Exhibit A

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.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS UNDER RULE 12(B)(1) & (6)

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I. INTRODUCTION

Plaintiffs' Complaint purports to attack the core business model that comScore, Inc. ("comScore") applies in measuring consumer behavior across the Internet. As a recognized market leader, comScore's business practices in recruiting its panelists (the individuals who opt-in to allow their Internet activity to be recorded) have been vetted and approved by numerous third-parties, including multiple recognized privacy organizations that have allowed comScore to display their seals of approval. Despite this track record, Plaintiffs and their counsel seek to paint comScore's business as a sham designed to further the "unauthorized infiltration of millions of unsuspecting consumer's personal computers"—among other sensational (and untrue) allegations in the Complaint. Setting aside the utter lack of merit of Plaintiffs' allegations, the Complaint is riddled with numerous defects of pleading that mandate dismissal as a matter of law.

As an initial matter, notwithstanding the barrage of inflammatory accusations in the Complaint about comScore's general business practices, Plaintiffs have failed to allege facts to show that ***they*** personally suffered an "injury-in-fact" as needed to establish standing under Article III of the Constitution. Indeed, out of a 126 paragraph Complaint, Plaintiffs devote only seven paragraphs to explain how comScore's conduct supposedly affected ***them*** (with three paragraphs pertaining to one of the Plaintiffs, and the other four paragraphs pertaining to the other). (Compl. ¶¶ 67-73.) When Plaintiffs' generalized allegations of theoretical harm are set aside, the only individualized injury stated in the Complaint is that Plaintiff Dunstan purportedly paid $40 to buy an antivirus program to remove comScore's software. The other Plaintiff (Harris) does not allege that he incurred such costs or that he suffered any other injury of any kind. As a matter of law, these paltry allegations are insufficient to establish the injury-in-fact that Article III demands, and Plaintiffs' claims thus fail for lack of constitutional standing.

Moreover, Plaintiffs' Complaint should be dismissed in its entirety because they consented to the very acts that form the basis for their lawsuit. As Plaintiffs acknowledge, to become a comScore panelist, an individual must first ***affirmatively agree*** to comScore's Terms of Service ("TOS"), which explain in unambiguous terms that the "online browsing and purchasing behavior" of panelists will "be monitored, collected, and . . . used" by comScore (among other disclosures). (Compl. Exh. A.) As former panelists, Plaintiffs were necessarily bound to the TOS and the disclosures therein. Plaintiffs' effort to launch a broadside attack on comScore's business fails because they cannot purport to impose liability for the very conduct that they agreed to.

In addition to these global issues impacting the Complaint as a whole, Plaintiffs' causes of action are also deficient for numerous claim-specific reasons. First, Plaintiffs do not meet the $5,000 damages threshold needed to bring a civil claim under the Computer Fraud and Abuse Act (CFAA), and they cannot aggregate the speculative damages that other putative class members may have suffered to circumvent this basic limitation of the CFAA. Second, the Stored Communications Act claim fails for the simple reason that Plaintiffs do not allege that comScore accessed any of *their* electronic communications, much less accessed such communications while "in electronic storage," as defined in the statute. Third, Plaintiffs' Illinois Consumer Fraud and Deceptive Practices Act and Unjust Enrichment claims fail because they are derivative of Plaintiffs' other claims. Moreover, because the ICFA claim sounds in fraud, it must be pled with particularity under Rule 9(b), which Plaintiffs have utterly failed to do.

For all these reasons, comScore respectfully requests that the Court dismiss the Complaint in its entirety.

II. STATEMENT OF FACTS[1]

A. About comScore

comScore is a leading Internet market research company that measures the online activity of Internet users ("Panelists") who volunteer to join a comScore market research panel in exchange for various benefits, such as the planting of trees in rural communities on their behalf, free third-party software applications, or the chance to win prizes—while helping to influence overall trends on the Internet (in the same way Nielsen TV families influence television). (*See* Compl. ¶ 25.) To join a comScore panel, a prospective Panelist must download and install comScore's proprietary software.[2] (*Id*.) A prospective Panelist can download the software directly through the websites for comScore's various panels (e.g., PermissionResearch.com or OpinionSquare.com) or through one of comScore's third-party recruitment partners. (*Id*. at ¶¶ 31-33.)

Before prospective Panelists can install comScore's software, they are required to affirmatively agree to the terms and conditions set forth in comScore's TOS, which are presented in full to every prospective Panelist. An example of the TOS and the extensive disclosures set forth therein is attached to the Complaint as Exhibit A. comScore's software will ***only*** install if a prospective Panelist affirmatively clicks on a button to acknowledge that he or she has read and agreed to the TOS (the "I Agree" button as reflected in Exhibit A). (*Id*. at ¶¶ 38-40, Compl. Exh. A.) This installation process is further described in the Declaration of John O'Toole filed

[1] This Statement of Facts is based on the allegations in the Complaint, documents referenced or relied therein, and facts of which this Court can take judicial notice. *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009); *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002); *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994). In presenting allegations asserted in the Complaint, comScore does not admit the truth or accuracy of these allegations.

[2] Throughout the Complaint, Plaintiffs use the misleading, pejorative, and argumentative term "Surveillance Software" to refer to comScore's software.

herewith ("O'Toole Decl.").[3] Importantly, the software can be *permanently* and *easily* removed from a Panelist's computer with just a few clicks of the mouse, using the standard process for removing most software applications (for example, the standard Windows "Add or Remove Programs" utility). This process is also described in the O'Toole Declaration.

B. Plaintiffs' Basic Allegations

The thrust of Plaintiffs' Complaint, which comScore disputes in its entirety, is that comScore tracks and collects information on consumers' Internet activity without their knowledge and unjustly profits from this "unlawful" conduct by selling the information to third parties. Specifically, Plaintiffs allege that:

- comScore uses its data collection software to monitor the "personal online movements of millions of consumers without their knowledge." (Compl. ¶ 1; *see also id*. at ¶ 4 (alleged tracking of "personal data from consumers' computers.").)

- comScore obtains this information by installing software code on Panelists' computers through improper means. (*Id*. at ¶ 6 ("To extract this data, comScore's Surveillance Software injects code into the user's web browser to monitor everything viewed, clicked, or inputted online.").)

