IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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

PLAINTIFF MIKE HARRIS'S REPLY IN SUPPORT OF HIS MOTION FOR LEAVE TO CONDUCT LIMITED EXPEDITED DISCOVERY

Plaintiff Mike Harris ("Plaintiff"), through his attorneys, submits this reply in support of his Motion for Leave to Conduct Limited Expedited Discovery (Dkt. 6) (the "Motion").

INTRODUCTION

Plaintiff's Motion requests leave to serve Defendant comScore, Inc. ("comScore") with three narrowly tailored interrogatories for one purpose—to ensure that the highly sensitive information that comScore unlawfully collected from unwitting consumers is safe and secure. Plaintiff has a justifiable cause for concern; his Complaint alleges that comScore surreptitiously inserts its tracking software onto the computers of consumers throughout the country to gather enormous amounts of personal data. comScore then compiles such data into reports that are sold to third parties. comScore argues, incorrectly, in its Response to Plaintiff's Motion that:

(1) comScore's venue motion, though centered on a choice of forum clause that Plaintiff *never* agreed to is a complete shield to Plaintiff's discovery request;

(2) Plaintiff should have to meet the heightened requirements for a *preliminary injunction* instead of the "good cause" showing necessary for *limited expedited discovery*;

(3) Plaintiff does not need to ensure that third parties provided with consumers' unlawfully gathered information are aware of the need to secure it; and

(4) answering three interrogatories is unduly burdensome, despite the fact that these interrogatories will inevitably have to be answered.

As explained more fully below, each of comScore's pleas completely fail. Instead, Plaintiff properly seeks limited, expedited discovery to learn the identities of the third party recipients of unlawfully gathered data, ensure that this sensitive data is protected, and to determine whether comScore's illegal data collection continues.

Plaintiff has tried to work cooperatively with comScore to ensure the protection of consumers' unlawfully gathered information. Before filing his Motion, in accordance with Local Rule 37.2, Plaintiff first contacted comScore to request the information he now seeks. comScore refused this request. Since the filing of this Motion, Plaintiff has twice presented ways for the parties to proceed without the assistance of the Court. comScore has again refused both attempts without offering any alternative solutions. As class representative, Plaintiff has a duty to protect the interests of absent class members. To make certain that the personal information unlawfully taken from consumers by comScore is adequately protected, Plaintiff requires answers to his three narrowly tailored interrogatories. As such, Plaintiff should be permitted to conduct limited expedited discovery to protect and preserve his and other class members' sensitive information.

ARGUMENT

I. Expedited Discovery is Proper Regardless of comScore's Pending Venue Motion.

comScore disingenuously argues that Plaintiff agreed to a venue selection clause when it secretly inserted its software onto his computer.[1] (Dkt. 10, p. 2.) As comSore concedes in its venue motion, "[t]hrough investigation, comScore has learned that, for a short period of time during the first half of 2010, one of comScore's registration partners employed a Terms of Service dialog box that failed to include a functioning hyperlink to the full ULA" for Macintosh users. (Dkt. 15, p. 4 n. 3.) Plaintiff, one of the Macintosh computer ("Mac") users described by comScore, was never offered terms and conditions that included a choice of venue clause, a functioning hyperlink linking to a choice of venue clause, or any information about where such clause could be found. Unequivocally, Plaintiff *never* agreed to any terms and conditions mandating venue in Virginia courts. (Dkt. 1, ¶ 69.)

comScore still argues that even though Plaintiff never viewed either the full text of, nor a hyperlink to, the supposed terms of service, he still agreed to a choice of venue clause because "the full text of the ULA was, at all times, available at the PremierOpinion website (www.PremierOpinion.com)." (Dkt. 15, p. 4 n. 3.) This assertion is contrary to well-settled law on electronic contract formation. Not only did the agreement page shown to Plaintiff fail to contain a venue clause or a hyperlink to any supposed terms of service, there also was not even mention of *where* the terms of service could be found. Obviously, no consumer could be reasonably expected to search the entire Internet for a set of terms and conditions that may or

[1] comScore seems to imply that any adhesion contract that contains a forum selection clause is *per se* valid. Such is obviously not the case, particularly when the supposed assent to such a clause involves deception (as will be more fully briefed in Plaintiff's upcoming opposition to comScore's venue motion). However, as it relates to the current Motion before the Court, this issue is entirely moot, as Plaintiff Harris never agreed to any choice of venue clause.

may not exist. Where a reasonable consumer is unaware of the forum selection clause, or lacks the opportunity to review the clause, the consumer "cannot have [his] rights restricted by that clause." *Electroplated Metal Solutions, Inc. v. Am. Servs., Inc.*, 500 F. Supp. 2d 974, 976-77 (N.D. Ill. 2007.) comScore's venue motion as a defense to his request for limited discovery fails because Plaintiff never agreed (nor had an opportunity to even read) comScore's Terms of Service.

