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 Chief Judge Holderman Magistrate Judge Kim

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

PARTIALLY FILED UNDER SEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Defendant comScore, Inc. ("comScore") respectfully submits this opposition to the class certification motion filed by Plaintiffs, Mike Harris ("Harris") and Jeff Dunstan ("Dunstan").

PRELIMINARY STATEMENT

It is undisputed that every person who downloaded comScore's software was presented with comScore's Terms of Service; clicked "Accept" in response to the Terms of Service, acknowledging that he or she had read and agreed to the terms and conditions of the Privacy Statement and the User License Agreement (as well as agreed to obtain the consent from anyone else using the computer); and was informed of the types of data collected (including "online browsing and purchasing behavior," "Internet usage," "demographic information," and "name and address"), with whom the aggregated information is shared (comScore's "clients"), and how the information is used ("to understand Internet trends and patterns," "other market research purposes," and to understand "household demographics").

Plaintiffs Mike Harris and Jeff Dunstan nonetheless ask this Court to certify a class of individuals who they allege were subjected by comScore to unauthorized monitoring of their computer usage. Their claims lack any legal or factual merit, but even apart from the defects in the substance of their allegations, the case is particularly unsuited for class treatment. Every person who wanted to recover under their theories of liability would have to establish myriad individualized elements and would be subject to unique affirmative defenses. Did the individual actually download comScore's software? What monitoring actually occurred that the individual claims exceeded the granted consent? What actual damages, if any, are claimed by the individual as a result of the allegedly unconsented monitoring? And the list goes on.

The individual factual questions demonstrate the individual issues that would exist with respect to each class member's claims (starting with whether the alleged claimant is actually a

member of the class). Even if the Court were to focus only on the named Plaintiffs' claims, it is clear that the questions surrounding their claims are not amenable to class-wide resolution.

The Court should also be aware of specific, disqualifying problems affecting the claims of these two Plaintiffs. Jeff Dunstan has no memory of downloading comScore's software; took actions suggesting that in fact it was his wife, and not Dunstan, who had downloaded the software and accepted the terms of use; and had on his computer a remarkable collection of viruses and malware that posed a high risk of incapacitating his computer. Mike Harris does not show up in comScore's records as having ever downloaded the software; claims to have "thrown away" the computer on to which the software allegedly was downloaded, rendering verification of his claims impossible; and had an entry of "zero" downloads in his profile on the site from which he insists he downloaded comScore's software. These serious and idiosyncratic issues would be central at any trial of Dunstan and Harris's claims. It is a near certainty that similarly atypical issues would arise in the trial of other individuals' cases.

For all of these reasons and the additional reasons set forth below, Plaintiffs' motion for class certification should be denied.

STATEMENT OF FACTS

I. COMSCORE

comScore is a leading Internet company that researches online behavior, particularly with respect to commercial behavior. comScore's data, culled from a qualifying group of individuals who provide data to comScore ("panelists"), is used by over 2,000 companies to inform their advertising and marketing decisions. (Ex. A, comScore Fact Sheet, available at http://www.comscore.com/About_comScore/comScore_Fact_Sheet, accessed Feb. 25, 2013.)[1]

[1] All cites to Exhibits herein refer to the exhibits attached to the Feb. 26, 2013 Declaration of Robyn M. Bowland, filed contemporaneously with this motion.

None of the information comScore provides its customers contains any individualized or personalized information; instead comScore provides a scientifically-selected set of aggregated data. (Ex. B, Nov. 30, 2012 Report of C. O'Malley ("O'Malley Rpt.") at p. 5.)

comScore obtains the data it uses from several sources. For example, a panelist may sign

Finally, comScore works with third parties to offer comScore's software along with the third party's software. (*Id.* at 110:17-23.) This practice is standard in the Internet industry. (Ex. D, Nov. 30, 2012 Report of R. Tamassia ("Tamassia Rpt.") at p. 3.) Typically, these panelists download a Relevant Knowledge-branded version of comScore's software.[2]

When a prospective panelist chooses to download software offered by one of comScore's third-party partners in conjunction with comScore's software, the prospective panelist agrees to two separate clickwrap[3] agreements—one for the third-party partner's software and one for comScore's software. (Ex. B, Nov. 30, 2012 O'Malley Rpt. at pp. 9-10.) The disclosure relating to comScore's RelevantKnowledge panel on its clickwrap agreement states the following:

---

[2]

[3] A clickwrap agreement is a common type of software license agreement. The user is presented a disclosure or link to terms, and is typically required to agree to the terms before the download can begin. Courts routinely uphold clickwrap agreements as valid. *See Sherman v. AT&T, Inc.*, No. 11 C 5857, 2012 WL 1021823, at *3 (N.D. Ill. Mar. 26, 2012) (holding clickwrap agreement valid); *see also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (discussing validity of shrinkwrap agreements).

> In order to provide this free download, RelevantKnowledge software, provided by TMRG, Inc., a comScore, Inc. company, is included in this download. 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, aggregated, and once anonymized, used to generate market reports which our clients use to understand Internet trends and patterns and other market research purposes. The information which is monitored and collected includes internet usage information, basic demographic information, certain hardware, software, computer configuration and application usage information about the computer on which you install RelevantKnowledge. We may use the information that we monitor, such as name and address, to better understand your household demographics; for example, we may combine the information that you provide us with additional information from consumer data brokers and other data sources in accordance with our privacy policy. We make commercially viable efforts to automatically filter confidential personally identifiable information and to purge our databases of such information about our panelists when inadvertently collected. By clicking Accept, 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.