[3] The O'Toole Declaration and attachments illustrate the process by which Panelists install comScore's software and agree to the TOS as well as the process for uninstalling the software. The Court can properly consider these materials because the processes at issue are partially referenced in the Complaint and are central to Plaintiffs' claims. *See Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *see also Hickman v. Wells Fargo Bank N.A.*, 683 F. Supp. 2d 779, 784 (N.D. Ill. 2010) ("'Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim.'" (citation omitted)); *Tierney*, 304 F.3d at 738 (The court may consider a document, even if not attached to the plaintiff's complaint, "if the document had merely been referred to in the complaint, provided it was a concededly authentic document central to the plaintiff's claim . . . ."). Here, the Complaint is replete with references to the process by which Panelists download, install, and attempt to uninstall comScore's software (*see, e.g.*, Compl. ¶¶ 13, 14, 32-34, 36-40, 57-65, 67-73), but Plaintiffs attach only a single page of this process at Exhibit A. Exhibit A is only one step in the installation/uninstallation process. Plaintiffs should not be allowed to cherry pick one part of a multi-step process while omitting others that undermine their claims. This is akin to a complaint that attaches only part of a contract, which is a circumstance in which courts have routinely taken judicial notice of materials beyond the complaint in analyzing plaintiffs' claims. *See, e.g.*, *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661-62 (7th Cir. 2002) (considering documents appended to defendant's motion to dismiss where plaintiff "has appended only a part of the relevant instrument" because "[i]t would have been impossible for the district court . . . to evaluate the disagreement between the parties without having all of the documentation"); *see also Magellan Int'l Corp. v. Salzgitter Handel GmbH*, 76 F. Supp. 2d 919, 923 (N.D. Ill. 1999); *Munoz v. Seventh Avenue, Inc.*, No. 04-C-2219, 2004 WL 1593906, at *2 (N.D. Ill. July 15, 2004). Moreover, the Court may consider evidence on a motion to dismiss for lack of standing, which comScore is asserting in this Motion. *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993).

- comScore sells this data to its clients. (*Id*. at ¶ 5 ("This data is sent to comScore's servers, and then organized and sold to [comScore's] clients.").)

As a consequence of the above, Plaintiffs allege that comScore obtained, intercepted, or accessed data in violation of (i) the Stored Communications Act (SCA), (ii) the Electronic Communications Privacy Act (ECPA), (iii) the Computer Fraud and Abuse Act (CFAA), (iv) the Illinois Consumer Fraud and Deceptive Practices Act (ICFA), and (iv) state law unjust enrichment principles. (*Id*. at ¶¶ 89-91, 98, 104, 106, 117, 121.)

Plaintiffs seek to represent two separate classes: (i) a global class of "[a]ll individuals and entities in the United States that have had comScore's Surveillance Software installed on their computer(s)" and (ii) the "Dunstan Subclass," defined as "[a]ll individuals and entities in the United States that have incurred costs in removing" comScore's software. (*Id*. at ¶ 74.)

C. The Named Plaintiffs

Plaintiffs Dunstan and Harris each allege that they "downloaded and installed" the comScore software. (Compl. ¶¶ 67, 70.) Dunstan alleges that he later spent $40 dollars to buy antivirus software to remove the software. Harris does not make any similar allegations and does not allege any form of economic or other injury from his experience as a comScore Panelist. While both Plaintiffs state they "did not agree to comScore's Terms of Service," (*id*. at ¶¶69, 73), they do not allege any facts to show that their process of downloading the comScore software differed in any way from the standard process described in the Complaint, in which individuals must first click to agree to the TOS before completing the download process.

III. ARGUMENT

A. Plaintiffs' Complaint Should Be Dismissed Because They Consented To The Conduct That Is The Subject Of Their Claims.

Despite Plaintiffs' hyperbolic characterizations of comScore's software as "secret" and "devious" "Surveillance Software" that operated without their knowledge, the Complaint shows

that Plaintiffs actually consented to the conduct at issue. The Complaint should therefore be dismissed in its entirety as matter of law because consent is a complete defense to liability for each of Plaintiffs' claims. *See* 18 U.S.C. § 2511(2)(d) (setting forth consent defense under the ECPA); *id*. § 2701(c) (consent defense under the SCA); *id*. §§ 1030(a)(5)(A)(B), (g) (consent defense under the CFAA)[4].

As Plaintiffs acknowledge, comScore's TOS explicitly discloses that the purpose of comScore's software is to track the Internet activity of Panelists who install the software:

> This software allows millions of participants in an online market research community to voice their opinions by allowing their online browsing and purchasing behavior to be monitored, collected, and once anonymized, used to create market reports, materials, and other forms of analysis that may be shared with our clients to help our clients understand Internet trends and patterns and other market research purposes. The information which is monitored and collected includes internet usage information, basic demographic information, certain hardware, software, computer configuration and application usage information about the computer on which you install PremierOpinion. We may use the information that we monitor, such as name and address, to better understand your household demographics: for example, we may combine the information that you provide us with additional information from consumer data brokers and other data sources in accordance with our privacy policy.

(Compl. Exh. A (emphasis added).) In short, the TOS discloses (i) the *types* of data collected (including "online browsing and purchasing behavior," "internet usage," "demographic information," and "name and address"), (ii) *who* the information is shared with (comScore's "clients" and "consumer data brokers"), and (iii) *how* the information is used (to "understand Internet trends and patterns," "other market research purposes," and to "understand . . .

[4] Plaintiffs' consent to the conduct at issue also defeats their ICFA and Unjust Enrichment claims because they are derivative of their SCA, ECPA, and CFAA claims. Moreover, even if these claims are viewed separately, consent would still provide a complete defense because comScore could not have engaged in fraudulent acts under IFCA, or acted unjustly within the meaning of an unjust enrichment claim, if they consented to the very acts at issue. Further, Plaintiffs' consent resulted in a written contract between Plaintiffs and comScore, and there can be no unjust enrichment claim where the parties' dispute is addressed by a written contract. *O'Brien v. Landers*, No. 1:10-cv-02765, 2011 WL 221865, at *7 (N.D. Ill. Jan. 24, 2011).

household demographics"). The TOS thus gives consumers express notice of, and requires them to consent to, the very acts that are the crux of the alleged wrongdoing in the Complaint. (*See, e.g.*, Compl. ¶¶ 1, 4-7.)

Critically, Plaintiffs' Complaint shows that they ***must*** have seen and agreed to the TOS in the process of downloading and installing comScore's software. As Plaintiffs explain, "if a person installs a free screensaver bundled with Defendant's RelevantKnowledge Surveillance Software, a screen *will* appear during, and not before, the installation process displaying a brief description of comScore's product."[5] (Compl. ¶ 39 (emphasis added).) Further, the "comScore TOS display screens *are presented to the user* during the bundled software installation process . . . ." (*Id*., at ¶ 40 (emphasis added).) To illustrate the screens that are displayed to prospective Panelists in the installation process, Plaintiffs attach Exhibit A to the Complaint, ***which is the comScore TOS with the exact disclosures quoted above***. As indicated by the buttons shown in Exhibit A, the software installation process ***requires*** a prospective Panelist to affirmatively click the "I Agree" button to manifest agreement to the TOS before proceeding with the installation process.[6] (Compl. Exh. A; O'Toole Decl., ¶ 4, 14.)