Regardless, the fact that comScore's venue motion is pending does not affect the Court's analysis on whether Plaintiff's Motion should be granted, and comScore's reliance on *In Re African-American Slave Descendants' Litigation,* 2003 WL 24085346 (N.D. Ill. July 15, 2003) is misplaced. That case is easily distinguishable. In *In Re African-American Slave Descendants' Litigation*, the plaintiffs requested extremely expansive discovery, calling for the "preserv[ation] [of] any and all documents that may relate to the establishment of the company, in past or present form, and any and all documents that touch on economic benefit," from some of the largest and oldest companies in the United States. *Id.* at *3. However, the plaintiffs, when requesting discovery at an early stage of the litigation, did not know if the requested documents existed, nor whether any companies actually possessed them. *Id.* at *1.

The court properly rejected the plaintiffs' motion, as their entirely speculative discovery request placed an undue burden on the defendants prematurely in the litigation. *Id.* The facts here are far different. Plaintiff asks comScore to answer three narrowly tailored interrogatories to determine who has access to unlawfully collected data. Unlike *In Re African-American Slave Descendants' Litigation*, there is no dispute that comScore acquired the information Plaintiff requests and has knowledge of the third parties with access to this data. (Dkt. 12, p. 2.) Thus, comScore cannot realistically claim that Plaintiff's discovery, in any way, compares to the broad

and extremely speculative requests denied in *In Re African-American Slave Descendants' Litigation*, and comScore should be compelled to respond to his interrogatories.[2]

In reality, comScore's argument amounts to little more than gamesmanship, and is simply an attempt to escape this Court's jurisdiction in order to move to what it perceives as a more inhospitable forum for Plaintiff. As Plaintiff never agreed to a choice of venue clause, and the requested information and holders of that information are far from speculative, comScore should answer Plaintiff's limited discovery request.

II. Plaintiff Has Demonstrated the "Good Cause" Necessary for Expedited Discovery.

Courts in the Seventh Circuit have consistently held that a plaintiff need only demonstrate "good cause" to conduct expedited discovery.[3] comScore mistakenly relies on the factors formulated by the court in *Notaro v. Koch* to articulate this standard: "some courts require[] showing that irreparable harm would result absent the discovery requested…." 95 F.R.D. 403, 405 (S.D.N.Y. 1982) (Dkt. 10, pp. 2-3.) However, this Court has explicitly rejected the use of the *Notaro* factors where a plaintiff moves solely for expedited discovery, and not a

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[2] Even assuming, *arguendo*, that this Court ultimately transferred this case, information gleaned from expedited discovery will still be useful in this litigation. comScore's argument that granting Plaintiff's Motion would result in a "tremendous waste of judicial resources" is unavailing. *See Sparks Tune-Up Centers, Inc. v. Strong*, 92 C 5902, 1993 WL 410067 *2 (N.D. Ill. 1993) (holding that there is no "absolute rule" to deciding when to allow discovery before jurisdictional challenges are resolved, and transferor courts can enter discovery orders.)

[3] Although not always specifically identified by name, courts in this Circuit routinely, and almost uniformly, employ the "good cause" analysis when determining the propriety of expedited discovery. *See, e.g., United C. Bank v. Kanan Fashions, Inc.*, 10-C-331, 2010 WL 775040, *4 (N.D. Ill. 2010) (holding that relation to multi-million dollar action and low practical burden of only "pull[ing] the inventory, sales and accounting documents" from defendant was good cause for expedited discovery); *Roche Diagnostics Corp. v. Med. Automation Sys., Inc.*, 1:10-CV-01718-SEB, 2011 WL 130098 *3 (S.D. Ind. 2011) (whether expedited discovery is granted depends "on the facts and circumstances of the particular matter.") (internal citations omitted); *Suzhou Parsun Power Mach. Co., Ltd. v. W. Import Mfg. Distrib. Group Ltd.,* 10-C-398, 2010 WL 2925894 *1 (E.D. Wis. 2010) ("The Court may grant a request for expedited discovery for good cause.")

preliminary injunction. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor,* 194 F.R.D. 618, 624 (N.D. Ill. 2000.) As Plaintiff only seeks expedited discovery, he must show the "good cause" required by this Court, not that mandated for the issuance of a preliminary injunction.