(Ex. D, Tamassia Rpt. at App. C.) The disclosure also typically presents a link to comScore's User License Agreement (ULA), which is also available online on each brand's webpage, including www.relevantknowledge.com and www.permissionresearch.com. (*Id.*) In relevant part, the ULA states the following:

> Computer hardware, software, and other configuration information: Our application may collect general hardware, software, computer configuration and application usage information about the computer on which you install our application, including such data as the speed of the computer processor, its memory capacities and Internet connection speed. In addition, our application may report on devices connected to your computer and your network, such as the type of printer or router you may be using.
> ...
> Internet usage information: Once you install our application, it monitors all of the Internet behavior that occurs on the computer on which you install the application, including both your normal web browsing and the activity that you undertake during secure sessions, such as filling a shopping basket, completing an application form or checking your online accounts. Our application may also collect information regarding the cookies that exist on your computer. We may use the information that we monitor, such as name and address, for the purpose of better understanding your household demographics; however we make

> commercially viable efforts to automatically filter confidential personally identifiable information such as UserID, password, credit card numbers, and account numbers. Inadvertently, we may collect such information about our panelists; and when this happens, we make commercially viable efforts to purge our database of such information.
>
> Our application will review the content of all web pages you visit and select e-mail header information from web based emails. We may provide our client with information allowing them to verify the context and location in which their content was displayed on individual web pages. In addition to information collected through our application, we may also collect data about your Internet use from third-parties, including search engines, email providers, social networks and other application service providers whose Internet sites you visit.
> ...
> The software will collect information on the types of applications you use and general statistics on how you use them. So, for instance, you may open a word processor, and our software would collect information on what type of word processing software that you are using, and how long the word processor was open, but it would not have any knowledge of what was typed in the word processor.

(Ex. D, Nov. 30, 2012 Tamassia Rpt. at App. B (ULA).)

In order to continue with the installation of comScore's software, a prospective panelist must click the "Accept" button when presented with the comScore disclosure. The "Accept" button is not pre-selected (*i.e.*, the prospective panelist must actively position her pointer over the "Accept" button to agree to comScore's ULA). (Ex. B, Nov. 30, 2012 O'Malley Rpt. at p. 10.) The ULA governs the relationship between comScore and its panelists. (Ex. C, M. Brown Tr. at 134:6-18.) If the consumer chooses "Decline," comScore's software is not installed, but the consumer's download of the partner's software (in many cases) is not affected.

Once a panelist downloads comScore's Windows-based software, the software announces its presence on the computer in several conspicuous ways.[4] First, a Relevant Knowledge icon is shown in the system tray. (Ex. D, Tamassia Rpt. at p. 4; Ex. C, M. Brown Tr. at 222:17-223:16.) Additionally, Relevant Knowledge is listed under the "All Programs" menu in Windows and in the Add/Remove Programs tool. (Ex. B, O'Malley Rpt. at p. 12-13.)

If a Windows-based panelist, after agreeing to the ULA and installing comScore's software on her system, decides to no longer participate as a panelist, she may uninstall comScore's software using the Add/Remove function. (Ex. D, Tamassia Rpt. at p. 4.) The Add/Remove function is an application within the settings of a computer that allows a user to launch the uninstallation program provided by the application to be uninstalled. All applications for Windows are expected to include such an uninstallation program, which will then be listed in the Add/Remove application. (Ex. G, R. Tamassia Tr. at 46:21-47:17.)[6] A panelist who wishes to remove comScore's software may also obtain instructions on how to do so from comScore. (Ex. D, Tamassia Rpt. at App. B (ULA).)

---

[4] Plaintiff's claim that comScore's panelists are unaware of their participation is provided without any factual support. (Dkt. No. 154 at n.3.) And rightly so as it is simply untrue. In the last three years alone, comScore's panelists have claimed over 113,000 prizes, valued at close to $2 million, as part of comScore's rewards program. (Ex. R, M. Brown Decl. at ¶9.) Under the rewards program, panelists are provided points for various tasks (such as taking a survey) that can then be traded in for prizes from the reward catalogue. (*Id.* at 8.) Over the same time period, comScore panelists have converted over 2.5 million "tokens," which are incentives that can be redeemed for reward points or other prizes. (*Id.* at 10.) Neither the tokens nor the reward points can be redeemed automatically. In both cases, the panelists must take an active step to claim a prize, and thus this is not something that can be accomplished by someone who is "unaware" of his or her participation. (*Id.* at 11.) The programs described above are not even an exclusive list of the incentives provided to panelists, which would also include sweepstakes and other programs offered for unique events. (*Id.* at 12.)

[5] Similar notifications were provided to Mac-based panelists, including adding a "menu extra" to the panelist's desktop. (*See* Ex. P, M. Harris Tr. at 69:17-24.)

[6] An uninstall application was provided to Mac-based users as well. (*See* Ex. P, M. Harris Tr. at 98:18-100:9; Ex. O, Harris's Resp. to Interrog. No. 6.)

Currently, comScore's software for computers supports only Windows-based operating systems. (*See* Ex. H, comScore's Second Suppl. Resp. to Interrog. ("2d Suppl. Resp.") No. 17.) For a short period of time, comScore offered a developmental Mac-based version of its software. Although this software was offered to the public, none of the data collected was used in any of comScore's commercial products. (Ex. I, comScore's Resp. to Interrog. No. 17; Ex. J, comScore's Fourth Suppl. Resp. to Interrog. No. 17.

As disclosed in the disclosure and ULA, comScore collects data regarding a panelist's Internet behavior as well as information about the panelist's computer itself. (Ex. D, Tamassia Rpt. at App. B (ULA).) comScore's software sends reports to comScore's servers from the panelist's computer regarding such activity—comScore does not intercept or otherwise interfere with communications between a panelist's computer and a third party. (Ex. C, M. Brown Tr. at 193:21-195:16; Ex. K, D. Waldhalm Tr. at 111:14-112:12.)

Additionally, contrary to Plaintiffs' "Statement of Facts," comScore's software does not collect "the names of every file on a user's computer." (Dkt. No. 154 at 4.)

comScore also does not collect "everything a user enters into a web browser." (Dkt. No. 154 at 4.)

comScore goes to great lengths to protect panelists' sensitive personally identifiable information. For example, comScore has developed a state-of-the-art "fuzzification" process to

obscure sensitive personal information, such as Social Security numbers, credit card numbers, and passwords, *before* it leaves the panelist's computer. (Ex. D, Tamassia Rpt. at p. 5.) To accomplish this, comScore uses "regular expressions," a common computational technique that searches for text patterns associated with sensitive data. (*Id.*) Once comScore's software identifies sensitive information, it replaces some data with zeros or x's and cryptographically hashes other data. (Ex. L, Y. Bigbee Tr. at 58:14-59:22.) For example, Social Security numbers are completely zeroed or x'd out, the last eight or nine digits of credit card numbers are also zeroed or x'd out,[7] and passwords are cryptographically hashed. (Ex. D, Tamassia Rpt. at p. 5.) Again, data goes through the fuzzification process *before* it leaves a panelist's computer.

