

**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,)
)
v.)
)
COMSCORE, INC., a Delaware corporation,)
)
Defendant.)

Case No. 1:11-5807

Hon. James F. Holderman

**PLAINTIFFS MIKE HARRIS’S AND JEFF DUNSTAN’S
REPLY IN SUPPORT OF THEIR MOTION TO STRIKE DEFENDANT
COMSCORE, INC.’S MOTION TO DISMISS UNDER RULES 12(b)(1) AND 12(b)(6)**

Plaintiffs Mike Harris and Jeff Dunstan, through their counsel, Edelson McGuire LLC, respectfully submit the following reply in support of their move to strike Defendant comScore, Inc.’s Motion to Dismiss under Rule 12(b)(1) and 12(b)(6). In support of their reply, Plaintiffs state as follows:

1. Defendant comScore, Inc. (“comScore”) responds to Plaintiffs’ motion to strike its *second* motion to dismiss by pretending that Plaintiffs’ counsel gave it permission to file successive Rule 12(b) motions rather than answering the Complaint. comScore’s argument is apparently derived from a two-sentence e-mail sent between counsel wherein Plaintiffs’ attorney, Jay Edelson, agreed—as a courtesy—to allow comScore to “respond” to the Complaint by November 4, 2011. (Dkt. No. 46-1, p. 2.) This e-mail was sent on October 7, 2011—the day that comScore’s first motion to dismiss under Rule 12(b)(3) was denied.

2. Although comScore failed to clarify the meaning of the term “respond” with Plaintiffs’ counsel at that time, it now argues that use of the term gave it *carte blanche* to file a

second motion to dismiss under Rule 12(b)(6)—even though such a filing would violate Rule 12(g)(2)’s prohibition against successive pre-answer Rule 12 filings. According to comScore, any other interpretation of the term “respond” would be superfluous because it could not have filed anything else besides a motion to dismiss or an answer to the Complaint. comScore is flat wrong that it could not have “respond[ed]” to the Complaint in any other way.

3. There are a number of ways that comScore could have “respond[ed]” to the Complaint that did not involve a motion to dismiss under Rule 12(b)(6). For example, comScore could have filed an answer, a counterclaim, affirmative defenses, a *true* motion to dismiss for lack of standing under Rule 12(b)(1), or a motion for summary judgment. *See* Fed. R. Civ. P. 56(b) (“a party may file a motion for summary judgment at any time. . .”). In this way, comScore could have responded to the Complaint in several procedurally proper ways—none of which included a *second* motion to dismiss under Rule 12(b). For these reasons, comScore’s “response” argument is nothing more than an after-the-fact attempt to delay answering the Complaint and should be rejected.

4. comScore’s second argument—that it may challenge standing under Rule 12(b)(1) at any time—misses the mark. As explained in Plaintiffs’ motion to strike, comScore’s so-called “Rule 12(b)(1)” motion attacks the sufficiency of Plaintiffs’ allegations—an issue analyzed under Rule 12(b)(6). Thus, comScore’s “Rule 12(b)(1)” argument should be rejected, and its second motion to dismiss should be stricken.

WHEREFORE, Plaintiffs respectfully request this Court to enter an Order: (i) striking comScore’s motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6) (Dkt. No. 42-1); (ii) compelling comScore to answer the Complaint immediately; and (iii) granting such other and further relief that the Court deems equitable and just.

Dated: November 14, 2011

Respectfully submitted,

By: /s/ Ari J. Scharg

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CERTIFICATE OF SERVICE

I, Ari J. Scharg, an attorney, certify that on November 14, 2011, I caused the above and foregoing ***Plaintiffs Mike Harris' and Jeff Dunstan's Reply in Support of their Motion to Strike Defendant comScore, Inc.'s Motion to Dismiss Under Rule 12(b)(1) and Rule 12(b)(6)*** by causing true and accurate copies of such paper to be transmitted to all counsel of record via the Court's CM/ECF electronic filing system, on this the 14th day of November, 2011.

/s/ Ari J. Scharg _____