

**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-05807

Hon. James F. Holderman

Magistrate Judge Young B. Kim

PLAINTIFFS' AMENDED MOTION FOR APPROVAL OF CLASS NOTICE PLAN

Plaintiffs Mike Harris and Jeff Dunstan (the “Plaintiffs”), through their undersigned counsel, respectfully move the Court for approval of their proposed Amended Notice Plan, which, as shown below, fully satisfies all requirements under Rule 23(c) and Due Process. In support of their motion, Plaintiffs state as follows:

I. INTRODUCTION AND BACKGROUND

Plaintiffs bring this amended motion at this time because shortly after they filed their original Motion for Approval of Notice Plan (“Motion for Notice”),¹ the case was stayed pending resolution of comScore Rule 23(f) petition for leave to appeal to the Seventh Circuit. Once the petition was denied, the Parties decided to engage in the meet and confer process so as to address comScore’s concerns with aspects of the proposed Notice Plan and in hopes of reaching an agreement on providing notice to the Class and Subclass (collectively, the “Class”) of this Court’s Order granting class certification (the “Certification Order”). At the same time that they were meeting and conferring with comScore, Plaintiffs deposed comScore’s 30(b)(6) designee

¹ For the sake of clarity, here “Notice Plan” refers to the plan filed with the Court on April 16, 2013. (Dkt. 189.) “Amended Notice Plan,” in contrast, refers to the instant plan for which Plaintiffs now seek approval from the Court.

on notice in October to clarify and better understand key issues relating to how providing notice to the Class in this matter could be effectuated.

Plaintiffs now present their Amended Notice Plan for approval. As explained below, the Amended Notice Plan benefits greatly from the information learned through both the Parties' several meet and confers and the notice-focused Rule 30(b)(6) deposition, and will provide the Class with the best notice practicable under the circumstances, thus satisfying Rule 23 and Due Process.

A. Plaintiffs' Original Motion for Approval of Class Notice Plan was Stayed Pending Resolution of comScore's Rule 23(f) Petition.

On April 2, 2013, this Court certified a Class and Subclass of individuals under Rule 23(b)(3) who allege that Defendant comScore "improperly obtained and used personal information from [their] computers after they downloaded and installed comScore's [tracking software, OSSProxy.]" (Dkt. 186 at 1, 19–20.) Following the Certification Order, Plaintiffs turned to the issue of notice to the Class and solicited bids from reputable class action administrators experienced in developing and implementing notice plans in complex class actions. (Declaration of Rafey S. Balabanian [cited as "Balabanian Decl.,"] ¶ 2, a true and accurate copy of which is attached hereto as Exhibit 1.) Plaintiffs retained Kurtzman Carson Consultants ("KCC"), and with its assistance, developed a proposed Notice Plan for effectuating notice to the Class of the Court's Certification Order. (*Id.*) On April 16, 2013, Plaintiffs moved the Court for approval of that proposed Notice Plan. (Dkt 189.)

The Notice Plan listed a four-pronged approach to effectuating notice to the Class, which Plaintiffs believed—based on the information then available to them (i.e., information learned during the class discovery period)—would provide the best notice practicable to the Class pursuant to Rule 23(c)(2). (*See id.*) The plan included: (i) "push" notice, where comScore would

notify Class and Subclass members (who presently have comScore’s software installed and running on their computers) of the Certification Order directly through its panelist software, OSSProxy; (ii) direct notice using the e-mail and U.S. Mail addresses of Class members in comScore’s records; (iii) publication notice through an online media campaign (e.g., using Internet banner ads targeted at individuals likely to have downloaded comScore’s panelist software in the past); and (iv) a website to serve as the traditional “long form” notice, which would provide detailed information about the litigation. (Dkt. 189 at 2–3.)

At about the same time that Plaintiffs filed their original Motion for Notice, comScore filed a Rule 23(f) petition for leave to appeal the Certification Order to the Seventh Circuit and, shortly thereafter, moved this Court to stay the underlying case pending resolution of the petition. (Dkt. 192 at 1.) In that motion, comScore stated that it “[took] issue” with Plaintiffs’ proposed Notice Plan and otherwise explained how any efforts directed towards notifying the Class and Subclass might be wasted, depending on the outcome of its Rule 23(f) petition. (*Id.* at 4–5.) The Court granted comScore’s motion, and the Parties directed their efforts towards the 23(f) petition. (Dkt. 194.)