Click-wrap agreements of this type are routinely and uniformly enforced. For example, in *Swift v. Zynga Game Network, Inc.*, No. C-09-5443 EDL, 2011 WL 3419499, at *6-7 (N.D. Cal. Aug. 4, 2011), the Court enforced the defendant's online Terms of Service even though, *unlike* comScore's TOS, it was not presented directly to the user and was only accessible by hyperlink. *Id*. at *2. The court found that this "modified clickwrap" agreement was sufficient to

[5] Plaintiffs' gripe that comScore's TOS appears *during* the installation *process* is a red herring. It might be significant if the TOS appeared *after* installation was *complete*, but that is not what Plaintiffs allege.

[6] If the prospective Panelist fails to click the "I Agree" radio button, the "Next" button—which also appears in Exhibit A, but which is ghosted out—will not activate. (Compl. ¶¶ 38-40, Exh. A; O'Toole Decl., ¶ 4.) If the "Next" button does not activate, the prospective Panelist cannot click on it, and thus, will not be able to proceed to the next step in the installation process. (Compl. ¶¶ 38-40, Exh. A; O'Toole Decl., ¶ 4.)

put plaintiffs on notice and dismissed plaintiffs' complaint based on Zynga's terms. In so holding, the court noted that although "there is no admission here that Plaintiff was aware of what the terms of service were . . . , there was a click box for assent" that users had to click to use the software applications at issue. *Id*. at *7. There is overwhelming case law in accord, in which courts have enforced online Terms of Service as a matter of law—both in circumstances involving a "modified clickwrap" like *Zynga*[7] and, even more so, where the terms at issue are presented directly to the user (as here).[8]

As indicated, comScore's TOS is not presented via "modified clickwrap" but is set forth *directly* on the same dialog box as the "I Agree" button. Plaintiffs allege no facts to show that their individual experience in downloading the software was somehow different from the process laid out in the Complaint, in which the TOS is displayed to prospective Panelists who must click "I Agree" to the terms before proceeding with the installation process. To the contrary, Plaintiffs state in plain terms that they "downloaded and installed" the software, ***without*** indicating that anything unusual occurred in their individual experiences with the installation process. (Compl. ¶ 67, 70.) The ***only*** inference that can be drawn from these allegations is that Plaintiffs did, in

[7] *See Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825 JW, 2005 WL 756610, at *2, *4-5 (N.D. Cal. Apr. 1, 2005) (enforcing forum selection clause that was only available by hyperlink even though defendant contended the forum selection clause was not reasonably communicated to it and it was unaware of it); *Snap-on Bus. Solutions Inc. v. O'Neil & Assocs., Inc.*, 708 F. Supp. 2d 669, 681-82 (N.D.Ohio Apr. 16, 2010) (listing cases).

[8] *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402-03 (2d Cir. 2004); *F.T.C. v. Cleverlink Trading Ltd.*, No. 05 C 2889, 2006 WL 3106448, at *6 n.8 (N.D. Ill. Oct. 26, 2006) ("The fact that the acceptance may have come electronically in the form of a click in a box is analytically meaningless, as all the cases have held." (emphasis added)); *Van Tassell v. United Mktg. Grp., LLC*, No. 10 C 2675, 2011 WL 2632727, at *15-16 (N.D. Ill. July 5, 2011); *DeJohn v. TV Corp. Int'l*, 245 F. Supp. 2d 913, 921 (N.D. Ill. 2003) ("click-wrap" agreement valid and enforceable contract and "[t]he fact that the contract is electronic does not affect this conclusion"); *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157, 1162-63 (E.D. Cal. 2003) (clicking box on the screen marked, "I agree" on website evinced express agreement to terms); *Treiber & Straub, Inc. v. United Parcel Serv., Inc.*, No. 04-C-0069, 2005 WL 2108081, at *7 (E.D. Wis. Aug. 31, 2005); *i.LAN Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002); *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1081 (C.D. Cal. 1999); *In re Vistaprint Corp. Mktg. & Sales Practices Litig.*, No. 4:08-md-1994, 2009 WL 2884727, at *5-8 (S.D. Tex. Aug. 31, 2009) ("A consumer cannot decline to read clear and easily understandable terms that are provided on the same webpage in close proximity to the location where the consumer indicates his agreement to those terms and then claim that the webpage, which the consumer has failed to read, is deceptive."); *Chudner v. TransUnion Interactive, Inc.*, 626 F. Supp. 2d 1084, 1090 (D. Or. June 8, 2009).

fact, complete the normal installation process as set forth in the Complaint, including clicking the "I Agree" button to manifest consent to the comScore TOS.

Against this backdrop, Plaintiffs' conclusory assertion—made with no supporting facts of any kind—that they "did not agree to comScore's Terms of Service" should be rejected. (Compl. ¶¶ 69, 73.) This bare statement is, if anything, a purported legal conclusion about contract formation and should not be accepted as true for purposes of a Rule 12(b)(6) motion to dismiss. To the contrary, where a plaintiff seeks to assert claims based on a defendant's "unauthorized" access to information, the "plaintiff cannot survive a motion to dismiss . . . based solely on the naked allegation that defendant's access was unauthorized. A plaintiff must, allege[] and proffer[] sufficient proofs to create a colorable claim that such access was unauthorized." *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 510 (S.D.N.Y. 2001) (internal citation and quotations omitted). *See also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (confirming that a court need not accept the truth of legal conclusions couched as factual allegations); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("naked assertion[s]" devoid of "further factual enhancement" are insufficient to state a claim). Here, Plaintiffs' assertion that they "did not agree to comScore's Terms of Service" should be rejected because it is not only devoid of factual support but also affirmatively rebutted by Plaintiffs' own allegations showing that Panelists ***must agree*** to comScore's TOS as part of the software installation process.

The Court's ruling on comScore's Motion to Transfer Venue does not undermine this conclusion. That prior ruling turned on the accessibility of comScore's User License Agreement and Privacy Policy ("ULA"), a separate document that is *not* displayed directly to consumers during the installation process (although it is referenced in the TOS and accessible by hyperlink as comScore previously explained). (Compl. ¶¶ 38, 40.) While the Court felt constrained in its

prior ruling to accept Plaintiffs' allegation that "the location of the license agreement [the ULA] was not readily apparent" to consumers viewing the TOS, (Mem. Op. & Order, at *4, Oct. 7, 2011, ECF No. 31), that ruling regarding the ULA does not undermine the fact that the TOS itself is shown to prospective Panelists as part of the installation process.

