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 Plaintiff, v. COMSCORE, INC., a Delaware corporation Defendant.	CASE NO. 1:11-cv-5807 Judge Holderman Magistrate Judge Kim **FILED PARTIALLY UNDER SEAL**

COMSCORE'S OPPOSITION TO PLAINTIFFS JEFF DUNSTAN'S AND MIKE HARRIS'S MOTION TO COMPEL THE DEPOSITION OF MAGID ABRAHAM

Defendant comScore, Inc. ("comScore") respectfully submits this brief in opposition to Plaintiffs Jeff Dunstan's and Mike Harris's Motion to Compel the Deposition of Magid Abraham ("the Motion"). (Dkt. No. 295.)

I. INTRODUCTION

Plaintiffs seek the cumulative, burdensome, and harassing deposition of comScore's Chief Executive Officer Magid Abraham[1] despite already having had the opportunity to depose comScore's subject matter experts in the areas they claim to require discovery. Moreover, Dr. Abraham has little to no information to provide Plaintiffs on the topics Plaintiffs claim to seek to depose Dr. Abraham, and Dr. Abraham does not have unique or personal knowledge regarding these topics. In addition, the documents and testimony Plaintiffs cite (or claim to cite) either are

[1] To the extent the Motion implies that comScore objects to Dr. Abraham's deposition purely on the basis that Dr. Abraham is a high-ranking executive, that implication is false. comScore twice voluntarily designated its Chief Technical Officer, Mike Brown as a 30(b)(6) witness and did not object to the deposition of its Chief Research Officer, Joshua Chasin.

irrelevant to the instant matter or do not support Plaintiffs' arguments. The Court should deny the Motion.

II. LEGAL STANDARDS

Rule 26(b)(2) of the Federal Rules of Civil Procedure "empowers district courts to limit the scope of discovery if 'the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.'" *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002) (upholding lower court's decision to not compel deposition of high-ranking official); *see also* Fed. R. Civ. P. 26(b)(2)(C)(iii). Moreover, "[t]he discovery rules are not a ticket . . . to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest." *Sommerfield v. City of Chicago*, 613 F.Supp.2d 1004, 1020 (N.D. Ill 2009).

Finally, although high ranking officials are not automatically exempt from the discovery process, special rules apply to high ranking official witnesses: "'Because high level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions,' they may need 'some measure of protection from the courts;' courts often decline to compel the deposition of such witnesses absent some showing that the executive 'has unique or personal knowledge of the situation.'" *Last Atlantis Capital, LLC v. AGS Specialist Partners*, No. 04-C-0397, 2013 WL 4759581 at *4 (N.D. Ill. Sept. 4, 2013); *see also Tiger Capital, LLC v. PHL Variable Ins. Co.*, No. 12cv2939, 2013 WL 4517267 at *3 (S.D.N.Y. Aug. 26, 2013) ("'[c]ourts have recognized an additional layer of protection for senior corporate executives subject to depositions'") (citation omitted); *Guzman v. News Corp.*, No. 09cv9323, 2012 WL 2511436 at *1 (S.D.N.Y. June 29, 2012) ("However, unless it can be demonstrated that a corporate official has 'some unique knowledge' of the issues in the case, 'it may be appropriate to preclude a[ ] deposition of a

highly-placed executive' while allowing other witnesses with the same knowledge to be questioned.") (citation omitted).

III. ARGUMENT

Plaintiffs have already conducted a total of ten personal depositions of comScore employees in this matter. The comScore employees deposed work on a day-to-day basis in areas such as technology development, TAP panel management, and privacy. comScore has not restricted the topics Plaintiffs could cover with these witnesses in any way. Additionally, comScore has agreed to produce witnesses to testify pursuant to Fed. R. Civ. P. 30(b)(6) on topics including, but not limited to, comScore's decision to partner with TAP partners, comScore's decision to use RKVerify, comScore's decisions regarding presenting a Downloading Statement and TAP partner requirements, comScore's decisions to use separate brands and program sponsors, comScore's decisions regarding data collected by panelist software (to the extent such discovery has not already been provided), and comScore's decision to include terms within the ULA (to the extent such information does not constitute privileged material). (Ex. A, comScore's Amended Responses and Objections to Plaintiffs' Third 30(b)(6) Notice at Resp. Nos. 1-3 and 7- 8.)