This potential for inadvertently collecting sensitive data is disclosed to panelists in the ULA: "Inadvertently, we may collect [confidential personally identifiable information] about our panelists; and when this happens, we make commercially viable efforts to purge our database of such information." (Ex. D, Tamassia Rpt. at App. B. (ULA).) As explained in the ULA, comScore sifts through the data collected by comScore's servers and manually obfuscates any sensitive data that comScore's software inadvertently collected. (Ex. D, Tamassia Rpt. at p. 5.) The results of these efforts are used to improve comScore's fuzzification process. (*Id.*)

comScore also validates and improves its fuzzification process through two additional methods. First, before any software updates or patches are pushed to panelists, comScore runs

[7] The first seven digits of credit card numbers identify the credit card company and bank associated with the card, and therefore are not unique to individual panelists. comScore collects such data to gain an understanding of which types of credit cards its panelists use online. (Ex. G, R. Tamassia Tr. at 53:19-54:3; 54:18-55:15.)

the new code through a comprehensive list of quality control checks, including running the new code on secure websites. (Ex. N, M. Chand Tr. at 25:16-26:13; Ex. L, Y. Bigbee Tr. at 64:20-65:13.) Additionally, comScore employs a team of "Mystery Shoppers" who input sensitive information into various websites to determine whether the data is being properly fuzzified. (Ex. L, Y. Bigbee Tr. at 64:20-65:13.) When it is determined that data is not being properly fuzzified, the information regarding the data and website are sent to comScore's programmers so that they can address the issue. (Ex. N, M. Chand Tr. at 25:16-26:13.)

II. THE NAMED PLAINTIFFS

A. Mike Harris

Plaintiff Mike Harris claims to have downloaded the developmental Mac-based version of comScore's software in or around March 2010, although he does not recall downloading the third-party software offered with comScore's software or reviewing comScore's Terms of Service. (Ex. O, Harris Resp. to Interrog. No. 6; Ex. P, M. Harris Tr. at 85:24-86:25; 91:2-9; 95:16-96:6.) comScore's software ran on Mr. Harris's computer for less than a day because he "noticed it immediately and tried to remove it." (Ex. P, M. Harris Tr. at 70:22-71:14; 83:14-16; 98:18-99:15; 103:24-104:10.) Mr. Harris says that he no longer has the computer he claims he used to download the software, and he says that he has no idea where it is because he "had thrown it away." (*Id.* at 43:19-44:4.)

Although Mr. Harris claims to have downloaded comScore's software from the website macupdate.com, his profile on that site indicates that he never downloaded anything. (Ex. Q, M. Harris Dep. Ex. 6; Ex. P, M. Harris Tr. at 66:11-67:10; 71:15-18.) comScore is unable to locate any data or other indication that Mr. Harris ever downloaded comScore's software. (Ex. R,

Brown Decl. at ¶ 4.) Mr. Harris admits that there is no independent way to verify that he in fact downloaded comScore's software. (Ex. P, M. Harris Tr. at 114:18-115:4.)

Mr. Harris also admits that his computer was experiencing "pretty significant" input-output errors before he purportedly downloaded comScore's software, and says that his hard drive "gave up the ghost" shortly after he downloaded comScore's software. (Ex. P, M. Harris Tr. at 48:24-49:4; 109:12-25.) Mr. Harris purportedly used comScore's software uninstaller to remove the program. (Ex. O, Harris's Resp. to Interrog. No. 6.) Mr. Harris does not contend that comScore's software caused his hard drive to malfunction. (*See* Ex. P, M. Harris Tr. at 46:7-18; 48:24-49:18 (Harris's computer had been acting up for a while).)

B. Jeff Dunstan

Someone purportedly downloaded a Windows-based version of comScore's software onto Plaintiff Jeff Dunstan's computer in or around September of 2010. (Ex. S, Dunstan's Resp. to Interrog. No. 6.) Mr. Dunstan claims that comScore's software ran on his computer for one day and that during that time his computer "started locking up" and his access to the Internet was "intermittent." (*Id.*; Ex. T, Dunstan's Suppl. Resp. to Interrog. No. 6.) Dunstan claims that "Relevant Knowledge," the name of the comScore software, appeared in his Add or Remove Programs tool, but that he chose not to use that tool to remove comScore's software. (Ex. S, Dunstan's Resp. to Interrog. No. 6.) Instead, Dunstan claims he acquired and used a program called "PC Tools Spyware Doctor" to remove comScore's software. (*Id.*)

Mr. Dunstan's wife also had access to his computer at the time of the download. (Ex. V, J. Dunstan Tr. at 26:7-18.) Dunstan has no recollection whatsoever of personally downloading

the photo cropping program bundled with comScore software and admitted that after his computer started having problems he went to his wife and told her not to use his computer any more. (*Id.* at 26:7-18; 37:11-18.)

LEGAL STANDARD

Plaintiffs seek class certification under Rule 23(b)(3) and therefore bear the burden of satisfying the requirements of that provision, as well as the threshold requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation. *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 596 (7th Cir. 1993); *see also Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006) ("[I]t is the plaintiff's burden to prove the class should be certified[.]"). Courts must exercise caution before certifying a class. *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 746 (7th Cir. 2008). Indeed, certification is proper only if the trial court is satisfied after a "rigorous analysis" that the pre-requisites of Rule 23 have been satisfied. *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "Failure to meet any one of the Rule's requirements precludes class certification." *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008).

In deciding a class certification motion, a court need not accept all of the plaintiffs' allegations as true. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."). Instead, before deciding whether to allow a case to proceed as a class action, the court "should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 676. As the Supreme Court has explained, it may be necessary for the court to probe behind the pleadings before coming to rest on the certification issue. *Dukes*, 131 S. Ct. at 2551; *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("[A]ctual, not presumed, conformance with Rule

23(a) remains . . . indispensable")). Therefore, the Rule 23 factors must be addressed through the findings, even if these considerations overlap with the merits of the case. *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010). "Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence." *Reed v. Advocate Health Care*, 268 F.R.D. 573, 578 (N.D. Ill. 2009).

