Dunstan et al v. comScore, Inc. Doc. 161

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,	)	Case No. 1:11-5807
v.	)	Hon. Thomas M. Durkin
COMSCORE, INC., a Delaware corporation,	)	Magistrate Judge Kim
Defendant.	)	

PLAINTIFFS' MOTION FOR LEAVE TO FILE THEIR SECOND AMENDED CLASS ACTION COMPLAINT *INSTANTER*

Plaintiffs Mike Harris ("Harris") and Jeff Dunstan ("Dunstan") (collectively, "Plaintiffs"), through their undersigned counsel, respectfully move this Court for leave to file their proposed Second Amended Class Action Complaint ("Second Amended Complaint"), attached hereto as Exhibit 1, *instanter*. Plaintiffs' proposed Second Amended Complaint only updates the proposed Class and Subclass definitions[1] from those in the Original and Amended Complaints (Dkts 1 and 136)—and is consistent with the Class and Subclass Plaintiffs seek to certify by way of their Supplemental Motion for Class Certification. (Dkt. 152.) In support of their motion, Plaintiffs state as follows:

[1] At this juncture, it bears noting that, on January 4, 2013, Defendant comScore, Inc. served Plaintiffs' counsel with a Rule 11 motion for sanctions, contending that certain factual allegations in the Amended Complaint—namely, those relating to root certificates, firewall modifications, and the re-routing of Internet traffic to comScore's servers (*see*, *e.g.*, Am. Compl. at ¶¶ 15 (root certificate), 36(f) (firewall), 8 (traffic re-routing))—lack a factual basis. Plaintiffs disagree with comScore's accusations, have a sound factual basis for each allegation (including, among others, representations made by comScore's own attorneys), and will address comScore's Rule 11 motion in due course before January 25, 2013 (*i.e.*, 21 days after being served with the motion). Here, as stated, the proposed Second Amended Complaint only seeks to update the proposed Class and Subclass definitions, and nothing more.

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I. FACTUAL BACKGROUND

On August 23, 2011, Plaintiffs filed their original Class Action Complaint ("Complaint") against Defendant comScore, Inc. ("comScore"), alleging that it designs, distributes, and deploys data collection software that monitors millions of consumers' computers without their knowledge or knowing consent. (Dkt. 1.) Plaintiffs' pleadings included claims under the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701, *et seq.*, Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. 2510, *et seq.*, Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §§ 1030, *et seq.*, Illinois Consumer Fraud and Deceptive Practices Act ("ICFA"), 815 ILCS 505/1 *et seq.*, and for unjust enrichment. (*Id.*)

After months of class discovery, Plaintiffs orally moved the Court to amend their Complaint for the purposes of (1) settling a discovery dispute and (2) streamlining the claims asserted on behalf of the Class as the litigation neared class certification. (*See* Transcript of October 25, 2012 Proceedings, a true and accurate copy of which is attached here as Exhibit 2.) The Court granted Plaintiffs' oral motion on October 25, 2012, and Plaintiffs filed their First Amended Complaint that same day. (Dkt. 136.) The First Amended Complaint was substantially identical to the original Complaint, except that the ICFA claim was removed (consistent with Plaintiffs' counsel's statements on the record as to what was going to be amended) and a few edits were made to the factual assertions in light of class discovery. (*Cf,* Dkt. Nos 1, 136.)

Shortly thereafter, the Parties timely completed the remaining steps of class discovery by the scheduled cut-off dates, with comScore producing its Rule 26(a)(2) expert reports on November 30, 2012 and Plaintiffs deposing both of comScore's experts by December 14, 2012. (Dkt. 144.) With class discovery having been completed, Plaintiffs turned to drafting their Supplemental Motion for Class Certification. Through that Motion and supporting Memorandum

of Law, Plaintiffs seek certification of the following Class and Subclass:

> **Class:** All individuals who have had, at any time since 2005, downloaded and installed comScore's tracking software onto their computers via one of comScore's third party bundling partners.
>
> **Subclass:** All Class members not presented with a functional hyperlink to an end user license agreement ("ULA") before installing comScore's software onto their computers.

(*See* Mem. in Support of Pls' Suppl. Mot. for Class Cert. at 3 (Dkt. 154); Ex. 1 at ¶ 71.)

The only difference between the Class definition proposed above and the ones proposed in the Original and Amended Complaints is that the above Class definition is narrower. (*See* Dkt. 136 at ¶ 71 (seeking certification on behalf of "[a]ll individuals and entities in the United States who have had comScore's Surveillance Software installed on their computer(s).").) Specifically, the above definition incorporates a timeframe ("after 2005")[2] and clarifies that this case concerns comScore's distribution of its tracking software through its third party bundling partners, as was commonly experienced by each named Plaintiff. (*See id.* at ¶¶ 32-33 (describing the "devious method that comScore uses to induce consumers to install its [software] . . . through its third-party application provider program"), 64-70 (describing how Plaintiffs downloaded comScore's software through third party bundling partners).) As such, the proposed Class definition excludes consumers who may have had comScore's tracking software downloaded and installed onto their computers through "[o]nline respondent acquisition . . . [using] sweepstakes enrollments and prizes in exchange for membership in its 'program.'" (*Id.* at ¶ 32.)