A. Plaintiffs seek information from Magid Abraham that is unreasonably cumulative and duplicative and that is obtainable from more convenient, less burdensome and expensive sources

As discussed above, Plaintiffs have taken the personal depositions of nine comScore employees,[2] and have noticed three 30(b)(6) depositions on a wide range of topics. For example,

[2] Plaintiffs noticed and deposed Yvonne Bigbee, comScore's Senior Vice-President of Technology, during both the class certification fact discovery and substantive fact discovery periods.

Plaintiffs deposed the following comScore employees in the technology department, which develops the comScore software:

- Mike Brown, Chief Technical Officer (designated by comScore as a 30(b)(6) witness);
- Yvonne Bigbee, Senior Vice President of Technology;
- Steven Chase, Director of Software Engineering;
- Glen Marchione, Senior Director, Quality Assurance;
- Randy McCaskill, Director, Software Engineering;
- Michiko Chand, Quality Assurance Manager.

Plaintiffs also deposed John O'Toole, Vice President of Panel Operations; Richard Weaver, Deputy Privacy Officer; LaToya Peterson-Renfrow, Customer Service Manager; and Joshua Chasin, comScore's Chief Research Officer. Plaintiffs claim that "[a]s President, co-founder and CEO of comScore, Mr. Abraham had a central role in, *inter alia*, comScore's decisions to (i) target and collect certain categories of personal information from panelists, (ii) "fuzzify" personally identifiable information ("PII") collected by OSSProxy, and (iii) utilize the TAP recruitment process to distribute OSSProxy to consumers—all of which are directly relevant to Plaintiffs' claims." Motion at pp 1-2. As discussed more thoroughly below, Plaintiffs have provided no support for their contention that Dr. Abraham had a central role in any of the decisions they cite. However, as an initial matter, it is important to note that Plaintiffs have already had the opportunity to depose comScore employees with respect to these topics. For example, Mike Brown, Yvonne Bigbee, and Richard Weaver all provided information regarding the first two topics (decisions regarding what information to collect and fuzzification of information). John O'Toole and Josh Chasin provided information regarding decisions about recruiting via TAP partners. And, to the extent Plaintiffs have additional questions regarding these topics, comScore has agreed to produce a 30(b)(6) witness to answer their questions. (Ex. A, comScore's Amended Responses and Objections to Plaintiffs' Third 30(b)(6) Notice at Resp.

Nos. 1-3 and 7- 8 (agreeing to provide a witness on topics regarding comScore's decisions to partner with TAP partners, to use RKVerify, regarding presenting a Downloading Statement and TAP partner requirements, to use separate brands and program sponsors, regarding data collected by panelist software, and to include particular terms within the ULA).)[3]

Plaintiffs had the opportunity to depose comScore's subject matter experts; any information they obtain from Dr. Abraham would be cumulative and less comprehensive than the information they have already or will gain through other depositions and interrogatory responses. Plaintiffs seek an unnecessary cumulative and burdensome deposition—the Court should not compel it.

B. Magid Abraham does not have unique or personal knowledge with respect to Plaintiffs' claims

Although Plaintiffs have had ample opportunity to depose comScore's subject matter experts in data collection, fuzzification, and TAP recruiting, they now claim they require the testimony of comScore's CEO. However, when Plaintiffs asked comScore's employees about Dr. Abraham's level of involvement in these areas, they were informed that Dr. Abraham's involvement was "infrequent" and "uncommon:"

[redacted]

[3] Indeed, during a meet and confer between the parties and subsequent communications, Plaintiffs indicated that producing 30(b)(6) witnesses on the "decision-making" topics would be sufficient to address their concerns regarding their perceived lack of evidence on the issue. Although comScore did not, and does not, agree that such information is relevant to this matter, it agreed to produce these 30(b)(6) witnesses in lieu of Dr. Abraham's deposition. After Mr. Chasin's deposition, however, Plaintiffs claimed that they would seek to compel Dr. Abraham's deposition due to one email Plaintiffs questioned Mr. Chasin on during his deposition. Thus, Plaintiffs motion is more fairly seen as a motion to depose a high-ranking comScore executive on the basis of one email written in 2008, as Plaintiffs have indirectly acknowledged the other information they seek is available via 30(b)(6) designees.