ARGUMENT

I. THE PROPOSED CLASS ACTION FAILS TO SATISFY RULE 23(a)'s COMMONALITY AND RULE 23(b)(3)'S PREDOMINANCE REQUIREMENTS.

A. Rule 23(a)(2): Plaintiffs Have Not Met Their Burden Of Showing The Existence Of Common Issues Of Fact Or Law.

To satisfy the commonality requirement, plaintiffs must show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Superficial common questions are not enough. *Jamie S. v. Milwaukee Pub. Schs.*, 688 F.3d 481, 497 (7th Cir. 2012) (citing *Dukes*, 131 S. Ct. at 2551). Instead, the plaintiff must demonstrate that the class members have suffered the same injury and that their claims depend upon a contention "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. Specifically, "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (emphasis in original). Dissimilarities within the proposed class can preclude classwide resolution. *See id.*; *see also Groussman v. Motorola, Inc.*, No. 10 C 911, 2011 WL 5554030, at *3-4 (N.D. Ill. Nov. 15, 2011) (holding that plaintiffs failed to satisfy the commonality requirement where the relevant facts for each class member varied widely and the assessment of damages would require individualized analyses).

Plaintiffs stretch to find issues that they might label "common," but none satisfies the governing legal standard. They offer up:

- "Is comScore a party to the ULA and, if not, does it have any third party rights under it?"
- "Does the process for downloading and installing OSSProxy, which does not lend itself to securing knowing consent, render the ULA unenforceable?"; and
- "Assuming comScore can enforce the ULA, does OSSProxy's data collection violate its terms?"

(Dkt. No. 154 at pp. 21, 23.) Among other defects, each question overlooks the fact, discussed in greater detail below, that consent—even as characterized by the Plaintiffs—is inherently an individual, not a common, question. Moreover, to the extent that Plaintiffs are suggesting that a clickthrough method for obtaining consent to the ULA is improper, they are clearly incorrect. *See Sherman*, 2012 WL 1021823, at *3 (holding that plaintiff assented to terms when he activated Internet service online by clicking a box corresponding to hyperlinked terms); *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 791 (N.D. Ill. 2011) (stating "[b]ecause clickwrap agreements require affirmative action on the part of the user to manifest assent, courts regularly uphold their validity when challenged"); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 122 (Ill. App. Ct. 2005) (upholding arbitration agreement contained in hyperlinked terms of service that did not require purchasers to affirmatively accept terms); *DeJohn v. The .TV Corp. Int'l*, 245 F. Supp. 2d 913, 918-20 (N.D. Ill. 2003) (finding clickwrap agreement valid and holding that "failure to read a contract is not a get out of jail free card").[8] Indeed, such agreements are essential to Internet commerce. Well-known companies such as Microsoft, Adobe, Reuters, the BBC, Chase, Nickelodeon, Viacom, Safeway, Apple, Google, and the United States government

[8] *See also Register.com v. Verio, Inc.*, 356 F.3d 393, 403-04 (2d Cir. 2004) (granting preliminary injunction and holding company was likely to prevail on its claim that a browsewrap agreement was enforceable); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-49 (7th Cir. 1997) (upholding terms and conditions placed in box with computer not provided when the plaintiff ordered the computer telephonically); *ProCD*, 86 F.3d at 1452 (finding software shrinkwrap license valid).

all use various clickwrap and browsewrap user agreements. (Ex. B, O'Malley Rpt. at pp. 15-32.) As noted above, courts considering certification can and should take into account the facial invalidity of plaintiffs' legal theories such as these.

In any event, the answers to these questions will not advance the litigation or decide any person's claim. The question concerning whether comScore (rather than comScore's subsidiary) is the true party to the ULA is a complete red herring. The ULA tells users about the monitoring that will take place, and there is no basis for any contention that the validity of consent (across the entire class, no less) turns on the name of the particular corporate entity involved. And even if it did matter, comScore is plainly a party to the ULA. *Knickman v. Midland Risk Servs.-Ill., Inc.*, 700 N.E.2d 458, 461-62 (Ill. App. Ct. 1998); *see also Caligiuri v. First Colony Life Ins. Co.*, 742 N.E.2d 750, 756 (Ill. App. Ct. 2000) (holding a subsidiary can be an agent of its parent).

Plaintiffs' second suggested question improperly assumes an answer (". . . which does not lend itself to securing knowing consent . . ."). Any assertion that a person did not adequately consent due to the way that comScore obtains consent would not be a common issue. Different users will have different levels of understanding, and in any event, "[c]onsent under [the Electronic Consumer Privacy Act ("ECPA")] need not be explicit, it can also be implied." *Shefts v. Petrakis*, 758 F. Supp. 2d 620, 630 (C.D. Ill. 2010). "Implied consent is 'consent in fact' which is inferred from surrounding circumstances indicating that the party *knowingly* agreed to the surveillance." *Id.* (emphasis in original). "While the Seventh Circuit has not had much occasion to discuss the implied consent exception to the ECPA, its applicability has been found in other circuits to hinge on whether the plaintiff had notice of the fact that his communications would be monitored." *Id.* at 631. This is a subjective determination, and in a case such as this, involving a multitude of absent class members with varying levels of technical sophistication, the

Court would have to conduct mini-trials on each class member's understanding of comScore's disclosures.[9]

Plaintiffs' final proffered question—did the monitoring exceed the scope of consent—is quintessentially individualized. Even if the Court could determine in one fell swoop the scope of all class members' express and implied consent, the Court could not determine that comScore's software exceeded those terms because individuals use their computers in different ways.[10] For example, the fact that the software allegedly notes the contents of iTunes playlists does not mean that all panelists' consent has been exceeded in that regard, because not all panelists have iTunes on their computer. To the extent that Plaintiffs rely on the few instances in which comScore unknowingly collected sensitive information that would typically be fuzzified, the Court would need to engage in a series of mini-trials to determine whether a particular panelist input sensitive data while visiting a particular website during a particular timeframe.

Plaintiffs' "common" questions, therefore, are anything but. In essence, even if Plaintiffs' view of the world were adopted, and the validity of the ULA were subject to class-wide determination, there are only two paths the case could take:

- Path 1: The ULA is valid, and comScore has obtained consent from panelists. Presumably, the next step would be to cull out—on an individual by individual basis—those class members who contend that comScore has exceeded the scope of the consent from those who do not so contend. The scope of consent is an individual issue because panelists have differently configured computers, use their

[9] Moreover, consent is a defense, and due process requires that the defendant be afforded an opportunity to present every defense available to it. *Philip Morris USA Inc. v. Scott*, 131 S.Ct. 1, 3-4 (2010); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Plaintiffs may not use Rule 23 to bypass essential individual elements of the claim for particular plaintiffs and thereby expand the substance of the claims of the class members. *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (reversing certification where district court's erroneous certification of a class allowed plaintiffs to litigate on behalf of a "perfect plaintiff" rather than the members of the class). Further, both parties requested a jury trial of all issues so triable.