B. comScore’s 23(f) Petition is Denied and the Parties Discuss the Details of Plaintiffs’ Proposed Notice Plan.

On June 11, 2013, the Seventh Court denied comScore’s 23(f) petition, (dkt. 199), and, on June 19, 2013, the Parties embarked on what would be a series of meet and confers about the proposed Notice Plan and comScore’s concerns about Plaintiffs’ suggested methods of providing notice to the Class. (Balabanian Decl. at ¶ 3.) During their initial conference and through many follow up conversations, e-mails, and written correspondence, the Parties explored the factual bases underlying comScore’s concerns. (*Id.*) Through those communications, Plaintiffs determined that obtaining further information about the types of Class-member contact

information possessed by comScore and the Parties' ability to reach those individuals would require (i) limited notice-related discovery and, depending on the results of that discovery, (ii) revisions to the Notice Plan previously filed with the Court. (*Id.*)

By way of example, Plaintiffs have always believed that “pushing” notice to Class members directly through OSSProxy would be the most effective and, administratively, the easiest, method of providing notice directly to Class members who currently have OSSProxy installed on their computers. (*Id.* at ¶ 4.) comScore, however, took issue with that belief. (*Id.*) At first, it took issue with the word “push,” claiming that OSSProxy was not capable of “pushing” notice directly to current panelists (though comScore’s Rule 30(b)(6) designee previously spoke of OSSProxy’s equivalent technology, which could render what are known as “web pop” boxes on panelists’ computers). (*Id.*) comScore also claimed that even if the push notice were feasible, doing so would be unduly burdensome on its servers and technical infrastructure (though Plaintiffs understood otherwise, and indicated to comScore that it had effectively “pushed” analogous notices to panelists in the past). (*Id.*) When Plaintiffs deposed comScore’s corporate designee on the issue in October of this year, Plaintiffs found that comScore’s concerns regarding “pushing” notice were based on a misunderstanding; apparently comScore believed Plaintiffs wished to send push notice to the entire Class (e.g., even those who no longer have OSSProxy installed and running on their computers), which was not the case. (*Id.* at ¶ 5.) Rather, Plaintiffs have always been of the position that push notice should/could only be sent to Class members with OSSProxy currently installed and running on their computers. (*Id.*) With the Parties now on the same page (and speaking the same language), even comScore seems to agree that Plaintiffs’ “push” notice proposal is feasible and not prohibitively expensive. (*Id.*)

Plaintiffs’ notice-related discovery requests were not limited to understanding

comScore's ability to "push" notice to Class members. (*Id.* at ¶ 6.) Plaintiffs were also concerned, for example, with the veracity of the information that comScore provided them regarding the contact information that it had in its possession for Class members. (*Id.*)

C. Key Information Learned from the Deposition of comScore's Rule 30(b)(6) Designee and Chief Technology Officer on Notice-Related Issues and comScore's Latest Document Production.

Following their several meet and confers, on October 3, 2013, Plaintiffs moved forward with the deposition of comScore's Rule 30(b)(6) designee and Chief Technology Officer, Mike Brown, on notice-related issues. (*Id.* at ¶ 7.) Through that deposition, and as corroborated by materials from comScore's most recent document production, Plaintiffs have now learned several key pieces of information, including: (i) comScore's ability to "push" notice directly to Class members currently running OSSProxy on their computers with relative ease; (ii) details regarding the number of individuals who *currently* have comScore's panelist software installed on their computers and who can be contacted directly (whether through a "push" or "pop" notice via OSSProxy itself or through an e-mail); (iii) the number of *former* panelists that comScore has contact information for, which might facilitate direct notice via telephone, U.S. Mail, e-mail, and social network-based e-mail, such as Facebook e-mail addresses; and (iv) demographics of individuals who have, or have had, comScore's software installed on their personal computers. (*Id.*)

D. Key Revisions Reflected in Plaintiffs' Amended Notice Plan Based on Information Learned After Conducting Limited Notice-Related Discovery.

Based on the information gleaned from Plaintiffs' several discussions with comScore's counsel, the deposition of Mr. Brown, and comScore's latest document production, Plaintiffs identified a need to revise their proposed Notice Plan in the following ways.

First, the Parties have moved the Court to amend the certified Class definition in this case

to only include United States residents. (Dkt. 252.) The requested limitation will ensure that the case proceeds as efficiently as possible, avoids manageability problems, and facilitates more practicable and effective notice. (*See id.*) As such, the Amended Notice Plan is designed to reach the maximum number of United States residents that fall within the definition of the Class.