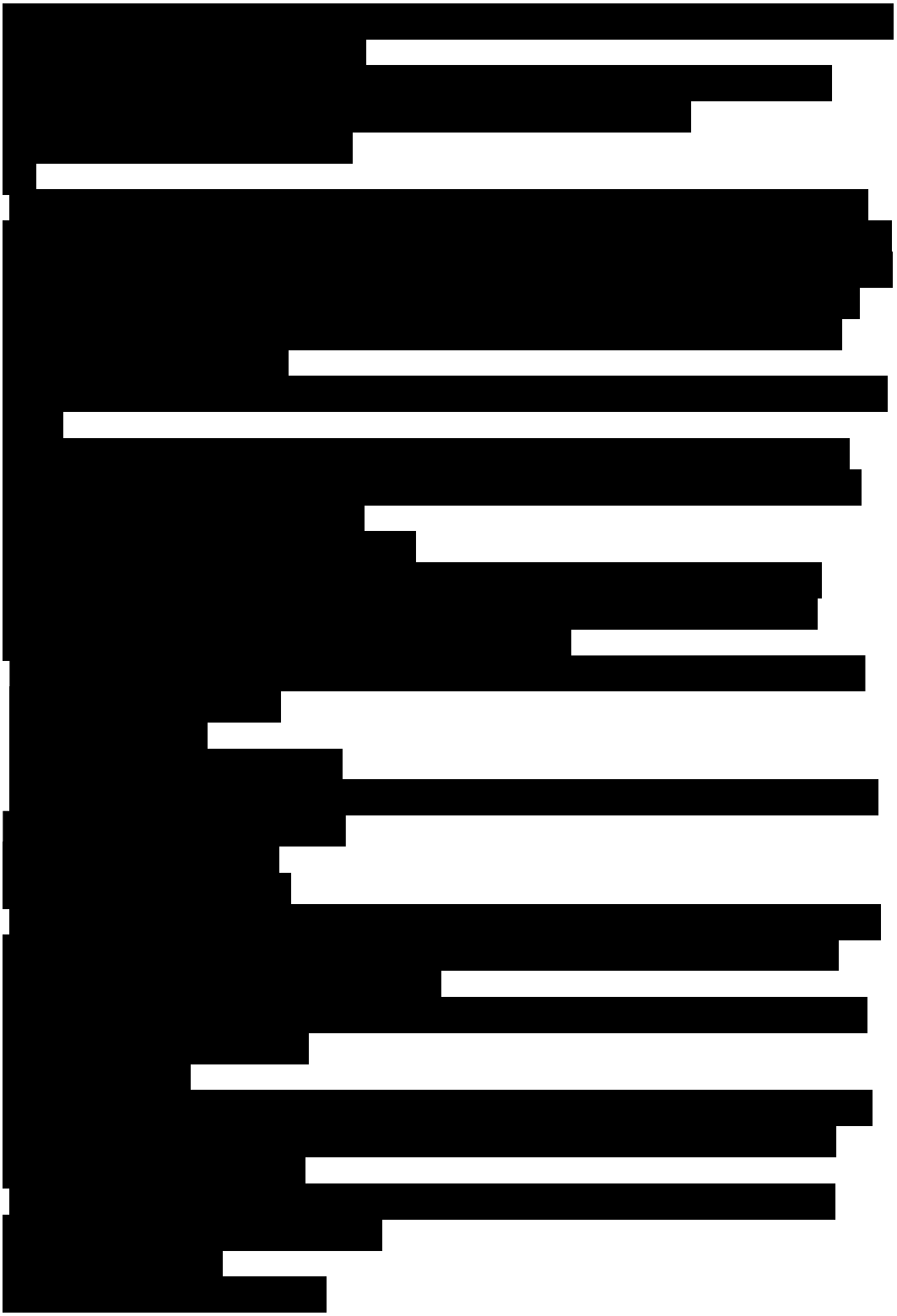
(Ex. B, Nov. 20, 2013 Bigbee Dep. Tr. at 93:10-94:5; 94:19-95:3 (objections removed); Ex. D to the Motion, O'Toole Dep. Tr. at 123:10-16 ("