Indeed, the Court expressly recognized that Plaintiffs would necessarily have seen the TOS during the software installation process, stating: "It is true, of course, that ***the plaintiffs in this case should have seen the reference to the agreement and the requirement that they acknowledge that they read it before commencing their download***." (*Id*. (emphasis added).) This statement in the Court's Order refers to the provision of the TOS that states: "By clicking 'I Agree' you acknowledge that . . . you have read [and] agree[d] to . . . the terms and conditions of the Privacy Statement and User License Agreement . . . ." (Compl. Exh. A.) The Court has thus recognized that Plaintiffs "should have seen" the TOS and the disclosures therein advising Plaintiffs that their "online browsing and purchasing behavior [will] be monitored, collected, and . . . used" by comScore. Plaintiffs' claims should therefore be dismissed as a matter of law because they cannot seek to impose liability for alleged conduct that they consented to.[9]

B. Plaintiffs Have Not Alleged Injury in Fact and Lack Article III Standing

While Plaintiffs' Complaint is peppered with various claims of abstract injuries to unidentified persons, it is devoid of allegations to show that ***Plaintiffs themselves*** suffered an "injury in fact" as needed to assert a claim in federal court. Under Article III of the Constitution, a plaintiff seeking relief in federal court must allege facts sufficient to show that "(1) [the plaintiff] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or

[9] Plaintiffs claim that certain issues with comScore's software are not disclosed in the TOS. But these alleged issues do not help Plaintiffs avoid dismissal because they are either (i) a technical detail on how comScore's software purportedly operates that is subsumed in the disclosure that comScore's software "monitor[s] and collects" data including "hardware, software, computer configuration and application usage information about the computer," or (ii) an alleged issue (access to local networks, "root certificates," etc.) that has nothing to do with the Plaintiffs' actual experiences or individual claims and should be ignored on that basis.

imminent, not conjectural or hypothetical; [and] (2) the injury is fairly traceable to the challenged action of the defendant . . . ." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Plaintiffs must "allege an injury to [themselves] that is 'distinct and palpable' as opposed to merely '[a]bstract.'" *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990) (citations omitted). And in a putative class action, the named plaintiffs purporting to represent the class "'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) (citations omitted)). Plaintiffs' claims fail under these standards. When the various allegations of hypothetical harm to unidentified consumers are set aside, Plaintiffs are left with a mere seven paragraphs in their Complaint that allude to their actual experiences, none of which supports the injury-in-fact needed under Article III.

1. Plaintiffs' allegations regarding comScore's collection of demographic information do not support a cognizable injury

First, Plaintiffs claim in passing that comScore profited from the collection and use of their information. (Compl. ¶¶ 99, 101, 121). But the fact that a defendant might derive revenue from the collection of demographic or other information for business purposes hardly shows that *the plaintiff* has suffered an injury-in-fact. Numerous courts have rejected similar claims of a purported "injury" stemming from the collection and use of information pertaining to the plaintiff. For example, in *DoubleClick*, plaintiffs contended that DoubleClick's collection and sale of their demographic information caused them injury: "Essentially, [plaintiffs] argue that because companies pay DoubleClick for plaintiffs' . . . demographic information, the value of [the information] must, in some part, have rightfully belonged to plaintiffs." 154 F. Supp. 2d at 525. The Court disagreed, finding (in the context of a CFAA claim) that:

> [A]lthough demographic information is valued highly . . . the value of its collection ***has never been considered a[n] economic loss to the subject***. Demographic information is constantly collected on all consumers by marketers, mail-order catalogues and retailers. However, we are ***unaware of any court that has held the value of this collected information constitutes damage to consumers or unjust enrichment to collectors***.

Id. (footnote omitted and emphasis added). *Doubleclick* is just one of many cases that has come to this common-sense conclusion.[10] The passing references in the Complaint that comScore allegedly profited from the collection of Plaintiffs' information fail for the same reasons here.

Significantly, this untenable theory of purported harm is the ***only*** allegation of individual injury that Plaintiff Harris asserts in the Complaint. The Complaint is devoid of any other allegation to show that Harris suffered any computer-related problems from the comScore software, that he incurred any costs to remove the software, or that he suffered any form of harm that could support a finding of Article III standing. His individual claims should therefore be dismissed in their entirety.

2. Dunstan's individual allegations also fail to demonstrate any injury.

With respect to Plaintiff Dunstan, his only other allegation of injury is that he purportedly paid $40 to purchase an antivirus program to remove comScore's software. As he claims:

[10] *See also LaCourt v. Specific Media, Inc.*, No. SACV 10-1256-GW (JCGx), 2011 WL 1661532, at *5 (C.D. Cal. Apr. 28, 2011) (plaintiffs failed to adequately allege injury in fact because they provided no facts showing they "ascribed an economic value" to their personal information, attempted a value-for-value exchange of the information, or were deprived of its value); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995) (cardholder name has little or no intrinsic value apart from its inclusion on a categorized list; instead, "[d]efendants create value by categorizing and aggregating" the names); *Thompson v. HomeDepot, Inc.*, No. 07-cv-1058 IEG (WMc), 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007) (use of plaintiff's personal information, including a name, for marketing purposes did not confer a property interest to plaintiff under California's Unfair Competition Law); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) ("there is [] no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large"); *Archer v. United Rentals, Inc.*, 195 Cal. App. 4th 807, 816 (2011) (holding that "collection and recordation" of plaintiffs' personal information did not constitute loss of money or property); *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 993-994 (2011) (rejecting plaintiff's claim he had an "intellectual property" interest in his home address or that he suffered any economic harm based on defendant's collection and licensing of his personal information, noting that the fact that the information had value to defendant "does not mean that its value to plaintiff was diminished in any way").

"After installation, Dunstan's firewall detected the re-routing of his Internet traffic to comScore servers, and in response, effectively disabled his computer from accessing the Internet" such that his "computer became entirely debilitated . . . ." (Compl. ¶¶ 71, 73 (emphasis added).) This allegation provides no facts from which the Court could reasonably infer that comScore's software was the cause of the alleged inability to access the Internet (as opposed to some other issue with Dunstan's computer). Nor is it apparent what Dunstan means by "effectively disabled" or "entirely debilitated"—terms that, without factual enhancement, amount to little more than labels. *See LaCourt*, 2011 WL 1661532, at *5 ("If Plaintiffs are suggesting that their computers' performance was compromised . . . they need to allege facts showing that this is true."). Notably, Plaintiff Harris *also* alleges he downloaded comScore's software, yet he apparently *never* experienced these same issues. In any event, a temporary inability to access the Internet, which Dunstan acknowledges he fixed himself, is not the type of "concrete and particularized" injury that gives rise to Article III standing. *See id.* ("[i]f the loss of the ability to delete cookies counts as harm to Plaintiffs' computers, then maybe Plaintiffs have alleged some *de minimis* injury, but probably not one that would give rise to Article III standing.")[11].

