**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| MIKE HARRIS and JEFF DUNSTAN, individually and on behalf of a class of similarly situated individuals<br><br>Plaintiff,<br><br>v.<br><br>COMSCORE, INC., a Delaware corporation<br><br>Defendant. | CASE NO. 1:11-cv-5807<br><br>Judge Holderman<br><br>Magistrate Judge Kim |

**COMSCORE, INC.'S REPLY IN SUPPORT OF ITS RENEWED MOTION TO DISMISS UNDER RULE 12(B)(3)**

## INTRODUCTION

Plaintiffs' response to comScore's renewed motion to dismiss is the *third* time that Plaintiffs have changed their position on whether they accepted comScore's Terms of Service. At the outset of the litigation, Plaintiffs alleged that Harris and Dunstan *did not agree* to comScore's terms. (Dkt. 169 at ¶¶ 66, 70). But Plaintiffs directly contradicted their Complaint when they argued that "Plaintiffs and each Class member . . . **accepted** the ULA" to support their commonality argument at the class certification stage. (Dkt. 184 at 1-2) (emphasis added). Now, Plaintiffs say that they did accept the terms, but that comScore is not a party to the agreement. (Pl. Br. at 2). But Plaintiffs' most recent position *still* contradicts the Complaint, because the Complaint describes the agreement as "comScore's Terms of Service" or "Defendant's Terms of Service" throughout.

In any event, taking Plaintiffs' most recent representation as true, Plaintiffs admit that they have agreed to litigate this case in Virginia. comScore is entitled to enforce that agreement as a party thereto. To the extent that Plaintiffs argue that comScore is not a party, that is irrelevant, because comScore would still be entitled to enforce the forum selection clause as a non-party, pursuant to Seventh Circuit precedent. Further, Plaintiffs' claim that comScore has waived its right to enforce the forum selection clause is without merit. Any delay in transferring this case to the proper forum has been caused by Plaintiffs' own contradictory assertions throughout the litigation and, in particular, their continued assertion in the Complaint that the Plaintiffs did not agree to the Terms of Service. The forum selection clause is enforceable by comScore, and comScore has timely asserted its rights. The motion should be granted.

## ARGUMENT

### I. comScore is Entitled to Enforce the Forum Selection Clause

Plaintiffs' argument that comScore is a non-party to the agreement who cannot enforce the forum selection clause is specious. The very first sentence of the Downloading Statement notified the Plaintiffs that "RelevantKnowledge software, provided by TMRG, Inc., **a comScore, Inc. company**, is included in this download." (Dkt. No. 176-4 at 45-73) (emphasis added). And the very first paragraph of the ULA advised Plaintiffs that "[t]he information that you contribute is used by **comScore, Inc.**" (Pl. Br., Ex. B) (emphasis added). Moreover, Plaintiffs' Second Amended Complaint repeatedly describes the agreement as "comScore's Terms of Service," "Defendant's Terms of Service," or substantively the same. (Dkt. 169, at ¶¶ 16, 35-37, 39, 48-50, 79(c), 100). comScore is plainly a party to the agreement. However, even if comScore were a "non-party," as Plaintiffs assert, comScore would still be entitled to enforce the forum selection clause.

Under Seventh Circuit precedent, a non-party may enforce a forum selection clause. In *Adams v. Raintree Vacation Exch., LLC*, the court held that a parent company may enforce a forum selection clause contained in a subsidiary's contract, "since the effect is merely to substitute one party for another . . . *bound by the forum selection clause to which plaintiffs had agreed.*" 702 F.3d 436, 442 (7th Cir. 2012) (emphasis in original); *see also Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd.*, 364 F.3d 884, 889 (7th Cir. 2004) ("Nor is a forum-selection clause to be defeated by suing an affiliate or affiliates of the party to the contract in which the clause appears.") (collecting cases). Plaintiffs allege that they contracted with comScore's subsidiaries. (Pl. Br. at 1). As the parent company of a party to the contract,

comScore may assert the forum selection clause that Plaintiffs agreed to, *irrespective* of whether comScore is a party to that agreement.

