# 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,

          v.

COMSCORE, INC., a Delaware corporation,

          Defendant.

Case No. 1:11-cv-5807

Hon. James F. Holderman

Magistrate Judge Young B. Kim

### DECLARATION OF RAFEY S. BALABANIAN IN SUPPORT OF PLAINTIFF JEFF DUNSTAN'S MOTION TO COMPEL COMSCORE, INC. TO RESPOND TO PLAINTIFF'S WRITTEN DISCOVERY

I, Rafey S. Balabanian, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1.      I am a Partner at the law firm of Edelson LLC, which has been retained to represent Plaintiffs Mike Harris and Jeff Dunstan (collectively, "Plaintiffs") in this matter. I am an adult over the age of 18 and I am fully competent to make this Declaration. I have personal knowledge of all matters set forth herein. If called upon to testify as to the matters stated herein, I could and would competently do so.

2.      Presently, the Parties are engaged in the merits phase of discovery in this case.

***Dunstan's Discovery Requests and comScore's Responses.***

3.      On July 31, 2013, comScore was served with Dunstan's First Set of Interrogatories and Requests for the Production of Documents and Plaintiff Harris's Second Set of Interrogatories. (*See* Plaintiff Jeff Dunstan's First Set of Requests for Production of Documents to comScore, Inc. ("Dunstan's Requests"), Plaintiff Jeff Dunstan's First Set of Interrogatories to comScore, Inc. ("Dunstan's Interrogatories"), and Plaintiff Mike Harris's

Second Set of Interrogatories to Defendant comScore, Inc. ("Harris's Interrogatories"), true and accurate copies of which are attached as Exhibit Nos. 1, 2, and 3, respectively).

4. On August 30, 2013 comScore responded to Plaintiffs' discovery, primarily by offering boilerplate objections to each Interrogatory and Document Request. comScore also failed to answer certain of Dunstan's Interrogatories with sufficient detail (or even answer some Interrogatories at all) and didn't produce documents at that time. Just over two weeks later, however, Plaintiffs received comScore's document production via a hard drive containing files Bates-labeled "CS0016909-CS0096420."[1] And after completing an initial survey of those files, Plaintiffs learned that comScore's production spans between 1.5 and 3.5 million pages of printed material.

***The Parties Met and Conferred, But comScore Presently Refuses to Supplement Portions of Its Discovery Responses.***

5. Pursuant to this Court's September 17th Order, the Parties met and conferred on September 26, 2013 about many of the issues above (the "meet and confer"). Thereafter, the Parties exchanged several letters outlining their positions as to the contested discovery issues, wherein comScore agreed to supplement its responses regarding certain information and requests, but confirmed that it would not supplement in regards to others.

6. In terms of anticipated supplementation, comScore has indicated that it will supplement its responses to Dunstan's Requests Numbers 74, 75, 76, 77, and 88, and its answers to Dunstan's Interrogatory Numbers 2, 3, and 4. Of these, Plaintiffs specifically note that

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[1] As previewed in Plaintiffs' recent motion filed with this Court, (Dkt. 217), comScore says that it produced documents on September 9, 2013—and Plaintiffs have no reason to disbelieve comScore—but regardless due to an apparent mix-up with FedEx's delivery of the hard drive, my firm—despite thoroughly searching both our offices and the lobby of our building for the unencrypted hard drive at comScore's request—could not locate it, nor believe that it was actually delivered. comScore then promised to have a replacement hard drive delivered by September 16, 2013, but that too was delayed. As noted above, Plaintiffs received comScore's document production on September 17th.

comScore has agreed to supplement its response to Dunstan's Request Number 88, which sought "[a]ny and all policies of liability insurance under which [comScore was] named or covered" during and before this litigation—information that should have been disclosed during comScore's Rule 26(a)(1) disclosures. And as previewed in their most recent motion submitted to this Court, (*see* Dkt. 217-1 ¶ 10), Plaintiffs presently take no position as to whether comScore willfully withheld information related to its insurance coverage for this matter, but to the extent it has any such coverage and failed to disclose it in accordance with the Federal Rules, Plaintiffs intend to address that failure under a separate motion. For now, Plaintiffs look forward to receiving the promised supplements to comScore's discovery responses—and will, of course, alert the Court to the extent the promised material is not provided.