In any event, the $40 Dunstan claims he spent is an entirely phantom "injury" because there is no reason why he would have needed to purchase an antivirus program to remove comScore's software. Far from it, as the software can *easily* be removed with a few clicks of the

[11] Notably, *La Court* analyzed Article III's injury requirement independently from the question of whether the elements of the statutory claims at issue had been adequately pled. 2011 WL 1661532, at *3-4. This issue of whether Article III's injury-in-fact requirement can be satisfied solely by pleading the elements of a statutory claim without any further allegations of injury is currently before the U.S. Supreme Court in the matter of *First American Financial Corporation v. Edwards*, No. 10-708, 2011 WL 2437037 (U.S. June 20, 2011) (referring to the petition for certiorari available at 2010 WL 4876485 (U.S. Nov. 23, 2010)), scheduled for argument on November 28, 2011. The Seventh Circuit has not addressed this issue in the context of any of the statutory claims asserted here, although it has indicated that Congress "may not lower the threshold for standing below the minimum requirements imposed by the Constitution." *Kyles v. J.K. Guardian Sec. Services, Inc.*, 222 F.3d 289, 294-95 (7th Cir. 2000). As indicated in *Kyles*, the proper analysis of Article III in the Seventh Circuit requires a statute-by-statute approach. *Id.* (analyzing Article III and holding that plaintiffs had standing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e, but not under 42 U.S.C. section 1981).

mouse, using standard tools like the Windows "Add or Remove Programs" utility. (O'Toole Decl., ¶¶ 10-14).

3. Dunstan's alleged injury does not flow from comScore gaining access to any of his *communications,* as required under the SCA and ECPA.

Even if the alleged problems with Dunstan's computer could be deemed a "concrete and particularized" injury, Dunstan would still lack Article III standing because the alleged issues have nothing to do with the conduct he seeks to challenge under the SCA and ECPA. Under established standards, a "'plaintiff must demonstrate standing separately for *each form of relief sought*.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citation omitted and emphasis added). To do so, a plaintiff must demonstrate "a causal connection between the injury *and the conduct complained of*" and "the injury has to be 'fairly . . . trace[able] *to the challenged action* of the defendant . . . .'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted and emphasis added).

Here, the "challenged action" at issue in the SCA and ECPA claims turns on the alleged improper access and interception of ***electronic communications***. Neither the SCA nor the ECPA is intended to be a catch-all statute to regulate the installation of software on a computer or to prohibit access to general computer files. Nor are they intended to provide a broad remedy for claims of degraded computer performance. Instead, they are targeted specifically at injuries stemming from the improper access or interception of "electronic communications," as specifically defined in the statutory schemes.[12] (*See* Compl. ¶¶ 89, 98 (reciting statutory elements of claims).)

Plaintiff Dunstan has no standing to assert an SCA or ECPA claim because there is no

[12] For example, the legislative history of the SCA indicates it was intended to "address[] the growing problem of unauthorized persons deliberately gaining access to, *and sometimes tampering* with, electronic or wire communications . . . ." (H.R. Rep. 99-647, at 62, 74 (1986) (emphasis added); *see also* S. Rep. No. 99-541, at 26-27 (1986) (describing injuries contemplated by the ECPA).

causal connection between his purported computer problems and any alleged access or interception of an electronic communication. Even if the Court were to conclude that the alleged technical issues with Dunstan's computer were caused by comScore's software, there are no factual allegations to support an inference that those issues were tied specifically to comScore's alleged unauthorized access to an electronic communication. Dunstan has therefore failed to demonstrate Article III standing to assert his SCA and ECPA claims, notwithstanding his allegations of generalized computer-related problems.

4. Plaintiffs lack standing to seek injunctive relief.

Plaintiffs also request injunctive relief in the Complaint to modify comScore's business practices. (Compl. ¶¶ 25-26.) But to establish standing to seek such relief, Plaintiffs must show that there is a "real or immediate threat" that comScore will violate their rights again *in the future*. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).[13] Plaintiffs cannot make such a showing because they have already removed comScore's software from their computers. (Compl. ¶¶ 68, 73, 118.) The only possible way Plaintiffs could suffer a future harm, then, is if they decided to reinstall comScore's software. Thus, there is no "real or immediate threat" of any future harm to Plaintiffs and their various requests for injunctive relief should be dismissed.[14]

[13] In *Lyons*, the plaintiff sued the Los Angeles Police Department to enjoin its practice of using chokeholds in certain situations. *Id*. at 98. The Supreme Court concluded that while the plaintiff had been subjected to this practice in the past, the plaintiff had failed to establish that he had standing to seek injunctive relief. *Id*. at 97-98, 100. Although the plaintiff noted that "others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life, *id*. at 98 (emphasis added), the Court held that "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . .'" *Id*. at 101 (citation omitted).

[14] Plaintiffs also lack standing to assert claims on behalf of non-Panelists. For example, Plaintiffs allege that comScore injured unidentified non-Panelists by collecting information from non-Panelists' computers that share a local area or wireless network with a Panelists' computer. (Compl. ¶¶ 49, 51, 52, 54.) But because Plaintiffs do not allege that *they* suffered any such injury, they lack standing to assert these claims. Plaintiffs' allegations regarding "root certificates" fail for the same reason, as Plaintiffs do not allege that root certificates were installed on *their* computers, or that a root certificate harmed *them* in any way. (*See* Compl. ¶¶ 6, 16, 37(f), 60-66); Fed. R. Civ. P. 12(f) (court can *sua sponte* strike from a pleading any "redundant, immaterial, impertinent, or scandalous matter").

C. Plaintiffs' class claims should be dismissed because the proposed class, by its express terms, includes individuals with no possible standing.

Even if the Court were to conclude that Plaintiff Dunstan has proper standing due to the alleged costs he incurred to remove the comScore software, the Court should nonetheless dismiss Plaintiffs' allegations pertaining to the class of "[a]ll individuals and entities in the United States that have had comScore's Surveillance Software installed on their computer(s)." (Compl. ¶ 74.) By its terms, this proposed class would sweep together ***all*** individuals who downloaded comScore's software, ***including*** individuals (i) whose computers experienced no performance issues of any kind, (ii) who never incurred any costs to remove comScore's software, (iii) who unequivocally consented to the installation of comScore's software, and (iv) whose demographic information was never collected or sold by comScore.