"); *see also id.* at 51:18-24; 52:13-19; 53:4-11 (

).)

Indeed, no comScore employee cited Dr. Abraham as having unique or personal knowledge with respect to a particular topic, despite Plaintiffs' thin claims to the contrary. Plaintiffs claim that Josh Chasin testified that either Magid or Linda Abraham were "the only people who could testify as to the contents of [certain] email correspondence." Motion at 12. Because Plaintiffs failed to cite a portion of the Chasin transcript that supports their proposition, it is difficult to determine what portion of the transcript they believe is relevant. However, comScore has been unable to locate any instance during Mr. Chasin's deposition where he

testified that Dr. Abraham was the only person who could testify regarding the email Plaintiffs cite. The portion of the transcript they appear to rely upon instead states:



[redacted]

(Ex. C, Chasin Dep. Tr. at 56:13-58:12 (objections omitted; emphasis added).) In other words, Mr. Chasin testified that Dr. Abraham, Ms. Abraham, Greg Dale, and Josh Chasin would all be capable of answering questions about the email. Moreover, Mr. Chasin answered questions about the substance of Plaintiffs' inquiries regarding the email—whether or not comScore discloses the percentage of panelists recruited by TAP in its overall panel:

[redacted]

Id. at 60:4-61:1 (emphasis added).

[redacted]

Id. at 63:8-12; 14-23 (objection omitted; emphasis added). Thus, Mr. Chasin, who regularly discusses research methodologies with current and potential comScore customers, and who is knowledgeable regarding the reports and disclosures provided to those customers, has already provided Plaintiffs answers regarding this topic. Plaintiffs appear to be doing nothing more than attempting to manufacture a basis for conducting a burdensome and harassing deposition of comScore's CEO.

Plaintiffs also cite John O'Toole's deposition and claim that Dr. Abraham is the only person with knowledge regarding developing a utility for comScore's mobile application. Beyond the obvious—the testimony and accompanying exhibit involves comScore's **mobile**, not TAP panel, and is therefore irrelevant, and there is no evidence comScore developed such a mobile application utility—Plaintiffs also mischaracterize Mr. O'Toole's testimony. (Ex. C to the Motion.) At no point did Mr. O'Toole state that Dr. Abraham was the only person at comScore would could answer questions about this proposed mobile application utility, and Mr. O'Toole went on to answer questions about this hypothetical utility for the next two pages of testimony. (*See generally* Ex. D to the Motion, O'Toole Dep. Tr. at 125-127.)

Plaintiffs also claim "Discovery has revealed that, given his tenure and position at comScore, Mr. Abraham is in a unique position to testify regarding key decisions about the development and operation of OSSProxy and comScore's TAP process." Motion at 8. Notably, however, Plaintiffs fail to cite even one piece of evidence in support of this proposition. *Id.* And, given the testimony of comScore's subject matter expert employees regarding Dr. Abraham's level of involvement with them, it is clear that although Dr. Abraham does make decisions for comScore, they are not decisions Plaintiffs claim are relevant to this lawsuit (i.e. related to data collection, fuzzification, and privacy).

