No. 13-8007

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MIKE HARRIS, and JEFF DUNSTAN,
individually and on behalf of a class of similarly situated individuals,

Plaintiffs-Respondents,

v.

COMSCORE, INC.,

Defendant-Petitioner.

On Appeal from the United States District Court
For the Northern District of Illinois,
Case No 1:11-cv-05807
The Honorable James F. Holderman, United States District Chief Judge

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PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The counsel of record for Plaintiffs-Respondents Mike Harris, Jeff Dunstan, and the Class hereby furnish the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party the attorneys represent:

Mike Harris

Jeff Dunstan

(2) If such party is a corporation:

Harris and Dunstan are not corporations.

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this Court:

Edelson LLC

INTRODUCTION

Putative *Amici Curiae*, the Direct Marketing Association, the American Association of Advertising Agencies, the Association of National Advertisers, the Entertainment Software Association, the Interactive Advertising Bureau, and the Chamber of Commerce of the United States of America (collectively the "Marketers") move the Court for permission to file a brief in support of Defendant-Petitioner comScore, Inc. ("comScore") and its Petition for Leave to Appeal Pursuant to Fed. R. Civ. P. 23(f), (App. Dkt. 1) (the "Petition"). This Court should deny the request. Rather than bringing valuable insider insight to the litigation, or exploring novel legal issues raised by the District Court's class certification decision, (Dkt. 186) (the "Certification Decision"), the Marketers spend the overwhelming majority of their brief parroting the points comScore makes in its Petition.

And even when they aren't repeating comScore's arguments, the Marketers follow comScore's lead and introduce their own version of the facts of the case, from which they believe the Court will find in their (and comScore's) favor on appeal. For example, in an apparent attempt to scare the Court into believing that a ruling in Plaintiffs' favor will destroy the Internet economy as we know it, the Marketers try to characterize this case as centering on fundamental technologies (specifically, the widespread use of "cookies") underlying Internet commerce. Cookie technology, however, has absolutely no relevance to this case and a finding in Plaintiffs' favor, in addition to being legally compelled, will not threaten the viability of the Marketers' businesses.

Amicus briefing is proper where it presents the Court with additional relevant information to inform and illuminate a pending decision. Here, however, the Marketers' proposed brief vacillates between repetition and fabrication, and ultimately fails to offer the Court any meaningful guidance. Accordingly, Plaintiffs-Respondents respectfully request that the Court deny the Marketers' motion to file *amici curiae* briefing.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint and comScore's early Rule 12 Motions

This lawsuit arises from comScore's use of its proprietary tracking software, OSSProxy, to surreptitiously monitor, collect, and ultimately profit from information about virtually all user activity on hundreds of thousands of consumers' computers. (*See* Dkt. 186 at 2; Dkt. 169, ¶¶ 1-18.) Plaintiffs-Respondents Jeff Dunstan ("Dunstan") and Mike Harris ("Harris") (collectively, the "Plaintiffs") are two individuals who downloaded and installed OSSProxy on their computers. (Dkt. 169, ¶¶ 64-70.) Thus, and like every other putative Class member, comScore's software began to monitor and collect information about both Plaintiffs' computers and computer usage without their consent. (Dkt. 154 at 24-25.) As a result of comScore's invasions of their privacy and property, Dunstan and Harris assert claims under three federal privacy laws—the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.* ("SCA"); the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 – 2522 ("ECPA"); and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA")—and under state law for unjust enrichment.

Not long after Harris and Dunstan filed their original complaint, (Dkt. 1), comScore moved to dismiss for improper venue, or in the alternative, to transfer to the Eastern District of Virginia. (*See* Dkt. 12.) Through that motion, comScore contended that because the Plaintiffs' suit was a "non-arbitral action or proceeding," it was subject to a choice of forum provision present in the User License Agreement ("ULA") that was accessible during some, but not all, installations of OSSProxy. (*See* Dkt. 14 at ¶ 6 (declarant for comScore explaining that not all installations of OSSProxy provided a hyperlink to the ULA); Dkt. 15 at 5, 8, 13.) The District Court rejected that argument, holding that (1) the Plaintiffs alleged that they did not consent to the ULA, (2) those allegations controlled at the pleading stage, and, accordingly, (3) comScore's Rule 12(b)(3) motion failed. (*See* Dkt. 31 at 3-5.) After finally answering the complaint, comScore next moved for, and obtained, an order bifurcating discovery between class and merits issues. (*See* Dkts. 66, 87.) From there, class discovery took place.

Class Certification Briefing and the District Court's Certification Decision

After the close of class discovery, Harris and Dunstan moved for class certification of a Class and Subclass of similarly situated individuals. Specifically, Harris and Dunstan sought certification of the following classes:

> **Class:** All individuals who have had, at any time since 2005, downloaded and installed comScore's tracking software onto their computers via one of comScore's third party bundling partners.
>
> **Subclass:** All Class members not presented with a functional hyperlink to an end user license agreement ("ULA") before installing comScore's software onto their computers.

(Dkt. 154 at 10.) In summary, Harris and Dunstan argued that certification was

appropriate because the interaction between the ULA (the document purportedly setting out exactly what information OSSProxy would collect and how it would collect it) and OSSProxy (the uniform software designed to collect information from consumers) produced common questions that would, in turn, provide common answers for the Class and resolve the litigation on a class-wide basis. (*See id.* at 27-32.) The most pressing questions asked: (1) "Is comScore party to the ULA and, if not, does it have any third-party rights under it?" and (2) "Assuming comScore can enforce the ULA, does OSSProxy's data collection violate its terms?" (*Id.*)

After thorough analysis, the District Court largely agreed with Dunstan and Harris. (*See* Dkt. 186.) The District Court opened its Certification Decision by denying Plaintiffs' motion with respect to their unjust enrichment claim after finding that certification of a 50-state unjust enrichment class would be improper. (*See id.* at 6-7.) From there, the District Court certified Plaintiffs' three federal claims.

