

**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.	)	
_____	)	

**PLAINTIFF MIKE HARRIS’S MOTION FOR LEAVE TO  
CONDUCT LIMITED EXPEDITED DISCOVERY<sup>1</sup>**

Plaintiff Mike Harris (“Plaintiff”), through his attorneys, moves this Court for leave to serve limited, expedited discovery on Defendant comScore, Inc. (“comScore”) pursuant to Fed. R. Civ. P. 26(d). In support of his motion, Plaintiff states as follows:

**INTRODUCTION**

comScore is an Internet marketing research company that monitors and records consumers’ Internet behavior using a wide array of sophisticated analytics tools. A subset of comScore’s overall business model is at issue in this lawsuit. That is, as alleged in the underlying

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<sup>1</sup> In accordance with LR 37.2, on September 9, 2011, at approximately 4:15 p.m. (CST), Plaintiff’s counsel, William C. Gray, met and conferred, by telephonic means, with Defendant’s counsel, Michael G. Rhodes, in a good faith attempt to obtain the discovery sought by this motion without court action. At that time, Mr. Rhodes asked Mr. Gray to put his request in writing and provide him with a reasonable period of time to communicate with Defendant to determine whether it would produce the requested discovery informally. Plaintiff’s counsel obliged. On September 13, 2011, at approximately 3:37 p.m. (CST), Mr. Rhodes indicated, via e-mail correspondence, that Defendant is unwilling to provide the requested information.

Complaint, comScore gathers data, in part, by inserting unauthorized spyware<sup>2</sup> (“Unauthorized Spyware”) onto a number of consumers’ computers without their knowledge or consent. This Unauthorized Spyware continuously transmits highly personal data back to comScore, where it is compiled, analyzed, and ultimately sold to third party clients.

Plaintiff has concerns about these practices and their immediate and irreversible harm to consumers. Plaintiff further is fearful that key evidence in the possession of unknown third parties may be destroyed. Therefore, Plaintiff seeks to conduct limited expedited discovery to (i) determine whether comScore has terminated the operations of its spyware program, (ii) identify any third parties currently possessing relevant information for preservation purposes, (iii) and ensure that comScore adequately protects the personal information that it has illegally collected. To that end, Plaintiff respectfully requests leave to issue three (3) narrowly tailored interrogatories on an expedited basis. (Plaintiff’s proposed Interrogatories are attached as **Exhibit A.**)

### **BACKGROUND**

comScore’s business model, while highly technical, can be summed up as follows: comScore collects massive amounts of information about consumers’ digital behaviors, organizes the data, and then sells it to third parties. To accumulate raw data, comScore gathers information using, *inter alia*, website analytics, mobile phone applications, research panels, and surveys. The Complaint (Dkt. No. 1), however, focuses only on the specific class of proprietary

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<sup>2</sup> Spyware is “software that is installed in a computer without the user’s knowledge and transmits information about the user’s computer activities over the Internet.” *See*, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/spyware> (last visited September 13, 2011).

software that comScore developed to unlawfully collect data from consumers' computers—its Unauthorized Spyware.

Through its Unauthorized Spyware, comScore retrieves a continuous stream of information, no matter how sensitive, about the activities conducted on an individual's computer system—all without the user's knowledge. (Compl., ¶7.) comScore effectuates this scheme by “bundling” its Unauthorized Spyware with seemingly innocuous software that consumers download for free on the Internet, such as games and screensavers. (Compl., ¶¶33, 34.) Once downloaded, the Unauthorized Spyware records and transmits virtually all information inputted into a web browser, including, *inter alia*, websites viewed, search queries, names, addresses, credit card numbers, usernames/passwords, and Social Security Numbers. (Compl., ¶7.) The Unauthorized Spyware also records and transmits information concerning all files on the user's computer, as well as, all files located on other computers found on local networks. (Compl., ¶¶ 49-54.) Worse, comScore designed the Unauthorized Spyware to deny consumers the ability to disable or otherwise reject its 24/7 surveillance, and does not even alert users to its presence. (Compl., ¶¶ 49-54.) As a result, scores of consumers remain unwilling subjects of comScore's research. (Compl., ¶29.)

