Dunstan et al v. comScore, Inc.
Doc. 192

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,	)	No. 11 C 5807
v.	)	Chief Judge Holderman
COMSCORE, INC., a Delaware corporation,	)	Magistrate Judge Kim
Defendant.	)	

DEFENDANT'S MOTION TO STAY

Now comes Defendant comScore, Inc., by its attorneys, and moves this Court for entry of an order staying proceedings for a period of 60 days pending a determination by the United States Court of Appeals for the Seventh Circuit of comScore's Petition for Leave to Appeal this Court's ruling of April 2, 2013.

BACKGROUND

On April 2, 2013, this Court entered an opinion and order certifying a class and subclass of Plaintiffs for various counts set forth in the Second Amended Complaint (hereafter "Certification Order"). (Dkt. No. 186.) On April 16, 2013, Defendant filed with the Court of Appeals a Petition for Leave to Appeal the Certification Order pursuant to Rule 23(f) (hereafter "Rule 23(f) Petition"). (Case No. 13-8007 Dkt. No. 1.)

On April 19, 2013, the Court of Appeals ordered Plaintiffs to file a response to comScore's Petition by May 6, 2013. (Ex. A, April 19, 2013 Order.)

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ARGUMENT

When ruling on a motion to stay proceedings pending consideration by the Court of Appeals, "courts in this District have considered three factors: (1) whether the stay will unduly prejudice or tactically disadvantage the non-moving party; (2) whether a stay will simplify the issues in question and streamline the trial; and (3) whether a stay will reduce the burden of litigation on the parties and on the Court." *Ezell v. City of Chicago*, 2011 U.S. Dist. LEXIS 38547, No. C 5135, at *3-4 (N.D. Ill. Apr. 8, 2011) (citing *Pfizer Inc. v. Apotex, Inc.*, 640 F. Supp. 2d 1006, 1007 (N.D. Ill. 2009); *GE Bus. Fin. Servs. Inc. v. Spratt*, No. 08 C 6504, 2009 U.S. Dist. LEXIS 33879, 2009 WL 1064608, at *1 (N.D. Ill. Apr. 20, 2009); *Arrivalstar S.S. v. Canadian Nat'l Ry. Co.*, No. 08 C 1086, 2008 U.S. Dist. LEXIS 60588, 2008 WL 2940807, at *2 (N.D. Ill. Jul. 25, 2008)).

1. Granting the instant motion will not unduly prejudice or tactically disadvantage the non-moving parties.

As set forth in the Certification Order, the certified class includes individuals who have downloaded comScore software "at any time since 2005." (Dkt. No. 186 at 1.) A class going back eight years is unlikely to be prejudiced by the short period Defendant's Petition will be under consideration by the Court of Appeals. In addition, the Certification Order moots any issues that could arise during the pendency of an appeal relating to the applicable statutes of limitations. (*Id.* at 17-18.) Finally, the Court of Appeals has already ordered Plaintiffs to respond to Defendant's Rule 23(f) Petition and should be in a position to determine quickly whether it will accept an appeal. (Ex. A, April 19, 2013 Order.)

It is also important to note that Plaintiffs bring no claims nor plead facts that any individual has been placed at immediate risk by comScore's actions. Rather, Plaintiffs "allege

that comScore has exceeded the scope of the consumer's consent to monitoring in the ULA." (Dkt. No. 186 at 4.) Whether comScore exceeded the scope of consent giving rise to statutory relief does not create a circumstance where Plaintiffs run the risk of being worse off at the end of the requested stay than they would be absent a stay. comScore submits that the Plaintiffs will not suffer any direct harm, undue prejudice or tactical disadvantage from the requested stay because the stay will be of a brief, finite duration and nothing will transpire in the interim that would cause undue prejudice.

2. **Granting a stay will simplify the issues in question and streamline the trial.**

Following the entry of the Certification Order, Plaintiffs' counsel noted that this matter will be "the largest privacy case ever to be tried." (Ex. B, *Privacy Lawsuit Given Class Action Status*, NBCNews.com, available at http://www.nbcnews.com/technology/technolog/privacy-lawsuit-against-comscore-given-class-action-status-1B9236418, accessed April 22, 2013.) In its Petition, comScore presented five questions to the Court of Appeals.[1] The resolution of any of these questions in comScore's favor would both greatly simplify and streamline resolution of the remaining issues in this case.

A stay may prevent this Court from having to make multiple rulings relating to the class notification and discovery issues. Plaintiffs have already filed a motion seeking

[1] "[A] party seeking a stay need not show that it is more than 50% likely to succeed on appeal; otherwise, no district court would ever grant a stay. It is enough that the [party] have a substantial case on the merits." *Thomas v. Evanston*, 636 F. Supp. 587, 590 (N.D. Ill. 1986). Other courts have also granted stays based on recognition that the Court of Appeals may ultimately disagree with the District Court's analysis. *See Andrews v. Chevy Chase Bank, FSB*, 474 F. Supp. 2d 1006, 1010 (E.D. Wis. 2007) (concluding that, despite a continued belief that the defendant should not prevail on appeal, the Court of Appeals may disagree). comScore respectfully submits that at a minimum it has raised significant issues in its petition to the Seventh Circuit.

approval for their class notification plan. (Dkt. No. 189.) If the Seventh Circuit refines, modifies and/or narrows the definition of the class, a stay will prevent this Court from having to address multiple iterations of notification plans. At worst, the stay merely defers for a short period of time the point at which this Court will have to rule on such motions. Further, there is no reason that class notice should be the subject of undue urgency at this point in the litigation. The notice must be issued prior to trial with sufficient time to permit class members to decide whether to remain in the class or opt out. At this point, no trial date is set.