7.      As for comScore's refusal to answer certain discovery requests, Plaintiffs seek to compel responses regarding: (1) comScore's marketing or promotion of OSSProxy (Plaintiff Dunstan's Document Request Nos. 19, 21, 22 and 26); (2) comScore's practices and policies relating to the purging of certain Class and Subclass members' information (Plaintiff Dunstan's Document Request Nos. 34 and 36); (3) the revenue and monies generated from the Class and Subclass's information (Plaintiff Dunstan's Document Request Nos. 56, 57, 58, 59, 60, and 61 and Plaintiff Dunstan's Interrogatory Nos. 10, 11, and 12); and (4) comScore's relationship with Trees for the Future, NPO (Plaintiff Dunstan's Request Nos. 64, 65, 66, 67, and 68). To be clear, these deficiencies represent only those identified in Plaintiffs' present review of comScore's written discovery responses and massive document production—and if this Court extends its discovery deadlines, (*see* Dkt. 217), Plaintiffs anticipate supplementing and/or clarifying this Motion to Compel as appropriate.

***comScore's Responses to Plaintiff's Discovery Requests are Lacking.***

8.      To date, comScore has refused to answer Dunstan's Document Request Nos. 19, 21, and 22, which seek documents relating to comScore's marketing or promotion of its Panelist Software, and Dunstan's Document Request No. 26, which seeks communications between comScore and its bundling partners regarding the functionality of comScore's Panelist Software. (*See* Defendant comScore, Inc.'s Responses to Plaintiff Jeff Dunstan's First Set of Requests for Production of Documents to comScore, Inc., Resp. to Req. Nos. 19, 21, 22, and 26, a true and accurate copy of which is attached as Exhibit No. 4.) When asked during the meet and confer, comScore offered two explanations and one compromise regarding its refusal to respond. First, comScore explained that it believes information relating to its marketing or promotion of the Panelist Software is not relevant to this case. Second, comScore asserted that the Requests were overly broad because the only possibly relevant information would be communications with bundling partners about actually bundling OSSProxy (*i.e.*, with the partners' software), along with marketing materials designed to recruit new bundling partners. For instance, the requested communications may show that comScore willfully deceived Class members by, for example, incentivizing prospective or current bundling partners to develop or use misleading installation processes, so as to increase the number of installations of OSSProxy and, in turn, increase the collection of data through bundled versions of OSSProxy. For the compromise, Plaintiffs understood that comScore then-agreed to produce documents falling into the limited scope of what comScore took to be "possibly relevant" communications—but comScore later clarified that it viewed the "proposed 'narrowing' as an attempt to re-write [Dunstan's] Requests, which is improper [and that it would] not supplement."

9.      Plaintiff Dunstan's Document Request Numbers 34 and 36 seek documents and

communications relating to "any occurrence where [comScore] did not Purge Personal Information Collected through [its] Panelist Software." comScore responded to these Requests with the same boilerplate objections discussed above, and, during the Parties' meet and confer, additionally explained that the Parties' definitions of "purge" were not in accord, but nonetheless agreed to consider producing documents that explain its purging procedures. Most recently, however, comScore claims that is "has no documents to produce responsive to these requests" because it "does not have any documents, including written policies, regarding any such purging." comScore's position is untenable. For instance, comScore has already produced documents responsive to—or at least showing that it has documents responsive to—these requests. That is, Plaintiffs have located communications between comScore employees discussing ████████████████████████████████████████████████

██████████████████████████████████████████. (*See*

CS0075487_Confidential—Attorney's Eyes Only.htm, a true and accurate copy of which is attached as Exhibit 5.) This document shows that comScore's position (*i.e.*, that it has no responsive documents) is incorrect, and to the extent comScore has other documents like this one, they must be produced.