Indeed, Plaintiffs themselves appear to acknowledge the overbreadth of this global class definition, as they include a narrower "Dunstan Subclass" as a fall-back position, which is defined as "[a]ll individuals and entities in the United States that have incurred costs in removing the Surveillance Software." (Compl. ¶ 74.) The proposed members of the global class who did not incur such "costs in removing" the comScore software (like Plaintiff Harris) cannot even make the tenuous claim for Article III standing that Dunstan asserts. As a matter of law, Plaintiffs cannot proceed with a proposed class that on its face includes these individuals with no conceivable standing. *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (certification properly denied because it was not "reasonably clear that the proposed class members have all suffered a constitutional or statutory violation"); *Kohen v. Pac. Inv. Mgmt. Co.*, 244 F.R.D. 469, 475 (N.D. Ill. 2007) (lawsuit may only be proceed as a class action if each member of the class

has suffered a particularized injury).[15]

The Court has broad discretion to address this issue at the pleading stage and need not wait until completion of class certification proceedings to strike a proposed class definition that is improper on its face and as a matter of law. *See Wright v. Family Dollar, Inc.*, No. 10 C 4410, 2010 WL 4962838, at *1 (N.D. Ill. Nov. 30, 2010) (stating that court "may—and should" strike Plaintiffs' class allegations at the pleading stage); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) ("Where the complaint demonstrates that a class action cannot be maintained on the facts alleged, a defendant may move to strike class allegations prior to discovery.").

While comScore believes the Complaint should be dismissed in its entirety for all the reasons herein, if the Court finds that Dunstan's allegations of injury are sufficient to demonstrate individual standing, then the *only* proposed class definition that should be allowed to proceed in this case is a proposed class of consumers who have suffered economic harm similar to Dunstan in terms of incurring costs to remove the comScore software.

D. Plaintiffs' CFAA Claim Fails for Additional Reasons.

The CFAA is an anti-hacking statute that criminalizes destructive computer hacking. The statute was never intended to reach acts undertaken for a legitimate business purpose or to provide an all-encompassing vehicle into which creative plaintiffs' lawyers might shoehorn whatever new computer-related claims they are able to dream up. *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 965-66 (D. Ariz. 2008) ("The general purpose of the CFAA 'was to create a cause of action against computer hackers (e.g., electronic trespassers).' . . . Simply stated, the CFAA is a criminal statute focused on criminal conduct. The civil component is an

[15] *See also Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("a class cannot be certified if it contains members who lack standing" and a "class must therefore be defined in such a way that anyone within it would have standing") (internal quotations and citations omitted); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) ("No class may be certified that contains members lacking Article III standing.").

afterthought.") (internal citations omitted). Given the focus of the CFAA on criminal conduct, the civil remedy available under the statute is subject to express limitations, which Plaintiffs have not complied with here.

1. Plaintiffs cannot meet the damages threshold for a civil claim.

First, a civil claimant under the CFAA must demonstrate that the defendant's action caused over $5,000 in "economic damages" over a one-year period to the plaintiff. 18 U.S.C. § 1030(a)(5)(B)(i), (g).[16] Here, the Complaint only identifies one source of potential economic damage: the $40 that Dunstan allegedly paid for antivirus software, which obviously fails to meet the required $5,000 threshold to bring a civil claim (to the extent the $40 is a cognizable economic injury at all given the freely available tools to remove the comScore software[17]).

To avoid dismissal, Plaintiffs will likely speculate that other putative class members may have incurred similar costs and ask the Court for permission to aggregate these speculative damages across the putative class to meet the $5,000 threshold. But Plaintiffs may not aggregate damages among putative class members unless and until the Court certifies a class. Where there has been no certification, the case must be treated as one brought by the named plaintiffs individually. *Roberts v. Am. Airlines, Inc.*, 526 F.2d 757, 762-63 (7th Cir. 1975) (absent class certification, court treats plaintiffs' claims as being brought solely by the named plaintiffs); *Thurmond v. Compaq Computer Corp.*, 171 F. Supp. 2d 667, 680 (E.D. Tex. 2001) (court would not consider purported damage to unnamed class members prior to certification).

Moreover, under established CFAA precedent, a plaintiff is allowed to aggregate economic damages suffered by different individuals ***only*** if the damages all stem from a "single

[16] The CFAA defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(c)(8) (2006).

[17] The CFAA defines a "loss" as a "*reasonable* cost" associated with "restoring the data, program, system or information to its condition prior to the offense . . . ." Section 1030(e)(11) (emphasis added). Purchasing unnecessary software to accomplish something that can be done for free can hardly be deemed a "reasonable" cost.

act." *DoubleClick*, 154 F. Supp. 2d at 523 (analyzing statutory terms and legislative history of CFAA and holding that "damages and losses under § 1030(e)(8)(A) may only be aggregated across victims and over time for a single act").[18] Here, Plaintiffs' apparent theory of classwide economic damages—that some unidentified individuals in the proposed class may have spent money to uninstall the comScore software—is predicated on numerous discrete acts that as a matter of law cannot be aggregated under the CFAA. According to Plaintiffs' own allegations:

- The classwide claims at issue involve at least *six different versions* of comScore's software. (Compl. ¶ 4).

- comScore allegedly induced consumers to install its software packages through *different* forms of paid advertising on *different* third-party websites making *different* offers to consumers. (*Id*. at ¶ 32.)

- Separate and apart from these paid advertising allegations, comScore also bundles its software within *different* software packages offered by *different* third-party partners that present the software offers to consumers in *different* ways. (*Id*. at ¶¶ 13, 33, 34.)

Under these circumstances, Plaintiffs cannot show that class members were uniformly harmed by a "single act" that would allow aggregation under the CFAA (even setting aside the entirely conjectural nature of Plaintiffs' economic damage theory).

Numerous courts have reached this same conclusion in cases involving similar allegations of harm to multiple computers. For example, in *Interclick*, the Court held that the defendant's placement of "cookies" on multiple computers could not be aggregated to reach the CFAA's $5,000 threshold. 2011 WL 4343517, at *6. Similarly, in *Pharmatrak*, the court held that, although plaintiffs alleged defendant placed "cookies" on many individuals' computers, 220 F. Supp. 2d at 6-9, "[p]laintiffs have not shown any facts that demonstrate damage or loss of over

[18] *See also In re Toys R Us, Inc. Privacy Litig.*, No. 00-CV-2746, 2001 WL 34517252, at *11 (N.D. Cal. Oct. 9, 2001) (same); *Bose v. Interclick, Inc.*, No. 10 Civ. 9183 (DAB), 2011 WL 4343517, at *6 (S.D.N.Y. Aug. 17, 2011) (same); *In re Pharmatrack, Inc. Privacy Litig.*, 220 F. Supp. 2d 4, 15 (D. Mass. 2002) (same), *overruled on grounds unrelated to CFAA*, 329 F.3d 9 (1st Cir. 2003).