Second, based on information learned from comScore concerning its ability to contact current and former panelists (i.e., by “web pop” or “push” notice, through traditional means—such as e-mail, U.S. mail, and telephone—and by sending e-mails to Class members using their social networking contact information, like FacebookIDs), Plaintiffs, with the assistance of KCC, have strengthened the proposed Notice Plan so as to *directly* reach a greater percentage of Class members residing in the United States. (Balabanian Decl. at ¶ 8.) Relatedly, and based on the new information learned from comScore concerning the demographic profile of its panelists, Plaintiffs are confident that the below-proposed Amended Notice Plan—again, developed with the assistance of KCC—will in fact reach as many individuals as possible who are likely to have (or have had) OSSProxy installed on their computers. (*Id.* at ¶ 9.)

With these additions, Plaintiffs believe that their Amended Notice Plan is even stronger than before and will reach (both directly and indirectly) the greatest number of Class and Subclass members possible. (*Id.*) And as demonstrated below, the revised and proposed Amended Notice Plan constitutes the best notice practicable under the circumstances and otherwise satisfies the requirements of Rule 23(c)(2)(B) and Due Process. Accordingly, Plaintiffs respectfully request that the Court approve their Amended Notice Plan.

II. ARGUMENT

A. The Amended Notice Plan is the Best Practicable Under the Circumstances.

Rule 23(c)(2)(B) provides that “[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011). Class notice must be “reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *F.C.V., Inc. v. Sterling Nat. Bank*, 652 F. Supp. 2d 928, 944 (N.D. Ill. 2009). Further, Rule 23 “accords considerable discretion to a district court in fashioning notice” and seeks “cooperative ingenuity on the part of counsel and the court in determining the most suitable notice in each case.” *Tylka v. Gerber Prods. Co.*, 182 F.R.D. 573, 578 (N.D. Ill. 1998) (quotations and citations omitted). The Federal Judicial Center has concluded that a notice plan that reaches at least 70% of the class is reasonable. *Federal Judicial Center, Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010), p. 3.

As before, Plaintiffs propose that Class notice be disseminated through a comprehensive four-pronged approach, which has been significantly strengthened by information learned subsequent to Plaintiffs’ original Motion for Notice.

1. Direct notice “pushed” through active installations of OSSProxy.

First, comScore will “push” the Summary Notice through OSSProxy to all Class members who currently have the software running on their computers, and will do so by rendering a dialogue (or pop-up) box on their computer screens. (The Declaration of Gina M. Intrepido-Bowen [cited as “Intrepido-Bowen Decl.”] at ¶ 20, a true and accurate copy of which is attached hereto as Exhibit 2.) The proposed Summary Notice, which will contain an active hyperlink to the Case Website, is attached to the Intrepido-Bowen Decl. as Attachment 1-B. This form of “push notice” will reach individual Class members through the most direct means possible—i.e., through the same computer onto which OSSProxy is installed. And because push

notice effectively identifies, reaches, and notifies Class members with minimal effort, “the express language and intent of Rule 23(c)(2) leave[s] no doubt that [such] individual notice must be provided to [these] [C]lass members,” even through they only comprise a portion of the Class. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) (requiring direct notice to 2.25 million of 6 million person class where that portion of the class was “identifiable through reasonable effort”); *accord Larson v. Sprint Nextel Corp.*, 07-5325JLL, 2009 WL 1228443, at *9 (D.N.J. Apr. 30, 2009) (“The fact that not every member of the class can receive the best notice does not mean that everyone gets the least notice. Rather, those [class members] capable of reasonable identification require individual notice.”).

2. Traditional direct notice (i.e., e-mails and postcards) via Class member contact information stored in comScore’s panelist database.

Second, KCC will send the Summary Notice via e-mail and a postcard to all addresses in comScore’s records. (Intrepido-Bowen Decl. at ¶¶ 21, 22.) In terms of the actual e-mail addresses in its possession, comScore will send the Summary Notice both to e-mail addresses that current and former panelists have provided to comScore directly (i.e., through optional “surveys” that some panelists completed at the time that they installed OSSProxy on their computers) and through e-mail addresses that comScore has collected from panelists’ computers *through* OSSProxy and now associates with individual panelists. (*Id.* at ¶ 21.) These e-mail addresses will be supplemented with e-mails sent to Class members’ social media e-mail addresses (*e.g.*, “@facebook.com” e-mail addresses) in addition to their main e-mail accounts, to the extent such information is available. (*Id.*) As before, because these e-mail addresses make Class members “identifiable through reasonable effort,” they should be used to notify Class members directly. *Eisen*, 417 U.S. at 175. The proposed forms of the e-mail and postcard versions of the Summary Notice are attached to the Intrepido-Bowen Decl. as Attachments 1-C

and 1-D, respectively.