comScore has already sold, and continues to sell, information to third parties that has been intrusively and unlawfully gathered from consumers through its Unauthorized Spyware. Plaintiff is concerned that the Unauthorized Spyware continues to monitor users, and also that the private information obtained by the Unauthorized Spyware is not being properly safeguarded. Further, the third party recipients of this data possess extremely relevant evidence that Plaintiff will need to prove his case. Unfortunately, such companies are likely unaware of the existence of this lawsuit or that they possess crucial evidence that must be preserved.

For these reasons, Plaintiff seeks limited, expedited discovery pursuant to Fed. R. Civ. P. 26(d), in the form of three (3) interrogatories in order to: (i) determine the identities of any third parties that possess comScore's illegally obtained consumer information, (ii) allow Plaintiff to serve such companies with subpoenas directing them to preserve relevant information (thus ensuring that the very evidence at the heart of this lawsuit is not destroyed), (iii) ensure that comScore has ceased collection of information gathered through its nefarious Unauthorized Spyware, and (iv) evaluate whether Plaintiff needs to seek a preliminary injunction to protect the interests of the putative class. These reasons constitute sufficient bases for allowing Plaintiff to proceed with limited, expedited discovery.

### **ARGUMENT**

Courts in this Circuit have held that expedited discovery is appropriate upon a showing of good cause. *See, e.g., Vance v. Rumsfeld*, 2007 WL 4557812, \*5 (N.D. Ill. Dec. 21, 2007); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623-24 (N.D. Ill. 2000); *Sheridan v. Oak St. Mortgage, LLC*, 244 F.R.D. 520, 522 (E.D. Wis. 2007). To show good cause, a moving party is required to demonstrate that the need for expedited discovery outweighs the prejudice to the responding party. *Vance*, 2007 WL 4557812, at \*5. In assessing good cause under Rule 26(d), the Court should also evaluate the scope of the requested discovery. *Interscope Records v. Does 1-14*, 2007 WL 2900210, \*1 (D. Kan. Oct. 1, 2007).

Discovery is frequently expedited where “physical evidence may be consumed or destroyed with the passage of time, thereby disadvantaging one or more parties to the litigation.” *Ervine v. S.B.*, 2011 WL 867336, \*2 (N.D. Ill. 2011); *Pod-Ners, LLC v. N. Feed & Bean of Lucerne Ltd. Liab. Co.*, 204 F.R.D. 675, 676 (D. Colo. 2002); *Ellsworth Assocs., Inc. v. United States*, 917 F.Supp. 841, 844 (D.D.C. 1996). In *Ervine*, this Court recently granted the plaintiff's

motion to issue subpoenas to third parties prior to the Rule 26(f) conference in order to preserve relevant information in their possession that might otherwise be destroyed. *Ervine*, 2011 WL 867336, at \*2. Thus, good cause exists to expedite discovery where the possibility of destruction or transfer of evidence decreases the likelihood of discovering relevant evidence. *See Interscope Records*, 2007 WL 2900210, at \*1 (good cause found to expedite discovery where electronic documents would likely be destroyed).

Here, good cause exists to allow Plaintiff to conduct limited, expedited discovery. Plaintiff seeks only to issue three (3) interrogatories that relate specifically to comScore's Unauthorized Spyware. As explained above, comScore records information about consumers' private digital behaviors using the Unauthorized Spyware, and sells such data to third party companies. The third party recipients of the Unauthorized Spyware data therefore possess information that is not only highly sensitive, but also highly relevant to prove Plaintiff's case. Many of comScore's clients are likely unaware of this lawsuit or that they possess relevant and discoverable information. Without limited discovery, Plaintiff is unable to determine which companies comScore sells its Unauthorized Spyware data to, or instruct them to preserve relevant evidence. Only comScore itself is able to identify which companies have received unlawfully collected information.