$5,000 for any single act of the Defendants." *Id*. at 15; *see also DoubleClick*, 154 F. Supp. 2d at 524 ("the suggestion that DoubleClick's accessing of cookies on millions of plaintiffs' computers could constitute a single act is refuted by the statute's plain language."); *Thurmond*, 171 F. Supp. 2d at 680-681 (plaintiffs could not aggregate damages sustained by 1.7 million computers as a result of defendant's mass sale of an allegedly defective disk drive). Similarly here, Plaintiffs cannot bypass the CFAA's $5,000 threshold by combining unspecified harm to multiple computers that arises from numerous distinct acts.[19]

2. By its express terms, the CFAA does not permit civil claims to be brought for alleged violations of Subsection (a)(2).

Further, Plaintiffs' CFAA claim seeks to rely on a specific subsection of the CFAA ***for which there is no civil claim***. As set forth in the Complaint, Plaintiffs are pursuing a claim for alleged violations of 18 U.S.C. § 1030 (a)(2)(C). (Compl. ¶¶ 105, 106.) But the CFAA ***only*** permits civil claims for alleged violations of a separate subsection, Subsection (a)(5): "A civil action for a violation of this section may be brought ***only*** if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of ***subsection (a)(5)(B)***." *Id*. at § 1030(g) (emphasis added). Subsection (a)(5)(B), in turn, is linked to Subsection (a)(5)(A) in that a violation of Subsection (a)(5) requires that the "conduct described in . . . subparagraph (A)" must cause one of the items of damage set forth in subparagraph (B). Thus, subparagraph (a)(5)(B)—and the

[19] Some courts construe "single act" as an act turning on a perpetrator's access to a *particular* computer. These courts hold that a civil plaintiff may aggregate losses sustained by multiple victims, but only insofar as those losses arise from damage to a single computer. *DoubleClick*, 154 F. Supp. 2d at 524; *Thurmond*, 171 F. Supp. 2d at 680-81; *Lyons v. Coxcom, Inc.*, No. 08-cv-02047, 2009 WL 347285 (S.D. Cal. Feb. 9, 2009), *vacated by subsequent order*, 718 F. Supp. 2d 1232; *see also La Court*, 2011 WL 1661532, at *17, n.4. Because the CFAA has criminal applications—indeed it is primarily a criminal statute—the rule of lenity applies and would further support this construction. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992); *Crandon v. United States*, 494 U.S. 152, 168 (1990); *see also Int'l Airport Centers, LLC v. Citrin*, 440 F.3d 418, 419 (7th Cir. 2006) (cautioning against interpretations of the CFAA that would "stretch[] the statute too far . . . since it provides criminal as well as civil sanctions for its violation."); *Thurmond*, 171 F. Supp. 2d at 676 ("the language of section 1030(a)(5)(A) must be given the same meaning regardless whether a criminal prosecution or a civil action is brought.").

limited civil remedy allowed under the CFAA—***only*** comes into play if there is an alleged violation of subparagraph (a)(5)(A) causing damage as defined in subparagraph (a)(5)(B).

Nothing in the CFAA indicates that a plaintiff can alternatively bring a civil claim premised on Subsection (a)(2)(C), as Plaintiffs seek to do in the Complaint. Plaintiffs' decision to rely on Subsection (a)(2) likely stems from its seemingly looser standard. In particular, Subsection (a)(5) requires proof that a defendant acted "without authorization" of any kind, whereas Subsection (a)(2) permits claims for acts that "exceed" an existing level of authorization. And unlike Subsection (a)(5), Subsection (a)(2) does not expressly require a plaintiff to show that the defendant "intentionally" or "recklessly" caused damage. The Court should not allow Plaintiffs to avoid these required elements of proof under Subsection (a)(5) by invoking a purported civil remedy that does not exist under the CFAA for alleged violations of separate Subsection (a)(2)(C).

E. Plaintiffs Stored Communications Act (SCA) Claim Fails For Additional Dispositive Reasons.

Plaintiffs' SCA claims also fail because they do not allege, and cannot allege, that comScore gained improper access to one of *their* stored communications, or *any* stored communication, ***while it was in storage with an electronics communications provider*** (*e.g.*, an Internet service provider like AOL or a provider of a web-based email service like Google Gmail). As the Court explained in *Doubleclick*:

> Section 2510(17)(A)'s language and legislative history make evident that . . . the section is specifically targeted at communications ***temporarily stored by electronic communications services incident to their transmission – for example, when an email service stores a message until the addressee downloads it***. . . . In other words, Title II only protects electronic communications stored 'for a limited time' in the 'middle' of a transmission, i.e. when an electronic communication service temporarily stores a communication while waiting to deliver it.

DoubleClick, 154 F. Supp. 2d at 511-12 (emphasis added).

This inherent limitation of the SCA is reflected in the following provisions:

- Section 2701(a), which defines a violation of the SCA as the unauthorized "access to a wire or electronic communication ***while it is in electronic storage***," 18 U.S.C. § 2701(a) (emphasis added);

- Section 2510(17), which defines "electronic storage" as: "(A) any temporary, intermediate storage of a wire or electronic communication ***incidental to the electronic transmission thereof***; and (B) any storage of such communication ***by an electronic communication service*** for purposes of backup protection of such communication," 18 U.S.C. § 2510(17) (emphases added); and

- Section 2510(15), which "defines an 'electronic communications service' as 'any *service* which provides *to users* thereof the ability to send or receive wire or electronic communications.' Examples of providers in the Internet world would include ISPs . . . as well as, perhaps, the telecommunications companies whose cables and phone lines carry the traffic." *See DoubleClick*, 154 F. Supp. 2d at 511, n.20.[20]

Applying these statutory terms, Courts have consistently rejected SCA claims alleging that a defendant improperly accessed information stored on ***an individual's computer***, as opposed to communications while stored with an ISP or other provider of an "electronic communication service." *See DoubleClick*, 154 F. Supp. 2d at 511, n. 20 (dismissing SCA claim involving placement of cookies on individual computers because the plaintiffs and putative class members in that case "are not 'electronic communication service' providers."); *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183, 1204-1205 (S.D. Cal. 2008) (dismissing SCA claim involving alleged improper access to communications stored on plaintiff's personal laptop and explaining that "e-mail messages stored on [plaintiff's] hard drive do not constitute 'electronic storage' within the meaning of the Stored Communications Act."). Plaintiffs' SCA claim suffers