On October 22, 2013, Plaintiffs provided comScore with a draft of their Amended Notice Plan, which, *inter alia*, anticipated the use of Class member e-mail addresses (as collected and/or maintained by comScore) to provide direct notice to the Class. (Balabanian Decl. ¶ 10.) In response, comScore did not suggest that they were not in possession of such e-mail addresses, but instead claimed that (i) certain e-mails in the list might identify multiple household users of a single monitored computer (some of whom may not actually be Class members) and, second, that certain stored e-mail addresses might represent duplicate contact points for a single panelist. (*Id.* at ¶ 11.) Neither potential issue—to the extent either is true—should preclude use of the e-mail lists for the purposes of providing notice to Class members. For the first, the fact that other members of a given panelist’s household may receive notice is of little concern, especially because such receipt of the Summary Notice is, if anything, more likely to increase the chance that actual Class members *are* eventually notified of this case. *Cf. Hernandez v. Talman Home Mortgage Corp.*, 85 C 1330, 1986 WL 5205, at *8 (N.D. Ill. Apr. 29, 1986) (accepting objectors’ suggestion that publication notice in the Chicago Daily Law Bulletin would “further the desirable end of providing notice to as many class members as possible” because attorneys who previously represented such class members may see the notice and contact their clients). For the second, Plaintiffs can see no reason why two e-mails sent to a single Class member would make notice impracticable or otherwise inappropriate, especially since the cost differential of sending one, two, or even ten identical e-mails is negligible. And besides, sending a single Class member two e-mails will only increase the likelihood that s/he sees and reads one of them.

In the end, given that the list of collected e-mails is readily obtainable by comScore and is guaranteed to reach a substantial portion of the Class, using it is eminently practicable and

should remain a core part of the Class Amended Notice Plan.

3. Consumer publication notice in *People* magazine.

Third, to build upon the reach of the individual notice effort, KCC will place a half-page notice in *People* magazine, which offers a circulation of over 3.5 million and, factoring in pass along readership, an adult audience of over 43 million. (Intrepido-Bowen Decl. at ¶ 24.) KCC has calculated that the readership of *People* magazine is likely to include a significant portion of the Class. (*Id.* at ¶¶ 16, 24.)

4. Supplemental notice via Internet banner ads.

Fourth, KCC will supplement the above with Internet banner ads displayed on the 24/7 Real Media Internet network, which allows access to over 4,000 premium websites. (Intrepido-Bowen Decl. at ¶¶ 25, 26.) These ads will run for a one-month period, contain active hyperlinks to the Case Website, and result in 110 million *unique* impressions. (*Id.* at ¶ 25.)

Depending on the percentage of Class members reached through the OSSProxy “push” notice and direct mail and e-mail campaigns, KCC will supplement the Amended Notice Plan with additional publication notice and a second Internet media campaign sufficient to achieve notice reach to at least 70% of Class members. (*Id.* at ¶ 27.) The proposed banner ads are attached to the Intrepido-Bowen Decl. as Attachment 1-E.

5. Website containing long-form notice and other information.

Fourth, the direct “push” notices, mail and e-mail campaigns, and supplemental Internet notices will direct Class members to a website, www.comScoreClassAction.net (the “Case Website”), which will be created and maintained by KCC. (*Id.* at ¶ 28.) This website is an easily remembered domain that will serve as the traditional “long form” notice, will provide access to relevant Court documents, and will provide Class members with additional information about the

litigation and their options and rights, as well as contact information for Class Counsel and KCC.² The proposed Long Form Notice is attached to the Intrepido-Bowen Decl. as Attachment 1-F.

All told, the direct OSSProxy “push” delivery, direct mailing, targeted Internet ads, and website Amended Notice Plan is consistent with other effective court-approved notice plans, is the best practicable notice to the Class under the circumstances, and complies with Rule 23 and Due Process. (Intrepido-Bowen Decl. at ¶¶ 30, 34, 35.) Plaintiffs propose that the deadline for a Class member to request to be excluded be sixty (60) days after the Amended Notice Plan has been fully effectuated.

