UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MIKE HARRIS and JEFF DUNSTAN, individually and on behalf of a class of similarly situated individuals,	)	
Plaintiffs,	)	Case No. 1:11-5807
v.	)	
COMSCORE, INC., a Delaware corporation,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs Mike Harris and Jeff Dunstan ("Plaintiffs"), through their undersigned counsel, respectfully move this Court for an Order certifying this case as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and (b)(3). In support of their motion, Plaintiffs state as follows:

I. Introduction

1. Defendant comScore, Inc. ("comScore") has, without authorization, infiltrated millions of unsuspecting consumers' personal computers, as well as engaged in other deceptive and unfair business practices perpetrated in conjunction with its data collection software. Plaintiffs have asserted violations of the Stored Communications Act ("SCA") (18 U.S.C. §§ 2701, *et seq*.), violations of the Electronic Communications Privacy Act ("ECPA") (18 U.S.C. §§ 2510, *et seq*.), violations of the Computer Fraud and Abuse Act ("CFAA")(18 U.S.C. §§ 1030, *et seq*.), violations of the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA") (815 ILCS 505/1 *et seq*.), and common law claims for unjust enrichment.

2. Plaintiffs brought this lawsuit on behalf of a Class of all individuals and entities in the United States that have had comScore's surveillance software ("Surveillance Software") installed on their computer(s) and a Subclass of all individuals and entities in the United States that have incurred costs in removing the Surveillance Software. Even at this extremely early stage of the litigation,[1] this is a textbook example of a case suitable for class certification. For all relevant purposes, the factual and legal issues are identical: comScore, without authorization, accessed and monitored the computers of Plaintiff and each member of the Class. Each member of the Subclass incurred monetary costs attempting to remove comScore's software.

II. The Proposed Class

3. Plaintiffs seek to certify this case as a class action on behalf of a Class and Subclass as defined as follows:

> **The Surveillance Software Class:** All individuals and entities in the United States that have had comScore's Surveillance Software installed on their computer(s).
>
> **The Dunstan Subclass:** All individuals and entities in the United States that have incurred costs in removing the Surveillance Software.

The Surveillance Software and the Dunstan Subclass are collectively referred to, where not separately identified, throughout the rest of this Motion as "the Class."

III. Fed. R Civ. P. 23's Requirements for Certification Are Satisfied

4. In determining whether to certify a class, the Court does not inquire into the merits of the plaintiffs' claims. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). As such, "for purposes of considering a motion for class certification, the substantive allegations of the complaint are generally assumed to be true and it is also assumed that cognizable claims are stated." *Anderson v. Cornejo*, 199 F.R.D. 228, 237 (N.D. Ill. 2000).

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[1] This case was filed today (August 23, 2011).

5. The Court may certify a class when the plaintiffs demonstrate that the proposed class and proposed class representatives meet Rule 23(a)'s four prerequisites—numerosity, commonality, typicality, and adequacy of representation—and at least one of the three provisions of Rule 23(b).

6. As shown below, the Class satisfies each of Rule 23(a)'s prerequisites, as well as, the requirements for certification under Rules 23(b)(2) and (b)(3).

A. Rule 23(a)(1) – The Numerosity Element Is Met

7. The Rule 23(a)(1) numerosity requirement is satisfied where "the class is so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). There is no specific number required to satisfy this requirement, nor are the plaintiffs required to state the exact number of potential class members. *Smith v. Nike Retail Servs., Inc.*, 234 F.R.D. 648, 659 (N.D. Ill. 2006). A class action may proceed upon estimates as to the size of the proposed class and "[t]he court is entitled to make common-sense assumptions that support a finding of numerosity." *Morris v. Risk Mgmt. Alternatives, Inc*., 203 F.R.D. 336, 342 (N.D. Ill. 2001); *Gaspar v. Linvatec Corp*., 167 F.R.D. 51, 56 (N.D.Ill.1996). Generally, where the membership of the proposed class is at least 40, joinder is impracticable and the numerosity requirement is met. *Pope v. Harvard Banchares, Inc*., 240 F.R.D. 383, 387 (N.D. Ill. 2006)

8. comScore, through its own assertions, states that they monitor approximately two (2) million people in their panel of consumers. *See* http://www.comscore.com/About_comScore/Methodology (last visited, August 23, 2011). Accordingly, there is no question that at least 40 individuals have had comScore's software installed on their computers. The exact number of Class members will be confirmed by Defendant's internal records during discovery. Thus, the numerosity requirement of Rule

23(a)(1) is satisfied.