[20] The SCA's legislative history further confirms this basic limitation. For example, in considering a proposed amendment to the SCA, the House Judiciary Committee explained that "'any temporary, intermediate storage' [in § 2510(17)(A)] describes an e-mail message that is being *held by a third party Internet service provider until it is requested to be read*." H.R. Rpt. 106-932, at 1, n.7 (2000) (emphasis added). *See also DoubleClick*, 154 F. Supp. 2d at 512 ("S. Rep. No. 99-541 (1986)'s entire discussion of Title II deals only with facilities operated by electronic communications services" and such as "electronic bulletin boards" and "computer mail facilit[ies]," and the risk that communications temporarily stored in these facilities could be accessed by hackers. It makes no mention of individual users' computers, the issue in the instant case.").

from the same obvious and fatal defect. As in *Doubleclick* and *Hilderman*, Plaintiffs' claims are predicated entirely on alleged improper access to general "files"[21] on their personal computers and thus fall beyond the purview of the SCA's protections for electronic communication stored by an ISP or other electronic communication service provider.[22]

F. Plaintiffs fail to state a claim for violation of the ICFA

"[A]n IFCA claim is . . . subject to Rule 9(b) if the claim involves allegations of fraud." *Customguide v. CareerBuilder, LLC*, No. 11-C-945, 2011 WL 3809768, at *7 (N.D. Ill. Aug. 24, 2011) (Holderman, J.). Plaintiffs' ICFA claim here falls squarely within this established rule, as Plaintiffs themselves characterize their claim as stemming from alleged fraud. Specifically, Plaintiffs allege that comScore "engaged in *deceptive and fraudulent business* practices" by "intentionally concealing" the inclusion of its software in third-party freeware and by "omitt[ing] material facts about the true nature of its software products . . . ." (Compl. ¶ 117.)

Given Plaintiffs' characterization of their ICFA claims as arising from "fraudulent" conduct, Rule 9(b)'s heightened pleading standards apply and require "the circumstances constituting fraud or mistake [to] be stated with particularity." Fed. R. Civ. P. 9(b); *Vildaver v. Merrill Lynch*, No. 94 C 3041, 1995 WL 106396, at *1-2 (N.D. Ill. Mar. 09, 1995) (Holderman, J.). As this Court has explained, Rule 9(b) requires Plaintiffs to "identify . . . the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated." *Michalowski v. Flagstar Bank, FSB*, No. 01 C 6095, 2002 WL 113905, at *5 (N.D. Ill. Jan. 25, 2002) (Holderman, J.). That is, Plaintiffs must specify the precise statements or omissions they claims are fraudulent and specifically describe the circumstances surrounding

[21] As noted, Plaintiffs fail to allege that comScore accessed on of their *stored communications*.

[22] Moreover, the SCA allows a civil claim only where plaintiffs can allege that a defendant violated the statute "with a knowing or intentional state of mind . . . ." 18 U.S.C. § 2707. Other than parroting the terms of the statute, Plaintiffs allege no facts to show that comScore acted with a "knowing or intentional state of mind" to cause the alleged harms in this case.

their review of those statements—including "the who, what, when, and where of the alleged fraud." *Id.*

Plaintiffs fall well short of satisfying these heightened pleadings standards. While Plaintiffs allege in general terms that the TOS omitted certain information (Compl. at ¶¶ 17, 37, 49-51), the Complaint is barren of any facts (let alone facts sufficient to meet Rule 9(b)) to show that Plaintiffs themselves reviewed and were somehow misled by the TOS. Indeed, it is entirely unclear whether Plaintiffs actually read the TOS at all when it was displayed to them in the installation process, as they claim that they "did not agree to comScore's Terms of Service." (*Id.* at ¶¶ 69, 73); *see also Vistaprint,* 2009 WL 2884727, at *8 (dismissing plaintiffs complaint based on clickwrap agreement because "[a]lthough Plaintiffs allege that the webpage is deceptive, they do not allege that they read the Offer Details and other information provided on the webpage").

Even if the Court were to assume that Plaintiffs read the TOS (which would be improper under Rule 9(b)), there are no fact allegations to show that any alleged misstatement or omission in the TOS actually led to any harm, or even what third party software Plaintiffs allegedly downloaded. To impose liability for fraudulent omissions under the ICFA, the defendant must have omitted a "material" fact. *Jamison v. Summer Infant (USA), Inc.*, 778 F. Supp. 2d 900, 911 (N.D. Ill. 2011). A fact is "material" if "a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Id.* (citation and quotation omitted). Here, Plaintiffs have devoted more than 26 pages and over 126 paragraphs describing comScore's allegedly deceptive conduct. Yet nowhere in these paragraphs do Plaintiffs ever say that they

would not have downloaded the "freeware" if the TOS had said something different.[23]

G. Plaintiffs fail to state a claim for unjust enrichment.

Unjust enrichment is a "common law theory of recovery or restitution that arises when the defendant is retaining a benefit *to the plaintiff's detriment*, and this retention is unjust." *Cleary v. Philip Morris Inc.*, 656 F.3d 511 (7th Cir. 2011) (emphasis added). In Illinois, "unjust enrichment is not a separate cause of action," but rather must be tied to some other cause of action brought about by unlawful or improper conduct such as fraud, duress, or undue influence. *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 447 (7th Cir. 2011). Under these circumstances, "unjust enrichment will stand or fall with the related claim." *Cleary*, 656 F.3d at 517. *See also Pirelli*, 631 F.3d at 448 ("[W]hen the plaintiff's particular theory of unjust enrichment is based on alleged fraudulent dealing and we reject the plaintiff's claims that those dealings, indeed, *were* fraudulent, the theory of unjust enrichment that the plaintiff has pursued is no longer viable.").

Here, Plaintiffs' Unjust Enrichment claim is based on the same alleged conduct as Plaintiffs' ICFA claim. Consequently, Plaintiffs' failure to adequately plead their ICFA claim dooms their Unjust Enrichment claim. Moreover, even if the Court analyzes Plaintiffs' unjust enrichment claim independent of their IFCA claim, the claim still fails because an unjust enrichment "claim" requires that Plaintiffs suffer some sort of detriment. Plaintiffs claim they suffered harm because comScore benefited from its sale of their demographic information but, as set forth in Section _ above, a gain by defendant does not, by itself, establish a loss to plaintiff. Plaintiffs' unjust enrichment claim should be dismissed.

IV. CONCLUSION

[23] Plaintiffs also fail to plead that they suffered actual damages as required to state an IFCA claims. *Jamison*, 778 F. Supp. 2d at 911 (quoting 815 Ill. Comp. Stat. 505/10a)) ("To state a claim under IFCA, a plaintiff must allege that he or she has 'suffer[ed] actual damage as a result of the violation of th[e] Act.'").

For all of the reasons above, Plaintiffs' Complaint should be dismissed in its entirety.

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Respectfully submitted,

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