10.     Dunstan's Request Numbers 56, 57, 58, 59, 60, and 61 seek documents relating to the revenue and monies generated through comScore's "sharing, selling, transmitting, and/or disclosing" of the Class's and Subclass's personal information. For its part, comScore simply answered "None" to certain inquires (including Interrogatory Nos. 10 and 11). (Defendant comScore, Inc.'s Answers to Plaintiff Jeff Dunstan's First Set of Interrogatories to comScore, Inc., ("comScore's Answers"), a true and accurate copy of which is attached as Exhibit No. 6.) Regarding its "none" response, comScore has clarified that it answered "None" to Interrogatory

Nos. 10 and 11 because Plaintiffs' definition of "Personal Information" didn't include

"aggregated" and/or "anonymized" data. (*See* September 30th Meet and Confer Follow Up

Letter at 4, a true and accurate copy is attached as Exhibit 7) But that position doesn't hold up

because the requests specifically seek information relating to the sharing, selling, transmitting,

and/or disclosing of the *Class's* and *Subclass's* Personal Information—*i.e.*, in the aggregate

rather than for this or that Class member. What's more, and even if Plaintiffs' definition of

"Personal Information" excluded aggregated information, evidence from comScore's document

production shows that comScore *does* in fact share or sell share Personal Information that isn't

"aggregated" or "anonymized" at all. For instance, Plaintiffs have recently reviewed several

communications from comScore's most recent document production where comScore employees

specifically discuss ███████████████████████████████. (*See*

CS0049415_Confidential—Attorney's Eyes Only.htm, a true and accurate copy is attached as

Exhibit 8.) Likewise, comScore's Rule 30(b)(6) designee and Chief Technology Officer, Mike

Brown, recently testified ██ ████████████████████████████████

████████████. And regardless of the above, comScore has indicated that even if Plaintiffs

revised their definition of "Personal Information" to include aggregated information, it would

object to the requests on relevance grounds. That objection, however, is entirely without merit.

The information sought (*i.e.*, profits derived from the unlawful collection of Class members'

information) is directly and obviously relevant to this case, as two of the statutory claims

certified in this action (the ECPA and SCA) explicitly state that profits made in violation of the

laws are relevant in calculating damages. And while comScore suggested that Plaintiffs examine

its publicly available "Quarterly and Annual Financial Reports" for financial information, that is

not a workable substitute for information within comScore's possession.

11.     Dunstan's Document Request Nos. 64, 65, 66, 67, and 68 all seek documents and communications related to Trees for the Future, NPO, including "contracts, amendments to contracts, agreements, and understandings." Amongst its repeated and unspecific objections addressed already, comScore also objected that the word "understandings" was vague and ambiguous and failed to produce any responsive documents. In an attempt to clear up what Dunstan meant by "understandings," Plaintiffs explained that comScore's relationship with Trees for the Future is "relevant for the damages calculation in this case. If comScore's relationship with Trees for the Future was not as purported, and thus comScore's actions in this regard were willful or knowing, Plaintiffs may be entitled to additional damages." (*See* September 18th Meet and Confer Letter at 4, a true and accurate copy is attached as Exhibit 9.) For its part, comScore clarified that the real reason it did not produce any documents was because Trees for the Future is not a "Bundling Partner" and does not distribute the Panelist Software. (*See* October 3rd Meet and Confer Follow Up Letter at 2, a true and accurate copy is attached as Exhibit 10.) Regardless of which objection comScore chooses to assert, none have merit. comScore used, and continues to use, Trees for the Future as one method to convince consumers (and Class and Subclass members) to install OSSProxy. ██████████████████████████████████████ ████████████████████████████████████████████████████ ████████████████████████████████. (*See* CS0046036_Confidential—Attorney's Eyes Only.pdf at 20, attached as Exhibit 11.) And to date, comScore has produced nothing to show that it has actually planted any trees through the Trees For the Future program, apart from a single email (recently reviewed by Plaintiffs) referencing an "original donation" to the program.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of October 2013 at Chicago, Illinois.

/s/ Rafey S. Balabanian

## CERTIFICATE OF SERVICE

I, Benjamin S. Thomassen, an attorney, certify that on October 7, 2013, I served the above and foregoing ***Declaration of Rafey S. Balabanian in Support of Plaintiff Jeff Dunstan's Motion to Compel comScore, Inc. to Respond to Plaintiff's Written Discovery***, 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 7th day of October 2013.

/s/ Benjamin S. Thomassen