B. Rule 23(a)(2) – The Commonality Element Is Met

9. The second threshold to certification requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is present where a "common nucleus of operative fact" exists, even if as to one question of law or fact and is often found where "defendants have engaged in standardized conduct toward members of the proposed class." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *Whitten v. ARS Nat'l Servs. Inc.*, No. 00 C 6080, 2001 WL 1143238, *3 (N.D. Ill. Sept. 27, 2001) (internal quotations omitted). The question of commonality is a relatively low and easily surmountable hurdle. *Scholes v. Stone, McGure, & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992). Plaintiffs allege that Defendant violated the law by intentionally exceeding its authorization to access their computers, and the systems of the Class, without authorization. Plaintiffs' claims are universal and identical to the experience of the absent putative class members, whom have also had Defendant's surveillance software surreptitiously implanted on their computers.

10. Although common questions of either law or fact can be used to support a class action, both exist here. The common questions of fact for the class are: (a) whether comScore intentionally designed its software to scan files located on a monitored consumer's local network; (b) whether comScore intentionally designed its software to intercept packets on wireless networks; (c) whether comScore intentionally designed its software and/or business model with third-party application providers to avoid uninstallation when the third-party application was uninstalled, thus thwarting user attempts to remove the software; and (d)whether comScore intentionally designed its Terms of Service to exclude the true functionality of its Surveillance Software. The common questions of law are: (a) whether comScore violated the

SCA (18 U.S.C. §§ 2701, *et seq.*); (b) whether comScore violated the ECPA (18 U.S.C. §§ 2510, *et seq*.); (c) whether comScore violated the CFAA (18 U.S.C. §§ 1030, *et seq*.); (d) whether comScore violated the ICFA (815 ILCS 505/1 *et seq*.); and (e) whether comScore has been unjustly enriched by Plaintiffs and the Class.

11. Because there is a common nucleus of operative facts as to all the class members' experience with Defendant's software, Plaintiffs satisfy the commonality requirement of Rule 23(a)(2). "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992) (internal citations omitted). Class members also share a common interest in the question of whether Defendant's actions violated the SCA, the ECPA, the CFAA, and the ICFA. Because class members share common questions of law and fact, the commonality prong of Rule 23(a) is met.

C. Rule 23(a)(3) – The Typicality Element is Met

12. Rule 23 also requires that Plaintiffs' claims be typical of those of the Class. Fed. R. Civ. P. 23(a)(3). The typicality requirement is closely related to the commonality requirement and is satisfied if Plaintiffs' claims arise from "the same event or practice or course of conduct that gives rise to the claims of other class members and … are based on the same legal theory." *Radmanovich v. Combined Ins. Co. of Am.*, 216 F.R.D. 424, 432 (N.D. Ill. 2003) (internal quotations omitted). Nevertheless, the existence of factual differences will not preclude a finding of typicality; the claims of a named plaintiff need only share "the same essential characteristics" as those of the class. *Id.* Indeed, "[s]imilarity of legal theory is more important than factual similarity..." *Id.*, quoting *Harris v. City of Chicago,* Nos. 96 CV 2406, 96 CV 7526, 1998 WL 59873, at *5 (N.D. Ill. Feb.9, 1998).

13. Here, each claim is also based on the same legal theory—whether Defendant violated the SCA, the ECPA, the CFAA, and the ICFA through its actions perpetrated on Plaintiffs' and the Class's computer systems and networks. Plaintiffs' claims also cannot be factually distinguished from the claims of absent putative class members because each claim arises from identical conduct—Defendant's use of malicious proprietary software to monitor consumers' actions. Thus, as all of the class members' claims arise from the common issues of whether Defendant violated the SCA, the ECPA, the CFAA, and the ICFA, Plaintiffs have met the typicality requirement of Rule 23(a)(3).

D. Rule 23(a)(4) – The Adequacy of Representation Element is Met

14. The final Rule 23(a) prerequisite requires that proposed class representatives "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This factor requires that both proposed class representatives and their counsel have the ability to "zealously represent and advocate on behalf of the class as a whole." *Maxwell v. Arrow Fin. Services, LLC*, 2004 WL 719278, *5 (N.D. Ill. Mar. 31, 2004). The proposed class representatives must not have claims that are "antagonistic or conflicting … with other members of the class," and must have a "sufficient interest in the outcome of the case to ensure vigorous advocacy." *Id.* (internal quotations omitted). Furthermore, proposed class counsel must be competent and have the resources necessary to sustain the complex litigation necessitated by class claims; it is persuasive evidence that proposed class counsel have been found adequate in prior cases. *Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 401 (N.D. Ill. 1987).