[10] Additionally, as a legal matter, knowledge of the precise nature of how a party will use access to a system is not required for consent to be valid. All that must be authorized is access to the system. *In re Doubleclick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 510 (S.D.N.Y. 2001).

computers in different ways, and most importantly may have different understandings of the scope of the consent they gave.

- Path 2: The ULA is not valid, and the question is whether comScore has obtained explicit or implied consent through its disclosures. This is an individual issue because, in particular, implied consent is a fact-based determination.

The proposed common questions thus do not move the ball, and the proposed class action fails Rule 23(a)'s commonality test.

B. Rule 23(b)(3): Plaintiffs Have Not Met Their Burden Of Showing That Questions Of Law Or Fact Common To Class Members Predominate Over Individual Issues.

Even if Plaintiffs' issues did satisfy the commonality test as refined under *Dukes*, they certainly do not predominate over the multitude of individual issues in the case. Thus, no class can be certified.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Although the predominance inquiry is related to the Rule 23(a)(2) commonality requirement, it is "far more demanding." *Id.* at 624. In determining whether plaintiffs have met the predominance requirement, district courts "may look beyond the pleadings and determine whether the parties' claims are subject to proof by common evidence." *Radmanovich v. Combined Ins. Co. of Am.*, 216 F.R.D. 424, 435 (N.D. Ill. 2003). Common issues do not predominate where the issues of liability are not subject to class-wide proof but instead require individual and fact-intensive determinations. *Id.* at 435-36; *see also Amchem*, 521 U.S. at 624-625 (holding that class certification could not be upheld where plaintiffs failed to meet predominance requirement due to a greater number of questions unique to several categories of class members and individuals within each category).

The individual issues in this case are overwhelming. They include:

(1) Did the individual actually use comScore's service and/or download OSSProxy?

As an initial matter, all potential class members will have to prove that they downloaded comScore's computer software, also known as OSSProxy (Windows-based) or MacMeter (Mac-based). That issue has already arisen in this case. There is no record that Plaintiff Mike Harris downloaded or used comScore's software. (Ex. R, Brown Decl. at ¶ 4.) Nor can Harris provide any evidence on this issue from his now discarded computer.[11] (Ex. P, M. Harris Tr. at 43:19-44:4.) Harris admitted that there is no way to corroborate his claim that he in fact downloaded comScore's software. (*Id.* at 114:18-115:4.) Furthermore, Harris's member profile page on macupdate.com—the website he claims to have used to download the third-party screensaver bundled with comScore software—shows no record of any downloads for his account. (Ex. Q, M. Harris Dep. Ex. 6.) It is thus unlikely (and certainly not established by a preponderance of the evidence), that Harris actually downloaded comScore software or was ever subject to monitoring by comScore at all. But at a minimum, this is a dispositive individualized issue potentially subject to a determination by a jury. Even if the Court authorized an affidavit procedure for individual class members having no way to corroborate their supposed use of comScore's software, comScore would be entitled to depose each of those affiants. *See, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.2d 127, 134 (3d Cir. 1998) (affirming district court's denial of class certification where defendants would have right to depose potential class members who filled out a questionnaire indicating addiction to cigarettes and addiction was prerequisite to recovery). This individualized issue alone swamps any common questions in the case.

[11] Plaintiff Dunstan, too, resisted comScore's attempts to inspect his computer, and only provided information from his computer in response to a motion to compel. comScore withdrew its motion after reaching a compromise with Dunstan. (*See* Dkt. Nos. 102, 107.) Indeed, Mr. Dunstan did not produce his complete anti-virus logs until September 21, 2012. (Ex. W, Sept. 21, 2012 Email from B. Thomassen.)

(2) Did the individual consent to comScore's monitoring?

Consent or authorization is an element of or defense to every statutory claim that the Plaintiffs advance.[12] Proof of consent will require inquiries into the conduct and knowledge of individual class members. Consent is a class-member-specific inquiry where, among other things, the defendant submits evidence showing that it elicited consent from class members. *G.M. Sign, Inc. v. Brink's Mfg. Co.*, No. 09 C 5528, 2011 WL 248511, at *8 (N.D. Ill. Jan. 25, 2011). If the Court finds that comScore's ULA is unenforceable, no evidence showing generalized consent or a lack thereof would be available to the Court. Thus, the Court would have to engage in mini-trials regarding the issue of explicit and implied consent for each class member. "The nature of the plaintiffs' claims require an individualized person-by-person evaluation of what the potential class members viewed on the defendants' website, the potential class member's understanding of and reliance on this information, and what damages, if any, resulted." *Clark v. Experian Info., Inc.*, 233 F.R.D. 508, 512 (N.D. Ill. 2005) (denying class certification for failure to satisfy the predominance requirement).

[12] See 18 U.S.C. § 2701(a) ("Except as provided in subsection (c) of this section whoever--(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section."); 18 U.S.C. § 2701(c) ("Exceptions.--Subsection (a) of this section does not apply with respect to conduct authorized--(1) by the person or entity providing a wire or electronic communications service; (2) by a user of that service with respect to a communication of or intended for that user; or (3) in section 2703, 2704 or 2518 of this title."); 18 U.S.C. § 2511(2)(d) ("(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."); 18 U.S.C. § 1030(a)(2) ("Whoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--"); 18 U.S.C. § 1030(5)(A) ("Whoever . . . knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer . . .").

Those consumers obviously reviewed and made a decision based upon the Terms of Service. Therefore, in the circumstances of this case, it is impossible for this Court to determine on a class-wide basis which putative class members explicitly consented to the terms presented, which ones "consented in fact" and which ones did not consent.