Additionally, much of the evidence held by comScore's clients likely exists in transient electronic format, and will be unobtainable if not expeditiously recovered and securely preserved. Other relevant evidence is undoubtedly held on individual employee laptops or portable disks, and therefore likely to be frequently purged. Thus, there is an immediate need to identify the comScore clients that received information collected with its Unauthorized Spyware.

To efficiently identify such clients, Plaintiff seeks to issue three (3) interrogatories to comScore. These interrogatories are narrowly tailored to specifically identify only those third parties that may possess discoverable information (i.e., data collected using comScore's Unauthorized Spyware) or may come to possess such information in the near future. *See Interscope Records*, 2007 WL 2900210, at \*1 ("because plaintiffs seek very specific information regarding a certain group of likely readily identifiable people, the court finds the scope of the discovery sought sufficiently narrow"). To effectively preserve relevant evidence, Plaintiff intends to issue subpoenas directing the identified parties in possession of information improperly collected from the Unauthorized Spyware to (a) preserve any and all relevant information, and (b) inform the Plaintiff that the responsive information has been preserved.

Plaintiff's proposed discovery would not prejudice comScore. In fact, comScore need not produce any documents, and instead, may simply identify information that is responsive to the interrogatories.<sup>3</sup> The only dangers present are the possible irreparable injuries associated with continued unlawful monitoring and the potential inadvertent spoliation of evidence that Plaintiff may face in the absence of expedited discovery. Such a danger far outweighs any minor inconvenience to comScore in identifying relevant third parties, especially given the extremely limited scope (i.e., only those companies that have received data from comScore's Unauthorized Spyware). In sum, Plaintiff's proposed discovery request is sufficiently limited in scope, and good cause exists to identify and preserve crucial evidence that may be destroyed. *Ervine*, 2011 WL 867336, at \*2; *Pod-Ners, LLC*, 204 F.R.D. at 676; *Ellsworth Assocs., Inc.*, 917 F.Supp. at 844.

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<sup>3</sup> Of course, Plaintiff would enter into an appropriate confidentiality agreement with comScore with respect to this information.

**CONCLUSION**

For the foregoing reasons, Plaintiff Mike Harris respectfully requests that this Court grant his Motion for Leave to Conduct Limited, Expedited Discovery in accordance with the following schedule:

1. Within 3 days of entry of the Court's Order, Plaintiff shall serve comScore with three (3) Interrogatories (Ex. A);
2. Within 14 days of service upon comScore, comScore shall respond to Plaintiff's Interrogatories;
3. Within 14 days of receiving comScore's responses, Plaintiff shall issue subpoenas *duces tecum* to all identified third parties; and
4. Within 30 days of the entry of an Order, the Parties shall engage in a Rule 26(f) conference.

Dated: September 13, 2011

RESPECTFULLY SUBMITTED,

**MIKE HARRIS**, INDIVIDUALLY AND ON  
BEHALF OF A CLASS OF SIMILARLY SITUATED  
INDIVIDUALS,

By: /s/ Ari J. Scharg

One of Plaintiff's Attorneys

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**CERTIFICATE OF SERVICE**

I, Ari Scharg, an attorney, hereby certify that on September 13, 2011, I served the above and foregoing ***Plaintiff's Motion for Leave To Conduct Limited Expedited Discovery*** by causing true and accurate copies of such paper to be transmitted to the persons shown below via electronic mail, and further by causing true and accurate copies of such paper to be placed in postage prepaid envelopes addressed to the persons shown below, and by causing such envelopes to be deposited in the United States Mailbox located at 350 North LaSalle Street, Chicago, Illinois on this 13th day of September, 2011.

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*Counsel for Defendant comScore, Inc.*

/s/ Ari J. Scharg  
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Ari J. Scharg