Finally, Plaintiffs misinterpret keeping Dr. Abraham "in-the-loop" with respect to operations as evidence that he makes decisions regarding these operations. For example, Plaintiffs note that Dr. Abraham is invited to weekly panel operations meetings. However, as John O'Toole, who is in charge of panel operations testified, Dr. Abraham has not attended one of these meetings in several years. (Ex. D to the Motion, O'Toole Dep. Tr. at 53:8-11; Ex. K to the Motion.) Plaintiffs' claims that Dr. Abraham should be deposed because he presumably used to attend such meetings is a red herring—Plaintiffs already had the opportunity to depose the person who runs and attends every single panel operations meeting—Mr. O'Toole. *See also Tiger Capital* at *4 ("his presence at the meetings alone does not suggest that [the company's CEO] possessed unique knowledge."). Moreover, Dr. Abraham is not involved with Panel Operations on a day-to-day basis, rarely speaks with Mr. O'Toole, has no involvement in the TAP partners comScore chooses to work with, and has not had a meeting with Mr. O'Toole in a year or so despite the fact that his office is only 50 yards from Mr. O'Toole's. (Ex. D to the Motion, O'Toole Dep. Tr. at 51:18-24; 52:13-19; 53:4-7.)

Additionally, although Dr. Abraham, as CEO, served on comScore's Privacy Committee at some point, Plaintiffs fail to provide any information regarding what comScore's Privacy Committee does, and failed to ask comScore's Deputy Privacy Officer, Richard Weaver, any questions regarding the Privacy Committee or Dr. Abraham's involvement in the committee or with privacy issues generally. Simply stated, Dr. Abraham is not involved in decision-making regarding privacy issues, and sitting on an undefined "privacy committee" does not change this fact. Indeed, Richard Weaver did not identify Dr. Abraham as part of comScore's privacy "team." (Ex. D, Weaver Dep. Tr. at 19:2-6 ("[redacted]

[redacted]

[redacted]").)

C. Plaintiffs cite irrelevant documents and testimony in an attempt to prop up their insufficient arguments regarding Dr. Abraham's personal knowledge

Finally, the remaining documents and testimony Plaintiffs cite are irrelevant to their claims. First, the email chain between Dr. Abraham, Ms. Abraham, and Gregory Dale cited by Plaintiffs obviously deals with a presentation to an international group, as it is entitled "[redacted]," and therefore does not deal with U.S. operations. (Ex. H to Motion.) The email cited by Plaintiffs regarding the termination of the MarketScore panel in 2007 is similarly irrelevant, because the MarketScore panel was not a TAP-based panel. (Ex. J to Motion.) [redacted] (Ex. E, Jan. 6, 2014 Decl. of O'Toole at ¶ 3.) Finally, as discussed above, the email from Dr. Abraham to Mr. O'Toole dealt with a proposal by Dr. Abraham to create functionality for a mobile application, not the TAP-based OSSProxy. (Ex. B to Motion.) In other words, Plaintiffs seek to depose Dr. Abraham on irrelevant non-US, non-TAP based topics. Such a deposition would be improper and unduly burdensome, and the Court should not compel it.

Plaintiffs seek to compel the deposition of Dr. Abraham despite (1) already having had ample opportunity to seek information regarding data collection, fuzzification, and privacy issues through numerous depositions, interrogatories, and document productions; (2) that any information gleaned from Dr. Abraham would be duplicative of information gleaned from other sources that are less burdensome to comScore; (3) that Dr. Abraham does not have unique personal knowledge with respect to Plaintiffs' claims; and (4) that Plaintiffs seek to depose Dr. Abraham on topics and documents that are clearly irrelevant to their claims. The Court should deny the Motion.

IV. CONCLUSION

For the foregoing reasons, comScore respectfully requests that the Court deny Plaintiffs Jeff Dunstan's and Mike Harris's Motion to Compel the deposition of Magid Abraham.

DATED: January 6, 2014

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of COMSCORE'S OPPOSITION TO PLAINTIFFS JEFF DUNSTAN'S AND MIKE HARRIS'S MOTION TO COMPEL THE DEPOSITION OF MAGID ABRAHAM has been caused to be served on January 6, 2014 to all counsel of record via the Court's ECF filing system and via electronic mail.

/s/ Robyn Bowland
Robyn Bowland