But there is more. An "authorized user" of a system can grant another access to a system without triggering statutory liability. *Konop v. Hawaiian Airlines, Inc.*, 411 B.R. 678, 683 (D. Haw. 2009). Thus, if a person other than the owner of a system was authorized to use a system and downloaded comScore's software onto a potential class member's computer (as may well have been the case with Mr. Dunstan and his wife), that would constitute authorization for comScore to access that system. The Court need not determine at this point whether this did or did not happen. The point is that these are individualized defenses that comScore is entitled to assert against any individual seeking a judgment against comScore. Accordingly, class treatment is not permissible. *See Broussard*, 155 F.3d at 342 ("[W]hen the defendant's affirmative defenses . . . may depend on facts peculiar to each plaintiff's case, class certification is erroneous."); *see also Mills v. Foremost Ins. Co.*, 269 F.R.D. 663, 677 (M.D. Fla. 2010) (finding class certification improper where "the putative class members while having similar interests, would both need to set forth separate and distinct extrinsic evidence in order to refute the defenses raised" by the defendant); *Wu v. MAMSI Life & Health Ins. Co.*, 269 F.R.D. 554, 562 (D. Md. 2010) (finding class certification improper where defendants asserted affirmative defenses that would turn on individual inquiries and facts peculiar to each claimant's case).

(3) What is the scope of each class member's consent?

Regardless of whether there even was a link to the ULA, consent could be based on the program's initial disclosure. That will at times be dependent on the individual's understanding of comScore's disclosure statement. Additionally, "[c]onsent can be limited based upon the subtleties and permutations inherent in a particular set of facts." *Shefts*, 758 F. Supp. 2d at 631 (internal quotation marks omitted). If the Court determined that an individual class member had impliedly consented to comScore's activities, the Court would then need to decide the scope of the implied consent.

(4) Did comScore exceed the scope of each individual's consent?

As noted above, if the scope of consent has been determined, the question whether comScore exceeded it is fraught with individualized questions. Did the individual use his computer to back up his BlackBerry? Did he create playlists on his iPod? Did he view documents in .pdf form? Questions like these will inevitably bear on whether the program's actions violated the scope of whatever consent was given.

(5) Are the individual's claims time-barred?

The statute of limitations is another individualized defense precluding class certification. At least one of the counts in the second amended complaint is based upon a statute which incorporates a discovery tolling rule, and this Court would have to engage in mini-trials to determine when each class member knew or should have known of her potential claim in order to apply the statute of limitations.

The proposed class encompasses many purported class members for whom the statute of limitations has likely already expired.[13] In order to determine which plaintiffs may bring an

[13] The statute of limitations for all of the federal claims asserted by Plaintiffs is two years, subject to the discovery rules incorporated in the statutes. 18 U.S.C. § 1030(g); 18 U.S.C. § 2707(f); 18

action and which may not, the Court must consider when the class member's "injury" accrued and when the class member knew or should have known of the "injury" and its cause. *See Barnes*, 161 F.3d at 136-37 (discussing need to determine whether the statute of limitations precludes an individual class member from suing and finding it is an individual issue). Since Plaintiffs seek a class consisting of individuals who downloaded comScore software from 2005 to the present, any such class would contain hundreds of thousands of individuals whose claims would be time-barred by the applicable two-year limitations unless they can invoke the statutes' discovery rules. Whether any particular plaintiff could so avail himself of these discovery rules would have to be determined on a case-by-case basis.

(6) Did the individual suffer damage or loss?

To establish a Computer Fraud and Abuse Act ("CFAA") violation under Section 1030(a)(5)(A), an individual must prove damage or loss. This is an individualized determination.

"[T]he term 'damage' means any impairment to the integrity or availability of data, a program, a system, or information." 18 USC § 1030(e)(8). "[T]he term 'loss' means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damages assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 USC § 1030(e)(11).

Damage does not encompass harm from the mere disclosure of information. *Landmark Credit Union v. Doberstein*, 746 F. Supp. 2d 990, 993 (E.D. Wis. 2010) (citing *U.S. Gypsum Co.*

U.S.C. § 2520(e). The statute of limitations for unjust enrichment in Illinois is five years, and the limitations period tolls from the time when the Plaintiff should have known of his or her claim. 735 Ill. Comp. Stat. 5/13-205; *Burns Philp Food, Inc. v. Cavela Cont'l Freight, Inc.*, 135 F.3d 526, 527-28 (7th Cir. 1998). As discussed *infra* in Section I.B(7), the limitations period of many different states will apply to Plaintiffs' unjust enrichment claims.

v. Lafarge N. Am., 670 F. Supp. 2d 737, 744 (N.D. Ill. 2009)). "There is virtually no support for the proposition that merely accessing and disseminating information from a protected computer suffices to create a cause of action under the CFAA. The CFAA claim borders on the frivolous . . . ." *Id.* at 994. *See also In re Doubleclick*, 154 F. Supp. 2d at 525 ("Demographic information is constantly collected on all consumers by marketers, mail-order catalogues and retailers. However, we are unaware of any court that has held the value of this collected information constitutes damage to consumers or unjust enrichment to collectors. Therefore, it appears to us that plaintiffs have failed to state any facts that could support a finding of economic loss from DoubleClick's alleged violation of the CFAA.").

To the contrary, recovery under the CFAA requires more than $5,000 worth of damage or loss over a one year period for each individual act by the defendant—and damages cannot be aggregated from putative class members. *See In re DoubleClick*, 154 F. Supp. 2d at 523-24. By its nature this assessment will be individualized.

(7) Which state's law applies to the individual's unjust enrichment claim?[14]

Unlike the other claims which are based upon federal statutes, unjust enrichment is a creature of common law. Since Plaintiffs seek to certify a claim that is not merely nationwide but worldwide, the implications of common law claims arising under multiple jurisdictions are relevant to any consideration of a class certification.

In *In re Aqua Dots Products Liability Litigation*, 270 F.R.D. 377 (N.D. Ill. 2010), the court compiled a list of cases from the Northern District of Illinois which considered and denied

[14] Although comScore's ULA includes a choice-of-law provision, Plaintiffs arguments regarding the enforceability of comScore's ULA renders this an individual issue. In particular, if comScore's ULA is valid, panelists have consented to comScore's use of their data and there is no unjust enrichment. If comScore's ULA is not valid, the Court will have to conduct a choice of law analysis for each class member. Moreover, the Court has already refused to enforce the forum selection clause in the ULA. (Dkt. No. 31.)

class certification for claims of unjust enrichment. These cases include *Meuhlbauer v. General Motors Corp.*, No. 05-2676, 2009 WL 874511 (N.D. Ill. Mar. 31, 2009), *Vulcan Golf LLC v. Google, Inc.*, 254 F.R.D. 521 (N.D. Ill. 2008), and *In re Sears, Roebuck & Co.*, Nos. 05-4742 & 05-2623, 2006 WL 3754823 (N.D. Ill. Dec. 18, 2006). *Id.* at 386. All of these cases reached the same conclusion: "[T]he law of unjust enrichment varies too much from state to state to be amendable to national or even to multistate class treatment." *Id.* As noted in *Lilly v. Ford Motor Co.*, No. 00 C 7372, 2002 WL 507126, at *2 (N.D. Ill. Apr. 3, 2002), "[t]he variations in state common laws of unjust enrichment demonstrate that class certification of such a claim would be unmanageable."