In determining whether good cause exists for expedited discovery, courts "examine the discovery request … on the entirety of the record to date and the *reasonableness* of the request in light of all the surrounding circumstances." *O'Connor,* 194 F.R.D. at 624 (emphasis in original.) Applying the analysis espoused by the court in *O'Conner*, other courts have found good cause where "[p]laintiffs have made reasonable attempts to gather the relevant evidence with defendant's cooperation and have narrowly tailored their request for expedited discovery." *Monsanto Co. v. Woods*, 250 F.R.D. 411, 413 (E.D. Mo. 2008.)

Like the plaintiffs in *Monsanto,* Plaintiff first made good-faith attempts to gather the information sought before filing his Motion. (Motion, p. 1, n.1.) Plaintiff, through his counsel, contacted comScore and requested the information he now seeks. *Id.* comSore denied this request.[4] Furthermore, Plaintiff's discovery requests, like those in *Monsanto*, are narrowly tailored. Plaintiff's interrogatories seek to identify only those third parties that may possess discoverable information (i.e., data unlawfully collected by comScore) or that may come to possess such information in the near future. *See Interscope Records v. Does 1-14*, 2007 WL 2900210, *1 (D. Kan. Oct. 1, 2007) (finding discovery requests to be sufficiently narrow where plaintiffs seek specific information regarding readily identifiable parties.) Thus, Plaintiff has established good cause for expedited discovery.

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[4] On September 29, 2011, Plaintiff's counsel sent comScore's attorney another letter stating that Plaintiff would remove 2 of the 3 submitted interrogatories if comScore would itself inform the third party holders of sensitive consumer information of this lawsuit and their duty to preserve evidence with the caveat that comScore accept responsibility for any spoliation that may arise from their failure to do so. (Attached hereto as Exhibit A is a true and accurate copy of Plaintiff's September 29, 2011 letter to comScore.) comScore also refused this request.

Although Plaintiff's Motion seeks limited expedited discovery only to determine the former and soon-to-be recipients of illegally obtained consumer data, the responses to these inquires will guide Plaintiff's decision on whether to move for a preliminary injunction. (Motion, p. 4.) This Court has made clear that "where, as here, a plaintiff seeks expedited discovery in order *to prepare for a preliminary injunction hearing,* it does not make sense to use preliminary injunction analysis factors to determine the propriety of an expedited discovery request." *O'Connor,* 194 F.R.D. 618 at 624 (emphasis in original.) Courts do, however, still require "some showing of the necessity for the expedited discovery." *Id.* at 623. Expedited discovery is necessary here because the unidentified third parties with access to comScore's data are likely unaware of this lawsuit.

Accordingly, Plaintiff and the class members' sensitive information may be destroyed (thus eliminating relevant evidence), or mishandled (thus putting the data in jeopardy). Furthermore, if Plaintiff learns through discovery that comScore's illicit collection of consumer information continues today, and/or that this information is at risk, he will likely move for a preliminary injunction. At this early stage, however, Plaintiff can only make an informed decision by undertaking limited discovery. Plaintiff's Motion is entirely reasonable given the time-sensitive[5] nature of his requests, and the potential that class members' information

[5] comScore claims that Plaintiff's counsel's decision to contact comScore in April of 2011, yet wait until August, 2011 to file this lawsuit undermines the sincerity of Plaintiff's request for expedited discovery. (Dkt. 10, p. 4.) The opposite is true. As officers of the court, Plaintiff's counsel takes their Rule 11 obligations very seriously. *See Roberts v. Zemen*, 191 F.R.D. 575, 577 (N.D. Ill. 2000) ("*An attorney has an affirmative duty to investigate the facts prior to subscribing any motion or other paper*.") (emphasis in original) (internal citation omitted). After proper development of the factual record, Plaintiff is now keenly aware of comScore's intrusive methods for collecting consumer data, the highly sensitive nature of the information in comScore's control, and the necessity of quickly ensuring that such information is properly protected. Only after Plaintiff's counsel properly investigated his claims, as required by Rule 26(g)(1), did Plaintiff recognize the need to file his Motion.

continues to be unlawfully siphoned from their computers and sold to third parties by comScore. Expedited discovery should be granted.

III. comScore is Not Unduly Burdened by Plaintiff's Interrogatories, and any Speculative Burden is Far Outweighed by the Risk of Exposure or Loss of Sensitive Consumer Data.

comScore attempts to persuade this Court that answering three interrogatories is unduly burdensome, and claims that these requests are "sweeping … [and] aimed more towards intruding upon comScore's customer relationship than to serving any legitimate evidentiary concerns" and [ironically], "implicate[] the privacy rights of third parties." (Dkt. 10, p. 5.) This is an unpersuasive argument. Plaintiff only asks comScore to identify those clients with access to information obtained by the unlawful means described in his Complaint so that this data is properly protected and preserved. Moreover, Plaintiff has twice approached comScore with ways to accomplish this without a court order, including permitting comScore to deliver appropriate instruction about necessary data protection to third parties. Both times comScore refused without offering any alternative solutions. Additionally, given the possibility that third parties who possess Plaintiff's information may erase or fail to safeguard such data, the risks attendant with *not* conducting expedited discovery far outweigh any speculative burden on comScore.

