY SUBMITTED

COMSCORE, INC.

By: /s/ Leonard E. Hudson
One of Its Attorneys

Of counsel (pro hac vice applications pending):

Michael G. Rhodes, rhodesmg@cooley.com
Whitty Somvichian, wsomvichian@cooley.com
Ray Sardo, rsardo@cooley.com
COOLEY LLP
101 California Street, 5th Floor
San Francisco, CA 94111
Telephone: (415) 693-2000

Local counsel

David Z. Smith (ARDC #6256687)
Leonard E. Hudson (ARDC # 6293044)
REED SMITH LLP
10 South Wacker Drive
Chicago, IL 60606-7507
Telephone: (312) 207-1000
Facsimile: (312) 207-6400

CERTIFICATE OF SERVICE

The undersigned attorney certifies that he or she caused a copy of the foregoing document to be served on counsel listed below via the Court's CM/ECF online filing system this 28th day of September, 2011.

/s/ Leonard E. Hudson
Attorney for Defendant comScore, Inc.

TO:

Steven W. Teppler
William C. Gray
Ari J. Scharg
EDELSON MCGUIRE LLC
350 North LaSalle Street, Suite 1300
Chicago, Illinois 60654
Tel: (312) 589-6370
Fax: (312) 589-6378
steppler@edelson.com
wgray@edelson.com
ascharg@edelson.com

Attorneys for Plaintiff
MIKE HARRIS and the Putative Class