Further, Illinois uses a "borrowing statute" to determine the statute of limitations in claims arising out-of-state. 735 ILCS 5/13-210 provides: "When a cause of action has arisen in a state or territory out of this State, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State."

Plaintiff Dunstan was in California when he (or someone) downloaded the comScore software on to the computer owned by Dunstan and his wife. Assuming there is a viable claim for unjust enrichment, what is the applicable limitations period? It depends. If "fraud or mistake" are alleged, the relevant period is three years. If those allegations are not present, it is two years. *Boon Rawd Trading Int'l. Co. v. Faleewong Trading Co.*, 688 F. Supp. 2d 940, 955-56 (N.D. Cal. 2010). Actually, it is more complex than that. As stated in *Boon Rawd*:

> BRTI makes the argument that there is no cause of action for "unjust enrichment" in California . . . . This is true. Indeed, unjust enrichment is "not a cause of action . . . or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution." . . . It "does not lie when an enforceable, binding agreement exists defining the rights of the parties." . . . California, however, recognizes an exception to the rule that unjust

> enrichment does not lie when an enforceable contract exists: "Restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason."

Id. at 956 (internal citations omitted).

Dunstan concedes that before downloading comScore's software, he would have been "presented with comScore's standard dialog box terms" and that these terms "likely contained a hyperlink to the full ULA." (Dkt. No. 154 at 16.) By assenting to the ULA, he is precluded by California law from asserting an unjust enrichment claim unless he pleads and proves that the agreement with comScore was procured by fraud or is unenforceable for some reason.

In light of the nearly infinite number of open-ended legal questions arising from the use of a two word legal phrase which is treated differently by all 50 states, it is little wonder that "federal courts have generally refused to certify a nationwide class based upon a theory of unjust enrichment." *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 626 (D. Kan. 2008) (citing *Clausnitzer v. Fed. Exp. Corp.*, 248 F.R.D. 647, 660 (S.D. Fla. 2008); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483 (S.D.Ill. 1999)). As stated in *In re Conagra Peanut Butter Products Liability Litigation*, 251 F.R.D. 689, 697 (N.D. Ga. 2008), after a lengthy discourse on the various states' unjust enrichment laws, "[t]his morass is useful to establish not only the lack of uniformity of unjust enrichment claims across the country, but also the inferiority of class-wide resolution due to discerning the many differing legal standards."

Finally, comScore did not receive any benefit from a large number of the proposed class members, including the class representatives. Unless an individual was a panelist for more than 30 days, her data was not used in any syndicated reports. (Ex. R, Brown Decl. at ¶ 5.) In fact, class members who were panelists for less than 30 days generally cost comScore money. (*Id.* at

6.) If the Court proceeded with the unjust enrichment claim on a class basis, it would be faced with determining whether each and every class member contributed to comScore's bottom line.

(8) Did the user download comScore's software on a "facility through which an electronic communication service (ECS) was provided?"

The Stored Communications Act ("SCA") requires that a defendant access a facility through which an electronic communication service ("ECS") is provided. 18 U.S.C. § 2701. An ECS is "any service which provides to users thereof the ability to send or receive wire or electronic communications. 18 U.S.C. § 2510(15). A computer or device belonging to an end-user of an ECS is not such a facility. *See United States v. Steiger*, 318 F.3d 1039, 1049 (11th Cir. 2003) (holding SCA does not apply to hacking into an individual's computer). Moreover, maintaining a website or merely using Internet access does not constitute providing an ECS. *See Dyer v. Nw. Airlines Corp.*, 334 F. Supp. 2d 1196, 1199 (D.N.D. 2004) (rejecting argument that online merchant constituted an ECS); and *Crowley v. Cybersource Corp.* 166 F. Supp. 2d 1263, 1270 (N.D. Cal. 2001) (same). Thus, to prevail under the SCA a class member must show that she was providing an ECS—typically by showing that the class member was a telephone services company, internet service provider, or similar company. *See Steiger*, 318 F.3d at 1049 ("[T]he SCA clearly applies, for example, to information stored with a phone company, Internet Service Provider (ISP), or electronic bulletin board system (BBS).").

II. THE PROPOSED CLASS ACTION FAILS TO SATISFY RULE 23(b)(3)'s SUPERIORITY REQUIREMENT.

In addition to failing to satisfy the commonality and predominance prongs of Rule 23, the putative class action also fails to satisfy the superiority requirement of Rule 23(b)(3). Specifically, the named Plaintiffs have not demonstrated that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) directs courts to consider a non-exhaustive list of factors when

determining whether a class action is a superior device for adjudicating a dispute: (a) the class members' interest in individually controlling the action; (b) whether litigation by or against class members has already begun concerning the controversy; (c) the desirability of concentrating all the claims in one forum; and (d) the likely difficulties in managing the class action. *Id.* The fourth factor, manageability, encompasses the "entire range of practical problems that could render the class action inappropriate for a particular suit." *Radmanovich*, 216 F.R.D. at 438-39. Putative class actions are "unmanageable" where courts would be required to make numerous individual liability determinations. *See id.* at 439 (concluding plaintiff failed to satisfy burden of establishing manageability where the predominant individual issues in the case would require "extensive individual and exclusive liability determinations with regard to the claims of each class member"); *see also Cedeno v. Fieldstone Mortg. Co.*, No. 01 C 5110, 2002 WL 1592759, at *6 (N.D. Ill. July 19, 2002) (holding class certification would not be appropriate where the court would be required to examine liability on an individual basis); *Rodriguez v. Ford Motor Credit Co.*, No. 01 C 8526, 2002 WL 655679, at *5 (N.D. Ill. Apr. 19, 2002) (holding class action was improper where the case would require thousands of individual liability determinations). That is plainly the situation here.