Plaintiff asks this Court to grant his Motion only to ensure that consumer data is properly safeguarded and preserved. comScore incorrectly suggests, without *any* support, that Plaintiff is somehow attempting to affect its business affairs. However, comScore cannot point to how his discovery request would do so. The scope of the potential subpoenas is narrow and well defined,

and Plaintiff is not seeking any confidential non-party information.[6] Plaintiff only seeks to identify those entities who have received illegally-obtained data from August 23, 2009 to the present, and customers with whom comScore is obligated to share this data with in the near future. (Dkt. 6, Ex. A.) Plaintiff does not seek information concerning any speculative future clients. *Id*. Instead, Plaintiff's requested discovery is extremely limited, narrowly tailored in scope, and comScore cannot earnestly argue that it will encounter any real hardship in answering the interrogatories.[7]

Given the "potential for [the] inadvertent destruction of important evidence by [these] non-parties," it is necessary that Plaintiff be allowed to subpoena these companies. *Appliance Zone, LLC v. Nextag, Inc*., 4:09-CV-89-SEB-WGH, 2009 WL 2476566, *2 (S.D. Ind. 2009.) comScore's recent filings lend credence to Plaintiff's concerns that non-parties may mishandle consumer data. In its Response, comScore's asserts that it is primarily concerned about expedited discovery because it will be faced with litigating "an unknown, but admittedly large" number of subpoenas.[8] (Dkt. 10, p. 5.) This assertion underscores the need to quickly ascertain the parties with access to this data, as it seems clear that comScore has widely dispersed this sensitive, unlawfully garnered information. (Dkt. 10, p. 5.)

Further troubling, in the Declaration of Vice President John O'Toole, attached by comScore to its Response, O'Toole states, "comScore retains and preserves *all of the data that it*

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[6] comScore states that its customer list is "highly proprietary" and that it has "no reason to believe it would be treated as such by Plaintiffs." (Dkt. 10, p. 5). However, Plaintiff's Motion offers to enter into an appropriate confidentiality agreement with comScore. (Motion, p.1, n.1.) In addition, Plaintiff's counsel has since sent comScore a letter re-iterating this offer. (Ex. A) Any suggestion that Plaintiffs will not respect the confidentiality of this information is unfounded.

[8] To the extent that comScore's concerns flow from potential embarrassment over disclosing to its clients the unlawful methods by which it obtains consumer data, this should not be a consideration in evaluating whether comScore is "burdened" by Plaintiff's requests.

uses to generate customer reports." (Dkt. 11, ¶ 3.) (emphasis added.) However, this Declaration, like most of comScore's "assurances" is more significant for what it does not say than for what it does. O'Toole does not indicate whether customer reports themselves are preserved or only the underlying data used to produce them. Nor does O'Toole provide any indication about whether third parties have taken any steps to ensure the preservation of such information, let alone what they done with this data. In fact, comScore's venue motion makes it very clear that certain consumer data collected by the Company is ultimately not used in customer reports. (Dkt. 15, p. 4 n. 3.) comScore, of course, does not mention, either in its motion or in the O'Toole Declaration, whether this sensitive information is destroyed, and if not, how it is secured. For all of these reasons, Plaintiff's Motion should be granted.

CONCLUSION

Plaintiff has established good cause to conduct limited expedited discovery and determine the identities of parties currently holding Plaintiff and the class members' unlawfully obtained sensitive information. Moreover, the burden borne by comScore in answering Plaintiff's interrogatories is *de minimus*, and the speedy determination of the issues raised therein is necessary to protect Plaintiff and the absent class members' data. For these reasons, Plaintiff's Motion should be granted.

Dated: October 3, 2011

RESPECTFULLY SUBMITTED,

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

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CERTIFICATE OF SERVICE

I, Ari J. Scharg, an attorney, hereby certify that on October 3, 2011, I served the above and foregoing ***Reply in Support of Plaintiff's Motion for Leave To Conduct Limited Expedited Discovery*** by causing true and accurate copies of such paper to be transmitted to all counsel of record via the Court's CM/ECF electronic filing system, on this the 3rd day of October, 2011.

/s/ Ari J. Scharg