Plaintiffs try to avoid this result by claiming that the third party rights clause in the ULA precludes comScore from asserting the agreement at all. The third party rights clause states that the agreement "shall not create any rights or remedies in any parties other than the parties to the agreement and no person shall assert any rights as a third party beneficiary under this agreement." (Pl. Br., Ex. B). But in *Productive People, LLC v. Ives Design*, the court held that a similar contractual provision did not prevent non-party enforcement of a forum selection clause under Seventh Circuit precedent:

> The Agreement does contain a clause stating that the agreement was not intended to confer any rights, remedies, obligations, or liabilities on a third party unless otherwise provided for in the agreement. The Court need not determine whether the second forum selection clause was intended to fall under the exception of this provision, however, because "third-party beneficiary status is not required" for non-parties to benefit from or be bound by forum selection clauses.

No. CV-09-1080, 2009 WL 1749751, at *4 (D. Ariz. June 18, 2009) (quoting *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 210 n.7 (7th Cir. 1993)). In *Hugel*, the Court of Appeals rejected the argument that "the court must make a threshold finding that a non-party to a contract is a third-party beneficiary before binding him to a forum selection clause," and instead held that "third party beneficiary status is not required." 999 F.2d at 210 n.7. Thus, contrary to Plaintiffs' argument, the contract does not have to confer rights upon a non-party to be enforceable by the non-party. It is sufficient if the non-party is a parent company enforcing its subsidiaries' contracts, as comScore is here. *See Adams*, 702 F.3d at 442.

However, the agreement *does* grant comScore rights. comScore is a party to the agreement, but to the extent that Plaintiffs claim otherwise, comScore is at minimum a third-party beneficiary. A third-party beneficiary is "a person who, although not a party to the

contract, the contracting parties *intended* to benefit from the contract." *Am. United Logistics, Inc. v. Catellus Dev. Corp.*, 319 F.3d 921, 930 (7th Cir. 2003). comScore is expressly identified as a beneficiary in the ULA—"The information that you contribute is used by comScore, Inc., a U.S.-based market research company . . ." (Pl. Br., Ex. B). Further, the third party rights clause does not preclude enforcement of an agreement by a third-party, when the beneficiary is identified by name as comScore is here. *Am. United Logistics, Inc.*, 319 F.3d at 930 (holding that a party identified by name and accruing a benefit from the agreement was a third-party beneficiary, despite contract language which stated that "nothing herein is intended to create any third party benefit.").

Plaintiffs' characterization of comScore as a non-party is inaccurate, but it is not determinative of comScore's legal right to enforce the forum selection clause. comScore is entitled to assert that clause regardless of whether comScore is a party to the agreement, a third-party beneficiary of the same, or a non-party parent company.

**II. comScore has Diligently Sought Enforcement of the Forum Selection Clause**

The Complaint in this case *still* alleges that the plaintiffs did *not* agree to comScore's terms of service. (Dkt. 169, at ¶¶ 66, 70). Plaintiffs would be better off (though still unsuccessful) arguing that a motion to dismiss that Complaint is therefore premature rather than too late. In any event, there has been no waiver or delay. First, comScore has objected to improper venue at least six separate times—in its original motion to dismiss, its Answers to Plaintiffs' three Complaints, its Rule 23(f) appeal to the Seventh Circuit, and in its present motion. (Dkt. 15; Dkt. 59, at 50; Dkt. 140, at 45; Dkt. 180, at 45; *comScore, Inc. v. Dunstan, et al.*, No. 13-8007, Dkt. No. 1 at 7 (7th Cir. April 16, 2013)).

Second, the ULA's "waiver" clause expressly states that a failure to enforce "any right or provision of the Agreement shall not constitute a waiver of such right or provision." (Pl. Br., Ex. B). Given the frequency with which comScore has raised its improper venue defense, and the language of the agreement, Plaintiffs cannot plausibly suggest that comScore intended to waive its right to litigate in Virginia. comScore's intent has been precisely the opposite.

