Dunstan et al v. comScore, Inc. Doc. 77

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MIKE HARRIS and JEFF DUNSTAN, individually and on behalf of a class of similarly situated individuals,	)	
Plaintiffs,	)	Case No. 1:11-cv-5807
	)	Judge: Hon. James F. Holderman
v.	)	Mag. Young B. Kim
COMSCORE, INC., a Delaware corporation	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANT'S
MOTION TO BIFURCATE DISCOVERY

Defendant comScore, Inc. respectfully submits this reply in further support of its Motion to Bifurcate Discovery and supporting Memorandum of Law filed on January 12, 2012 (collectively, the "Motion to Bifurcate"). (*See* Dkt. Nos. 66, 67.)

ARGUMENT

As this Court has recognized, phasing of discovery is appropriate "if in the end we are actually going to save time and money." (Jan. 5, 2012, Hr'g Tr. 5:13-15.) Bifurcating discovery here will do just that. Plaintiffs implicitly concede that the case will not proceed if class certification is denied. (*See* Dkt No. 70, Plaintiffs Mike Harris' and Jeff Dunstan's Response in Opposition to Defendant comScore Inc.'s Motion to Bifurcate Discovery, filed Jan. 9, 2012 ("Pls. Resp."), at 7-9.) At a minimum, there is a substantial likelihood that the Court's ruling on class certification will narrow the class. Proceeding to full merits discovery against this backdrop would be inefficient and unwise.

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Plaintiffs devote most of their brief to attacking Defendants for supposed foot-dragging between the last conference and the filing of their brief. That attack is not only (as we show below) entirely unfounded, it is also beside the point. The sole question before the Court is whether it is logical to divide discovery in this case into two phases, starting with class-certification issues. The answer to that question is "yes." Plaintiffs' fallback argument—that division of merits and class-certification discovery is destined to result in frequent requests for judicial intervention—vastly overstates the difficulty of separating the two issues, improperly assumes that the parties will ignore their professional obligations under Local Rule 37.2 and act unreasonably during the class certification phase, and is, at a minimum, premature. comScore has demonstrated through its actions to date that it is committed to working diligently to complete discovery and indeed has already provided plaintiffs with the most important piece of discovery in this case—its source code.

A. Phasing will Prevent Unnecessary and Wasteful Discovery on Issues that may be Mooted by this Court's Ruling on Class Certification

As this Court recognized at the January 5, 2012, hearing, discovery should be phased if it will save the parties and the Court "time and money." (Jan. 5, 2012, Hr'g Tr. 5:13-15.); *see also Ocean Atlantic Woodland Corp. v. DRH Cambridge Homes, Inc.,* Case No. 02 C 2523, 2004 WL 609326, at *2-3 (N.D. Ill. Mar. 23, 2004) ("[T]he factors to be weighed when considering whether or not to bifurcate [include]: convenience, the avoidance of prejudice, expedition or economy."). Phasing of discovery is particularly beneficial where, as here, the outcome of one phase may moot the following phase. *See Ocean Atlantic*, 2004 WL 609326, at *2 ("Because . . . the distinct possibility exists that the issue of damages will never be reached, bifurcating discovery as to liability from that of damages will serve the goals of convenience, expedition and economy.").

In this case, the need for, and scope of, merits discovery hinges entirely on whether the Court certifies Plaintiffs' case as a class action and, if so, the scope of that certification. It is comScore's position that particularized questions of fact relating to consumer experience and consent will either preclude class certification or, at the very least, drastically reduce the scope of the certified class, making open-ended merits discovery unnecessary and wasteful.[1]

Indeed, this Court denied class certification under similar circumstances in *Clark v. Experian Information, Inc.*, 233 F.R.D. 508 (N.D. Ill. 2005) (Holderman, J.), *aff'd,* 256 Fed.Appx. 818 (7th Cir. 2007). In *Clark*, the plaintiffs alleged that the defendant violated the Illinois Consumer Fraud Deceptive Practices Act by offering on-line consumers a "free" credit report while at the same time secretly enrolling them in defendant's monthly credit checking service. *Id.* at 509. The Court denied class certification, holding that common issues of law and fact did not predominate as required by Federal Rule of Civil Procedure 23(b) (3). Specifically, the Court found that "[t]he nature of plaintiffs' claims require an individualize [sic] person-by-person evaluation of what the potential class members viewed on the defendants' website, the potential class member's understanding of and reliance on this information, and what damages, if any, resulted." *Id.* at 512. The same individualized evaluation is required in this case and precludes class certification. Plaintiffs' claims require specific determinations as to whether users of comScore software received notice of, and consented to, becoming Panelists. Such determinations will be based on the experience of individual users and make class certification inappropriate.