Likewise, the proposed Subclass definition takes allegations prevalent throughout this case—*i.e.*, that some Class members were not presented with "a functioning link to [comScore's

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[2] As explained in the Supplemental Class Certification Motion and related briefing, discovery has shown that after 2005 comScore's tracking software no longer utilized "proxy servers" to collect information from consumers. (*See* Mem. in Support of Pls' Suppl. Mot. for Class Cert.at 4-5, n. 7 (Dkt. 154).) The proposed Class definition embraces this fact as a common point of clarity amongst the entirety of the proposed Class.

software's] full terms"—and asserts them on behalf of a subset of Class members. (*See id.* at ¶ 40; *see also* Exhibit A to Compl. (Dkt. 1-1) and Exhibit A to First Am. Compl. (Dkt. 136-1).) Here, discovery has shown that (according to comScore) only a subset of Class members—Harris included—was not presented with a hyperlink to comScore's software's user license agreement (the "ULA"). (*See* Mem. in Support of Pls' Suppl. Mot. for Class Cert. at 3, n. 6 and 8, n. 14 (Dkt. 154).) That fact was recently confirmed in the report and deposition of one of comScore's proposed Rule 26(a)(2) experts, Collin O'Malley. (*See* Def. Expert Report of Collin O'Malley at 10, n. 6; Dep. Tr. of Collin O'Malley at 152:6-13.)[3]

In summary, the proposed Class and Subclass definitions simply reflect—and represent a refinement of—the facts learned and theories developed over the discovery process. The Court should grant Plaintiffs leave to file their proposed Second Amended Complaint.

II. ARGUMENT

Federal Rule of Civil Procedure 15(a) provides that a court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Denials of motions for leave to file an amended complaint "are disfavored" in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or where the amendment would be futile." *Gevas v. Mitchell*, No. 11-2740, 2012 WL 3554085, at *4 (7th Cir. Aug. 20, 2012) (quoting *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010) and citing *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 432 (7th Cir. 2009)); *Arreola v. Godinez*, 546 F.3d 788, 792 (7th Cir. 2008); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). Absent

[3] The Rule 26(a)(2) report and excerpts from the deposition transcript of Collin O'Malley are attached as exhibits to the Edelson Declaration submitted in conjunction with the Memorandum in Support of Plaintiffs' Supplemental Motion for Class Certification as Exhibits D and F, respectively. (Dkt. Nos 156-4, 156-6.)

such factors, the Supreme Court and the Seventh Circuit have adopted a long-standing, and liberal, policy of "freely giving" leave to amend complaints. *See Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir. 1977); *see also Bausch*, 630 F.3d at 562.

Here, and as explained below, none of these cautionary factors are present. The proposed amendment is brought in good faith at an appropriate time (*i.e.*, in conjunction with a motion for class certification and just after the close of class discovery), will not prejudice comScore in any way (and in fact narrows the issues), and is not futile. Accordingly, this Court should grant Plaintiffs leave to file their Second Amended Complaint.

A. This Motion was filed without undue delay.

Relevant to evaluating whether there was undue delay in filing an amendment is whether the party seeking the amendment knew or should have known the facts upon which the proposed amendment is based, but failed to assert them in a timely fashion. *In re Ameritech Corp.*, 188 F.R.D. 280, 284 (N.D. Ill. 1999). As stated above, Plaintiffs' minor proposed amendment comes only after the recent completion of class discovery and relies on information learned in class discovery. Indeed, there would have been little point to Plaintiffs proposing amended class definitions before the end of class discovery, which passed after the December 14, 2012 deadline for Plaintiffs to depose comScore's Rule 26(a)(2) witnesses. (Dkt. 144.) The fact that, as discussed above, comScore's own Rule 26(a)(2) expert provided additional testimony germane to the Class and Subclass definitions proposed in the Supplemental Motion for Class Certification proves this point. *Supra*, § I.

B. The Motion—which simply refines the proposed Class and Subclass definitions—is not brought in bad faith or for the purposes of delay.

Plaintiffs seek leave to amend solely to revise their class definition in light of the complete body of class discovery obtained in this case—hardly a manifestation of bad faith or

dilatory motives. Indeed, it is an unsettled question in this Circuit as to whether a named representative (like the Plaintiffs) must even move for leave to amend his or her pleadings when seeking certification using an altered class definition. *See Savanna Group, Inc. v. Trynex, Inc.*, No. 10-CV-7995, 2013 WL 66181, at *2-3 (N.D. Ill. Jan. 4, 2013) (observing that "the Seventh Circuit has not addressed the scope of the district court's discretion to modify the class definition at the class certification stage," before holding that "the Plaintiff's change of class definition [without seeking leave to amend their pleadings] will not forestall the Court's class certification inquiry") (quoting *Schorsh v. Hewlett–Packard,* 417 F.3d 748 (7th Cir. 2005) (noting that "[l]itigants and judges regularly modify class definitions" in the context of deciding whether an amendment expanding the class definition commences a new action for purposes of the Class Action Fairness Act)).