Plaintiffs support their argument for waiver by manufacturing instances of "delay." First, Plaintiffs state that "comScore completely abandoned its venue challenge" from the date of this Court's Order on comScore's first 12(b)(3) motion on October 7, 2011, to Plaintiffs' filing of their class certification brief over a year later. (Pl. Br. at 11). But Plaintiffs mischaracterize the facts. comScore objected to improper venue *three separate times* within the time frame identified by the Plaintiffs. (Dkt. 59, at 50; Dkt. 140, at 45; Dkt. 180, at 45). Plaintiffs also argue that comScore should have objected to venue in its class certification brief. (Pl. Br. at 11). But as Plaintiffs are aware, Plaintiffs did not make the critical concession that "Rule 23 commonality and typicality exist because Plaintiffs and each Class member . . . was presented with a form ULA, [and] each **accepted** the ULA . . ." until their *reply brief*. (Dkt. 184 at 1-2) (emphasis added). Therefore, comScore had no grounds to renew its objection on the basis of that concession in its class certification briefing. However, once the Court granted class certification, based in part on Plaintiffs' representation, comScore pursued its improper venue defense in a Rule 23(f) appeal to the Seventh Circuit. (Dkt. 186 at 9) (holding that Plaintiffs satisfied the commonality requirement because "each Class member **agreed** to a form contract (made up of the ULA and the Downloading Statement)") (emphasis added). Plaintiffs nonetheless claim that after the appeal, comScore "again abandoned its venue challenge." (Pl. Br. at 12). This again misstates the facts. After the appeal, comScore served written discovery

requests on Plaintiffs with the intent of forcing Plaintiffs to acknowledge that they had agreed to the ULA. When the Plaintiffs made clear in a meet and confer on September 26, 2013 that they did not intend to admit that they accepted comScore's terms, comScore filed the present motion.

To the extent the delays purported by the Plaintiffs were actually the result of Plaintiffs' contradictory positions on whether they agreed to the forum selection clause, Plaintiffs should not be allowed to attribute those delays to comScore. It is Plaintiff's refusal to amend the Complaint to conform with their concession that has caused any delay, not comScore's unwillingness to assert its rights. Plaintiffs should not be permitted to change their positions throughout the litigation and to subsequently argue that the resulting delays are evidence that comScore waived its rights.

Plaintiffs also claim that comScore has waived its rights under the forum selection clause by participating in merits discovery. (Pl. Br. at 12). But there is no waiver "where the parties merely participated in pretrial motions, moved to dismiss after discovery has been completed, or where the opposing party was not prejudiced by dismissal." *Ferraro Foods, Inc. v. M/V IZZET INCEKARA*, No. 01 CIV 2682, 2001 WL 940562, at *4 (S.D.N.Y. Aug. 20, 2001). Here, the Court's Order on comScore's first motion to dismiss expressly contemplated comScore's participation in merits discovery—"*further factual development* may indicate that the plaintiff's allegations are incorrect . . . At this stage, however, the court must take plaintiffs' word for it." (Dkt. 31 at 4-5) (emphasis added). Plaintiffs agree that "the Court recognized comScore's right to develop the record and renew its motion with evidence that it could seek to enforce the forum clause." (Pl. Br. at 1). comScore has done exactly that. comScore has not filed dispositive motions on the merits in the Northern District of Illinois.

Further, the prejudice claimed by the Plaintiffs, specifically the time and expense of setting a new case schedule, engaging in motion practice, and "getting the transferee court up to speed," is minimal. (Pl. Br. at 13). *Plaintiffs agreed to litigate in Virginia.* And Plaintiffs presumably knew that they accepted the Downloading Statement and ULA when they first filed this case in the Northern District of Illinois, the wrong venue. "[W]hatever lack of fairness Plaintiff claims results from this decision is at least equaled by the prospect of subjecting Defendants to trial in a forum *they have specifically contracted against.*" *AIG Mexico Seguros Interamericana, S.A. de C.V. v. M/V Zapoteca*, 844 F. Supp. 2d 440 (S.D.N.Y. 2012), *aff'd AIG Mexico Seguros Interamericana, S.A. de C.V. v. M/V Zapoteca*, 508 F. App'x 58 (2d Cir. 2013).

**CONCLUSION**

Because the forum selection clause is prima facie valid and enforceable by comScore, comScore respectfully requests that this action be dismissed pursuant to Rule 12(b)(3).

Dated: December 6, 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 December 6, 2013 to all counsel of record via the Court's ECF notification system.

By: /s/ *Robyn Bowland*
Robyn Bowland