[1] Plaintiffs' suggestion that certain discovery could be avoided if comScore admits, inter alia, that its software is "spyware" is disingenuous since plaintiffs already know comScore disagrees with this disparaging characterization.

Should the Court agree and deny class certification, this litigation will come to an end—a fact that Plaintiffs effectively conceded by failing to respond to comScore's argument in its opening memorandum (at 7-8) that the litigation would end absent class certification. Thus, any time and money put towards discovery concerning issues other than those which related to class certification prior to the Court's denial will have been entirely wasted. Even if class certification is granted, the class is likely to be far smaller and more particularized than Plaintiffs currently assert. For example, as explained in detail in comScore's Motion, many of the issues alleged in Plaintiffs' Complaint pertain only to users of comScore software designed for beta testing in Macintosh computers, not users of Windows. (*See* Mot. to Bifurcate at 8-9.) Because the Macintosh beta testing involved only a small number of users and because the resulting information was never commercialized, much of the discovery Plaintiffs are seeking, including information about users of Windows-related software and commercialization of that information, would become irrelevant. Similarly, the time or money put towards discovery of such information prior to the Court's certification order would be wasted.

The point is that Plaintiffs cannot, and do not, dispute this potential for wasted resources. Instead, Plaintiffs merely point out that the class may be certified as they hope. If they turn out to be right, phasing still will have resulted in minor inefficiencies at best, since class certification is an issue in the case either way.[2] But, if they are wrong, the waste of time and resources will have been massive. For that reason, the Manual On Complex Litigation favors bifurcation, stating that "[d]iscovery relevant only to the merits delays the certification decision and may

[2] Under the schedule that comScore proposes there would be little, if any, delay in the overall discovery period. comScore's proposed schedule allows for ten months of discovery—the same amount of time proposed by Plaintiffs. (Dkt. No. 60 Report of the Parties' Planning Meeting, filed Dec15, 2011, ("Rule 26(f) Report") at 3.) The only difference would arise during the intervening time between the close of class certification discovery and this Court's ruling.

ultimately be unnecessary" and also for that reason, "[c]ourts often bifurcate discovery between certification issues and those related to the merits of the allegations." MANUAL FOR COMPLEX LITIGATION (Fourth) §21.14 (2004); s*ee also American Nurses' Assoc. v. State of Illinois*, 1986 WL 10382, at *3 (N.D. Ill. Sept. 12, 1986) ("[B]ifurcation of discovery . . . may result in substantial savings of time and energy later. If class certification is denied, the scope of permissible discovery may be significantly narrowed; if a class is certified, defining that class should help determine the limits of discovery on the merits.").

B. Dividing Discovery into Class Certification and Merits Phases will Reduce Rather than Increase Discovery Disputes

Plaintiffs assert that dividing discovery into class certification and merits phases will increase discovery disputes and cause the parties to "battle endlessly over whether specific discovery requests are relevant to class certification." (Pls. Resp. at 13-14.) That is pure hyperbole.

As an initial matter, there is no reason to assume that the parties will be obstreperous and unreasonably dispute discovery relevant to class certification. Indeed, to act in such a manner would not only violate Local Rule 37.2, but would be contrary to the admonitions contained in Judge Holderman's rules ("The court requires strict compliance with Local Rule 37. . . . The court believes that parties can should work out the discovery dispute") and Magistrate Judge Kim's rules ("The parties can and should resolve most discovery disputes on their own."). comScore's actions to date are consistent with these admonitions. Despite the stay of discovery entered on December 20, 2012, comScore moved quickly to negotiate a protective order and

make its highly confidential source code available to Plaintiffs even though comScore was under no obligation to do so.[3]

Furthermore, contrary to Plaintiffs' assertions, comScore has never taken the position that discovery in the class certification phase should be limited to the source code it has already produced. Plaintiffs are attempting to manufacture a dispute where none exists. As comScore has made clear both in the Rule 26(f) Report and in its Motion to Bifurcate, comScore agrees to produce materials relevant to class certification in addition to its source code and will meet and confer in good faith if disputes arise. (Rule 26(f) Report at 1-2; Mot. to Bifurcate at 11.)