Here, the proposed Second Amended Complaint will only clarify the issues (and, in turn, streamline these proceedings) for both the Parties and the Court, whereas any differences among the class definitions in the Amended Complaint and Plaintiffs' Supplemental Motion for Class Certification will only serve as a procedural distraction. Thus, Plaintiffs' request to amend under these circumstances speaks to their motivations.

C. The proposed amendment—which narrows the overall Class without changing any factual allegations—causes no prejudice to comScore.

The filing of the proposed Second Amended Complaint will not prejudice comScore in any way. As explained above, the changes to the proposed definitions only clarify and narrow the proposed Class and Subclass. The proposed Second Amended Complaint does not change Plaintiffs' theory of their case in any prejudicial way, relies upon the same factual allegations as before, and is, by all accounts, in line with comScore's own understanding of this case. To this latter point, comScore's Rule 26(a)(2) witness, Mr. Colin O'Malley, focused his expert report on

a single "brand" of comScore's tracking software (*i.e.*, RelevantKnowledge), which is *only* available through the third party bundling process. (*See* Excerpts from the Deposition of comScore's Rule 30(b)(6) designee, Michael Brown, at 106:17-24.)[4] When asked why he chose RelevantKnowledge as the subject of his case study, Mr. O'Malley replied that "[i]t was [his] understanding that RelevantKnowledge and the behavior of RelevantKnowledge and disclosures around RelevantKnowledge were the subject of the complaint," an understanding he received from comScore's counsel. (*See* Deposition Transcript of Colin O'Malley at 84:24-85-12 (attached as Exhibit F to the Edelson Declaration submitted in conjunction with the Plaintiffs' Memorandum in Support of their Supplemental Motion for Class Certification (Dkt. 156-6)).) Likewise, and relevant to the proposed Subclass, comScore itself submitted evidence in this case showing that "through investigation, comScore has learned that, for a short period of time during the first half of 2010, one of comScore's [third party bundling] partners employed a Terms of Service dialog box that failed to include a functioning hyperlink to the full ULA." (Declaration of John O'Toole in Support of comScore's Motion to Dismiss at ¶ 6 (Dkt. 14).)

In short, the proposed amendments are in line with both Parties' understanding of the case and will not—in any way—prejudice comScore as it forms its response to Plaintiffs' Supplemental Motion for Class Certification. *See Chapman v. Wagener Equities, Inc.*, No.09 C 07299, 2012 WL 6214597, at *6 (N.D. Ill. Dec. 13, 2012) ("It is difficult to see how a more specific and tailored class definition will prejudice the defendants, particularly where the Court may have been compelled, at a potentially later date, to make modifications to the class definition anyway."); *Savanna Group*, 2013 WL 66181, at *3 (noting that even though plaintiff changed its class definition in its class certification motion, "[d]efendant is not prejudiced by the

[4] The cited excerpt from the deposition transcript of Mr. Brown is attached as Exhibit A to the Declaration of Jay Edelson submitted in conjunction with Plaintiffs' Memorandum in Support of their Supplemental Motion for Class Certification. (*See* Dkt. 156-1.)

timing of the change here and has had ample time to respond to the modified proposed class.”).

D. The amendment is not futile.

Plaintiffs seek leave to file a Second Amended Complaint to amend the class definition, a procedure quite common in class actions. *See Chapman*, 2012 WL 6214597, at *5 (noting that changes to class definitions are “often contemplated by the court on a motion for class certification”). The proposed amendment will only save the Parties—and the Court—time and energy in the long run and is clearly not futile under the law. *See id.* at *6.

WHEREFORE, Plaintiffs Mike Harris and Jeff Dunstan, respectfully request that this Court enter an Order (i) granting their Motion for Leave to File their Second Amended Class Action Complaint, (ii) permitting Plaintiffs to file their proposed Second Amended Class Action Complaint, attached as Exhibit 1, *instanter*, and (iii) granting such other and further relief as the Court deems equitable and just.

Dated: January 16, 2013

Respectfully submitted,

MIKE HARRIS AND JEFF DUNSTAN,
INDIVIDUALLY AND ON BEHALF OF A CLASS OF
SIMILARLY SITUATED INDIVIDUALS,

By: /s/ Benjamin S. Thomassen
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CERTIFICATE OF SERVICE

I, Benjamin S. Thomassen, an attorney, certify that on January 16, 2013, I served the above and foregoing ***Plaintiffs' Motion for Leave to File their Second Amended Class Action Complaint Instanter***, by causing true and accurate copies of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

/s/ Benjamin S. Thomassen