Additionally, the Court and parties would be faced with a cumbersome and inadequate process simply to identify and notify potential class members. As discussed above, comScore has no record of Mike Harris in its data. Thus, comScore does not have a ready and complete list of potential class members, or their contact information. Even if comScore provides a list of the potential class members it does have, the parties will have to provide notice of the pending class action to everyone that uses a computer in the United States, and then engage in discovery with respect to each individual response to that notice.

Moreover, a class action is not the only means for individuals who truly have been harmed to obtain redress. Significant statutory penalties are intended to induce individual plaintiffs to bring individual suits. *See Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) ("The statutory remedy is designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf.").

III. THE PROPOSED CLASS ACTION FAILS TO SATISFY RULE 23(a)'s TYPICALITY REQUIREMENT

"The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). That requirement is not satisfied here. As explained above, the claims of each purported class representative—and each putative class member—implicate unique issues related to consent, the scope of consent, and damages. The claims of the named Plaintiffs and/or absent class members could founder on any combination of these. Indeed, the list of unique problems that the named Plaintiffs' cases raise is remarkable and foreclose any finding of typicality:

- Neither Harris nor Dunstan recall downloading the third-party software bundled with comScore or recall viewing the terms of service. (*See* Ex. P, M. Harris Tr. at 85:24-86:25; 91:2-9; 95:16-96:6; Ex. V, J. Dunstan Tr. at 26:7-9; 30:6-24; 33:9-22.)

- Harris's claim that he downloaded comScore software on his Macintosh computer lacks independent corroboration. Harris threw out the computer that he allegedly used to download the software in August 2010 and has no knowledge of where that computer is today. (Ex. P, M. Harris Tr. at 43:19-44:4.) Harris admits that there is no way to verify that he in fact downloaded comScore software other than his testimony. (*Id.* at 114:18-115:4.) Furthermore, Harris's member profile page on macupdate.com, the website he allegedly used to download the third-party screensaver bundled with comScore software, shows no record of any downloads for his account. (Ex. Q, M. Harris Dep. Ex. 6.)

- Even accepting his story, Harris had comScore software installed on his computer for less than a day, and thus, his data was not used in any reports. (*See* Ex. P, M. Harris Tr. at 70:22-71:14; 83:14-16; 98:18-99:15; *see also id.* at 103:24-104:10 (explaining he had "very little experience"

with comScore software on his computer because he "noticed it immediately and tried to remove it").)

- Harris's purported experience during the download and installation process may have been impacted by his unique computer problems unrelated to comScore software. Harris admitted that around the time he allegedly downloaded comScore software, his computer was having issues with input-output errors, a problem which he considered to be "pretty significant." (*See* Ex. P, M. Harris Tr. at 109:12-25.) Harris's hard drive "gave up the ghost" only three days after he allegedly downloaded comScore's software. (*Id.* at 48:24-49:4.)

- Dunstan also may have had problems with the functioning of his computer unrelated to comScore's software,
  (*See* Ex. V, J. Dunstan Tr. at 40:16-22; 62:8-11; Ex. U, Harris-Dunstan 0632-0655.)

- For Dunstan, there is a question of who allegedly downloaded the comScore software: Dunstan or his wife Lori, who lives with him and used the computer at the time of the download. (Ex. V, J. Dunstan Tr. at 26:7-18; 29:16-21.) Dunstan has no recollection whatsoever of personally downloading the photo cropping program bundled with comScore software and admitted that after his computer started having problems he went to his wife and told her not to use his computer any more. (*Id.* at 26:7-18; 37:11-18.)

If either named plaintiff lost his case based on one of these issues, would the result decide the cases of (and be binding on) absent class members? Obviously not, and for that reason the typicality requirement is not satisfied, and no class can be certified.

IV. THE PROPOSED CLASS IS NOT ASCERTAINABLE.

Under Rule 23 a class cannot be certified unless "an ascertainable class exists and has been properly defined." *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 395 (S.D.N.Y. 2008); *see also Sadler v. Midland Credit Mgmt., Inc.*, No. 06 C 5045, 2008 WL 2692274, at *3 (N.D. Ill. July 3, 2008) ("The definition of a proposed class must be sufficiently definite to permit ascertainment of the class members[.]" (internal quotation marks omitted)). But Plaintiffs' proposed classes are not sufficiently definite to allow the Court to determine whether a particular person is a member of the class without extensive factual inquiry. Where the practical

issue of identifying class members is overly problematic and determining membership in the class would require fact-intensive mini-trials, the class is not ascertainable, and the court should deny certification. *See Lau v. Arrow Fin. Servs., LLC*, 245 F.R.D. 620, 624 (N.D. Ill. 2007). Here, it would be impossible to identify class members without individual mini-trials.

As the case of Plaintiff Mike Harris—who has no evidence that his Internet usage was ever monitored by comScore—aptly shows, there is no objective way to identify all members of the proposed class. It is no answer to propose some form of "self-selection" for members of the class (through affidavit or other means). That (at best) would create individual issues, because comScore would have the right to depose each class member submitting an affidavit to test the sufficiency of the proposed class member's claim. *See Barnes*, 161 F.3d at 134-35 (defendants entitled to test affidavits claiming tobacco dependence); *see also Perez v. Metabolife Int'l Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003) (in class action, defendant must have "an opportunity to challenge the memory or credibility of the individual" consumer). And even that might not be adequate. To satisfy this "requirement that there be an identifiable class," it is necessary that the putative class's "members can be ascertained by reference to objective criteria," and it must be "administratively feasible for a court to determine whether a particular individual is a member" of the class. *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 181 (S.D.N.Y. 2005). That is not the case here. Certainly "class members' say so" is insufficient to satisfy the ascertainability rule, because "forcing [defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012). Accordingly, class certification should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Class Certification should be denied.

DATED: February 26, 2013

QUINN EMANUEL URQUHART & SULLIVAN, LLP

/s/ Andrew H. Schapiro

Andrew H. Schapiro
andrewschapiro@quinnemanuel.com
Stephen Swedlow
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

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

Attorneys for Defendant comScore, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing has been caused to be served on February 26, 2013 to all counsel of record via email.

/s/ Robyn Bowland
Robyn Bowland