B. The Proposed Notices are Easy to Read and Understand and, thus, Comport with Rule 23 and Due Process.

To satisfy Rule 23(c)(2)(B), the class notice must concisely state in plain, easy-to-understand language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class members under Rule 23(c)(3). “The federal judicial center has

² The Manual For Complex Litigation confirms that using a dedicated website to provide supplemental information is an effective notice technique:

Posting notices on dedicated Internet sites, likely to be visited by class members and linked to more detailed certification information, is a useful supplement to individual notice, might be provided at a relatively low cost, and will become increasingly useful as the percentage of the population that regularly relies on the Internet for information increases. An advantage of Internet notice is that follow-up information can easily be added, and lists can be created to notify class members of changes that may occur during the litigation. Similarly, referring class members to an Internet site for further information can provide complete access to a wide range of information about a class settlement. Many courts include the Internet as a component of class certification and class settlement notice programs.

created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.” Adv. Cmte. Notes (2003) to Fed. R. Civ. P. 23(c). Ultimately, notice is “adequate if it may be understood by the average class member.” ALBA CONTE & HERBERT B. NEWBERG, 4 NEWBERG ON CLASS ACTIONS, §11:53, 167 (4th ed. 2002).

Here, the Summary Notice (whether delivered via OSSProxy, U.S. mail, or e-mail, including via social media e-mail) and the Long Form Notice are based upon the question and answer format suggested by the Federal Judicial Center and comply with Rule 23(c)(2)(B) and Due Process. (Intrepido-Bowen Decl. at ¶¶ 31–33.) The Summary Notice is concise and written in plain, easy-to-understand language. (*Id.* at ¶ 32.) It provides a description of the defined Class and Subclass, along with a basic description of the nature of the action and claims at issue. (*See* Intrepido-Bowen Decl., Attachments 1-B, 1-C, and 1-D.) The Summary Notice informs each Class member that: he or she may enter an appearance through counsel if the member so desires, the binding effect of a class judgment on Class members, and that the Court will exclude from the Class any member who requests exclusion. (*See id.*) If any Class member desires additional information, the Summary Notice provides a toll-free telephone number and a website address where they can speak to a claims administrator, reach Class Counsel, and view Court documents. (*Id.*)

The Long Form Notice is also concise and written in plain, easy-to-understand language to provide additional information about the lawsuit. (*See* Intrepido-Bowen Decl., Attachment 1-F.) The first page of the Long Form Notice provides a basic description of the nature of the action. (*See id.*) This information is further explained in the Answers to Questions Nos. 1–9, which describe the posture of the action, the claims, the issues, the allegations, comScore’s response, and the relief sought. (*Id.*) The Answers to Questions 10–12 provide a description of

the Class and Subclass and explain how to determine if a person is a member. (*Id.*) And, if potential Class members are still unsure as to whether they are included, Answer to Question 13 encourages them to call Class Counsel for further help. (*Id.*)

The Answer to Question 14 provides an explanation of the rights of Class members should they elect to remain in the Class or Subclass and informs each member about the binding effect of a class judgment on them. (*Id.*) The Answers to Questions 15–16 explain that the Court will exclude from the Class and Subclass any member who requests exclusion and the time and manner for requesting exclusion. (*Id.*) The Answer to Question 17 explains that each member may enter an appearance through their own counsel if they so desire. (*Id.*) If further information is desired, the Answer to Question 23 informs Class members that more information is available by calling Class Counsel and/or the class action administrator. (*Id.*)

In sum, the format and language of each form of notice has been drafted so that it is conveyed in plain language, is easy to read, and will be readily understood by the members of the Class and Subclass. (*Id.* at ¶¶ 31–33.) Thus, the proposed notices satisfy the requirements of Rule 23 and Due Process.

III. CONCLUSION

For the reasons discussed above, Plaintiffs Mike Harris and Jeff Dunstan respectfully request that the Court enter an Order (i) approving the Amended Notice Plan, finding that it satisfies the requirements of both Rule 23 and Due Process, (ii) directing comScore, under KCC’s supervision, to “push” the Summary Notice to all current panelists, (iii) directing comScore to produce a computer-readable file containing the names, mailing addresses, and e-mail addresses, including social media e-mail addresses, associated with all Class and Subclass members contained in its database, (iv) authorizing that notice be sent by postcard and e-mail to

all Class and Subclass members for whom comScore possesses such contact information, (v) authorizing the dissemination of the Internet advertisements that comprise the online media campaign, (vi) authorizing the creation of the Case Website, and (vii) awarding such additional relief as the Court deems reasonable and just.

Respectfully submitted,

MIKE HARRIS and **JEFF DUNSTAN**,
individually and on behalf of a class of
similarly situated individuals,

Dated: November 8, 2013

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CERTIFICATE OF SERVICE

I, Benjamin S. Thomassen, an attorney, certify that on November 8, 2013, I served the above and foregoing *Plaintiffs' Amended Motion For Approval of Class Notice Plan*, 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 8th day of November 2013.

s/ Benjamin S. Thomassen