To date, comScore has agreed to produce the following:

- comScore's Windows-based source code as it existed on September 17, 2009;
- documents explaining the purpose of thirteen updates to the Windows based source code;
- the single version of the Mac Panel software's source code;
- source code for each version of the RK Verify used in the last two years;
- the contractual agreement and applicable terms between comScore and Panelists;
- particular agreements with the named plaintiffs;
- the number of Panelists in the proposed class;
- information on comScore's document preservation and compliance;

[3] Plaintiffs' assertions regarding comScore's "delay" in delivering the source code are unfounded. It was understood by all parties that the source code would not be supplied until a protective order was in place. Counsel for both sides were working on the language of the protective order as late as January 17th when Mr. Givens, counsel for Plaintiffs, sent counsel for comScore a draft containing "a couple minor edits." On January 19th, Mr. Schrag, another counsel for Plaintiffs, sent his edits to the stipulated motion for entry of the protective order, the most significant of which was his objection to the font being used. comScore accepted the changes (including Mr. Schrag's font choice) and the motion and protective order were presented by comScore's counsel to Magistrate Judge Kim who entered the order on Friday, January 20th. The source code was delivered to Plaintiffs' counsel on the next business date.

- discovery sufficient to show the methods by which comScore's terms of service and other disclosures are presented to prospective Panelist; and
- discovery sufficient to show the methods by which consent to comScore's terms of service is obtained from prospective Panelists.

(Rule 26(f) Report at 1-2; Mot. to Bifurcate at 10-11.)

The information contained in the source code and other materials listed above will be sufficient to respond to many of Plaintiffs' outstanding discovery requests during the class certification phase, including requests relating to third-party partners and demands for internal emails concerning design and deployment of the software referenced in Plaintiffs' Response. (*See* Pls. Resp. at 10-11.) For example, the source code will allow Plaintiffs to determine what information comScore software collects and transmits; how the software avoids collection of sensitive data, such as passwords, credit card numbers, and social security numbers; how the software affects and interacts with panelists; and how the software may be uninstalled. Plaintiffs will also be able to determine whether, in their view, the RK Verify source code results in any deficiencies with respect to consent. Plaintiffs should review and analyze the source code and the other materials that comScore has agreed to produce. If, after doing so, Plaintiffs for some reason are not satisfied, they can and should seek any additional materials they deem necessary to prepare their motion for class certification. comScore will of course approach any such request in good faith.

Finally, despite Plaintiffs' protestations to the contrary and as demonstrated by the list of documents and materials above, there is significant agreement between the parties as to the materials relevant to class certification. (*See supra* at 6.) The parties also agree that damages-related discovery is irrelevant to class certification. As Plaintiffs' counsel stated at the January 5,

2012, hearing "damages tend to be a separate issue, that is merits and not class certification."[4] (Hr'g Tr. 9:4-7.) To the extent that disputes arise, the parties should be able to work with each other professionally and reasonably to resolve those disputes in a timely manner, particularly where the issues have been narrowed to class certification (*i.e.*, those materials relevant to numerosity of potential plaintiffs, commonality and typically of their claims, and adequacy of the class representative, *see* Fed. R. Civ. P. 23(b)). Accordingly, comScore's Motion to Bifurcate should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant comScore's Motion to Bifurcate and stay discovery on the merits of this case pending the Court's ruling on class certification.

[4] Given their admission that damages are not relevant to class certification, Plaintiffs will likely be amenable to withdrawing their claims for discovery on "commercialization" of user information as they undisputedly relate to monetary damages and injunctive relief as well as to documents relating to the termination of the Mac Panel, which relate to injunctive relief. (Pls. Resp. at 10-12.)

Dated: January 26, 2012

Respectfully submitted,

By: */s/ Amanda S. Williamson*

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