3. **A stay will reduce the burden of litigation on the parties and on the court.**

Notwithstanding the fact comScore takes issue with the substance and procedure of Plaintiffs' proposed notice plan, one need not look further than Plaintiffs' recently filed motion regarding class notification to understand the significant burden facing comScore. Among other things, Plaintiffs have asked for an order directing comScore "to 'push' the Summary Notice to all current panelists" and "to produce a computer-readable file containing the names, mailing addresses, and email addresses of all Class members found on its database." (Dkt. No. 189 at 6.) Both of these would require the investment of significant financial, developmental, and administrative resources for comScore—all of which may be for nothing if the Court of Appeals chooses to accept the appeal of the Certification Order and modifies the class definition. (Ex. C, April 22, 2013 Decl. of Brown at ¶¶ 3-4.)

The technological burdens associated with just these two requests are daunting. First, the process is far more complex than the Plaintiffs make it sound. The class defined by this Court is limited to individuals who installed comScore's software "via one of comScore's

third party bundling partners." (Dkt. No. 186 at 1.) Therefore, the order would not go to "all current panelists" as requested by Plaintiffs, rather it would be limited to a subset consisting of those panelists who installed the software via a comScore bundling partner. Accordingly, comScore will be forced to try to segregate its panelists by bundling partner and then somehow program a notice to the segregated panelists on a scale it has never before attempted. (Ex. C, April 22, 2013 Decl. of Brown at ¶ 5.)

Similarly, producing a file containing the names, mailing addresses, and email addresses of all Class members will require comScore to search through literally millions of records to determine which panelists currently fit the class definition, and then to identify from this group the roughly three percent for which comScore still has contact information. (Ex. C, April 22, 2013 Decl. of Brown at ¶ 6.)

In the event that the class definition is modified in any way, all of this effort will have been in vain and will have to be repeated. comScore will again have to determine how to segregate and load information matching the modified class definition into a system that can send a notification, and will again have to scour its records under the new criteria. For example, a simple change in the starting date of class membership, say from eight years to two years, would cause the waste of countless hours and money spent assembling data which would no longer be useable.

Beyond notice, discovery is also likely to impose a significant burden given that the current class definition encompasses the download of comScore software onto approximately ten million machines. (Ex. C, April 22, 2013 Decl. of Brown at ¶ 7.) Any refinement of the class definition would mean that discovery relating to excluded members

of the class is pointless. The potential for unnecessary burden is made even more significant by the fact that Plaintiffs have admitted that there is little chance of continuing the proceedings absent a class. (Dkt. No. 2 at ¶ 19 (Plaintiffs stated that if the class was not certified "it would be difficult, if not impossible, for the individual members of the classes to obtain effective relief" given that "[t]he injuries suffered by individual [c]lass members are relatively small."); Dkt. No. 169 at ¶ 76 ("[a]bsent a class action, most members of the Class would find the cost of litigating their claims to be prohibitive and will have no effective remedy.").) Thus, given the slight chance that the Plaintiffs would bring this action individually, this is not a circumstance where the question is whether to proceed with discovery now or instead proceed with discovery later. Here, if class certification is ultimately limited or denied, there would be no forum for any collected discovery that turns out to be outside of the scope of the modified class definition. The time and effort involved in the extraneous discovery process would simply have been wasted.

Moreover, although both parties would presumably work in good faith to resolve any disputes relating to the scope and nature of discovery, it is reasonable to anticipate that absent a stay the parties would at times need to request assistance from the Court to resolve discovery disputes both in the form of motions to compel and motions for a protective order. Absent a stay, third parties with information related to the class claims would also be burdened with discovery requests that may ultimately prove to be beyond a modified scope.

Finally, the Plaintiffs' class notification plan motion also calls for advertisements that will generate 115 million unique impressions (Dkt. No. 189 at 3), as well as the creation of a website and additional notices to be sent by email and U.S. Mail (*Id.* at 6). The form and

scope of the notice plan is something the parties may not agree upon and must ultimately be approved by the Court (with significant constitutional considerations) before it can be implemented. These requests, along with the other notifications discussed above, represent what is potentially a significant burden for this Court. In the event that the class is modified in any way, the modification and reissuing of the notices is likely to cause significant frustration and confusion among the notified class members, which will likely result in demands for explanations from this Court and its personnel. Finally, the absence of a stay can also place a significant burden on comScore's operations, as repeated messaging can negatively affect panelist experience, making it harder for comScore to retain those panelists. (Ex. C, April 22, 2013 Decl. of Brown at ¶ 8.)

CONCLUSION

In light of the fact that the Court of Appeals has already set a date for Plaintiffs to reply to Defendant's Rule 23(f) Petition, a stay of these proceedings for a period of 60 days pending that Court's determination of whether to accept the appeal of the Certification Order: (1) would be efficient and would avoid potentially wasted time and expense, (2) would potentially eliminate burdens to this Court, the parties and third parties, and (3) would not prejudice Plaintiffs or the Class.

For the reasons set out above, Defendant comScore respectfully requests this Court grant a stay in this matter pending the Court of Appeals' determination as to whether it will accept Defendant's Rule 23(f) Petition.

DATED: April 22, 2013

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing has been caused to be served on April 22, 2013 to all counsel of record via the Court's ECF notification system..

/s/ Robyn M. Bowland
Robyn Bowland