15. In this case, no conflicts exist between Plaintiffs and the putative class members given the identical nature of their claims. *Rosario*, 963 F.2d at 1018. Moreover, Plaintiffs have the same interests as the proposed Class—obtaining relief from Defendant's surreptitious

monitoring of computer systems and networks, and ensuring that Defendant does not continue this conduct in the future. Therefore, Plaintiffs have no interests antagonistic to the interests of the proposed Class. Furthermore, Plaintiffs have hired counsel who are well respected members of the legal community, have regularly engaged in major complex litigation, and have had extensive experience in consumer class actions involving similar issues and that were of similar size, scope and complexity as the present case. (*See* Firm Resume of Edelson McGuire LLC, a true and accurate copy of which is attached as Exhibit 1). Accordingly, both Plaintiffs and their counsel will adequately represent the Class.

E. Rule 23(b)(3) – The Predominance/Superiority Element is Met

16. In addition to satisfying Rule 23(a), a plaintiff seeking certification must satisfy one of the provisions of Rule 23(b). Here, Plaintiffs seek certification pursuant to Rule 23(b)(2) and Rule 23(b)(3).

17. Rule 23(b)(2) provides that the party opposing certification must have acted or failed to act on grounds generally applicable to the proposed class, "so that final injunctive relief or corresponding declaratory relief is appropriate…." Fed. R. Civ. P. 23(b)(2). In this case, Defendant violated the SCA, the ECPA, the CFAA, and the ICFA through its actions perpetrated on Plaintiffs' and the Class's computer systems and networks. Thus, Defendant acted and failed to act on grounds generally applicable to the Class as a whole, making final injunctive relief necessary to protect Plaintiffs and the Class from such conduct in the future, and satisfying the requirements of Rule 23(b)(2).

18. Rule 23(b)(3) provides that a class action may be maintained where the questions of law and fact common to members of the proposed class predominate over any questions affecting only individual members. Fed. R. Civ. P 23(b)(3); *Fletcher v. ZLB Behring LLC*, 245

F.R.D. 328, 331-32 (N.D. Ill. 2006). In this case, common questions predominate for the class because Defendant's software operated in a functionally *identical* manner to monitor and scan Plaintiffs and the Class's computer systems and networks, as it did to all putative class members. Furthermore, a claim for statutory damages under the SCA and ECPA does not require each class member to prove that he or she has incurred actual damages. Thus, the predominance requirement is satisfied because liability will be decided predominately, if not entirely, based on common evidence of Defendant's conduct.

19. Rule 23(b)(3) also requires a showing that "a class action is superior to the available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P 23(b)(3). The instant class action is superior to other available methods for the fair and efficient adjudication of Plaintiffs and the class's claims. The injuries suffered by individual Class members are relatively small (not factoring in un-quantifiable violations of their privacy rights). *See Burns v. First American Bank*, 2006 WL 3754820 at *10 (Cases involving minimal actual damages are particularly appropriate for certification). Thus, absent a class action, it would be difficult, if not impossible, for the individual members of the classes to obtain effective relief. Maintenance of this case as a class action is also superior to other available methods because it would avoid the necessity for multiple adjudications of identical legal and factual issues, thereby reducing the burden on the judiciary.

20. For the reasons stated above, and which will be borne out by class discovery, this case is appropriate for class certification. Plaintiffs hereby request that the Court allow for and schedule discovery to take place on classwide issues, at the conclusion of which, Plaintiffs will file a memorandum in support of this motion detailing the appropriateness of class certification

and asking the Court to rule on this motion at that time.[2]

WHEREFORE, Plaintiffs Mike Harris and Jeff Dunstan, on their own behalves and on behalf of the proposed Class, respectfully requests that the Court (1) enter and reserve ruling on Plaintiffs' Motion for Class Certification; (2) allow for and schedule discovery to take place on classwide issues; (3) grant Plaintiffs leave to file a memorandum in support of its Motion for Class Certification upon the conclusion of classwide discovery; (4) grant Plaintiffs' Motion for Class Certification after full briefing of the issues presented herein; and (5) provide all other and further relief that the Court deems equitable and just.

Dated: August 23, 2011

Respectfully submitted,

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

By: /s/ Ari J. Scharg
One of their attorneys

Jay Edelson
William C. Gray
Ari J. Scharg
EDELSON MCGUIRE, LLC
350 North LaSalle, Suite 1300
Chicago, Illinois 60654
Telephone: (312) 589-6370
jedelson@edelson.com
wgray@edelson.com
ascharg@edelson.com

[2] Plaintiffs reserve the right to amend the class definitions at the conclusion of classwide discovery.

CERTIFICATE OF SERVICE

I, Ari J. Scharg, an attorney, certify that on August 23, 2011, I served the above and foregoing ***Motion for Class Certification***, 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, on this the 23rd day of August, 2011.

/s/ Ari J. Scharg