In terms of Rule 23's requirements, the District Court noted that comScore did not dispute that Rule 23's numerosity and adequacy requirements were met, and then described the evidence showing that both requirements were nevertheless satisfied. (*Id.* at 8, 13-14.) Next, the District Court found Rule 23's commonality and predominance requirements had been met by a preponderance of the evidence, as the key issues in the case would turn on interpretation of form contractual language (*i.e.*, the ULA and the "Downloading Statement" presented with it) and "whether OSSProxy's data collection violates the terms of the ULA and the Downloading

Statement." (*Id.* at 9-11.) While the District Court found that the record before it supported certification, it also recognized (as it must) that if evidence surfaced during the remainder of litigation tipping the balance of the evidence against certification, the case could always be decertified later under Federal Rule of Civil Procedure 23(c)(1)(C). (*See* Dkt. 186 at 11 n.4.) Finally, the District Court found that Plaintiffs' own claims met Rule 23's typicality requirement and that the Class was ascertainable. (Dkt. 186 at 11-13, 14-16.)

comScore's Rule 26(f) Petition for Leave to Appeal

Following the District Court's Certification Decision, comScore filed its Petition for Leave to Appeal (the "Petition"). (App. Dkt. 1.) Among other specious contentions, comScore's Petition relies on, and repeatedly returns to, two strategies. First, it accuses the District Court of "conditionally" certifying the Class and Subclass, by "kicking the can down the road" on supposedly crucial (but, according to comScore, wholly unaddressed) questions bearing on class certification. (*See id.* at 15-16, 20.) Second, and mistakenly construing its Petition as a fresh opportunity to oppose certification and re-write the briefing below, comScore introduces a litany of completely unsupported "facts" that it claims compel reversal of the Certification Decision (and were, to hear comScore tell it, ignored by the District Court, despite that comScore raises such new "facts" for the very first time in its Petition). For example, comScore claims for the first time and without citing any support that class membership spans "tens of millions of people," (*id.* at 6), that "comScore possesses email addresses for fewer than 3% of [putative Class members]," (*id.* at

19), and that had District Court independently conducted discovery, it would have learned from comScore "that approximately two-thirds of all panelists uninstall the [OSSProxy] software within 30 days" (*id.* at 21). Even more confounding, comScore now asserts that "fewer than 450,000 [panelists] showed any activity during the last full month for which data is available"—but doesn't inform this Court of the materiality of this unsupported, newly presented, and cryptic statement of "fact." (*Id.*)

The overarching problem with comScore's Petition—as will be explained more thoroughly in Plaintiffs' forthcoming opposition to it—is that the District Court did not conditionally certify the class. Instead, it made factual findings based on the evidence presented to it—most of which was, by the account of comScore's self-selected witnesses, uncontested—while acknowledging that the federal rules allow any "order that grants or denies class certification" to be reevaluated if contrary evidence emerges during merits litigation. (Dkt. 186 at 11 n.4.) And even though comScore hopes to introduce certain facts that it believes might support decertification, such facts must be introduced in the form of admissible evidence before the District Court, and not through its attorneys' unsupported factual assertions stated in appellate briefing.

Soon after comScore filed its Petition, the Marketers filed their brief and the motion seeking leave to file it. The Marketers consist largely of trade organizations and lobbying groups from comScore's industry, most of which comScore is either a member of or frequent partner with. As described above, the Marketers' proposed

brief largely tracks comScore's Petition. And when it does deviate, it quickly loses touch with the case, and fundamentally misunderstands both the technology at issue and the scope and effect of the Certification Decision. As such, the Marketers' brief serves not as an aid, but as a distraction.

ARGUMENT

Here, the Marketers seek leave to file a brief that does little more than announce that comScore's industry colleagues are on its side. But for their brief to be taken into consideration, the Marketers must do more then just echo the sentiments contained in comScore's Petition. Instead, the Marketers must establish that "the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell. Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers).

Recognizing that many proposed *amicus* briefs fail this requirement, this Court has advised that it

> grant[s] permission to file an amicus brief *only* when (1) a party is not adequately represented (usually is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.

Nat'l. Org. for. Women, Inc. v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000) (Posner, J.). "The policy of this court is, therefore, not to grant rote permission to file an amicus curiae brief," but rather to place the burden on the putative *amici* to demonstrate their value to the case. *Id.*

The Marketers' motion fails to meet this Court's standard for at least three reasons. First, the Marketers' brief largely regurgitates the arguments contained in comScore's Petition. Second, where the Marketers' brief does wander from the path charted by comScore, it adds no unique perspective and instead represents an industry-wide attempt to lobby the Court for a favorable result. Third, while the Marketers bemoan the existence of class actions and the prospect of corporate liability, they fail to identify their involvement in even a single case that will be materially affected by this Court's Rule 23(f) decision.[1] Beyond all that, the Marketers' brief fails to understand even the most basic facts of the case, and instead creates confusion and conjures nightmares of ruinous class liability destroying Internet commerce as we know it.

In short, by failing to meet *any* of the requirements outlined by this Court, the Marketers' brief falls in line with the majority of proposed *amici* briefs, which do little "more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting." *Voices for Choices*, 339 F.3d at 545. Accordingly, the Court should deny the Marketers' motion for leave to file and refuse their attempts to interject confusion and hysteria into this otherwise straightforward appeal.

I. The Marketers' proposed brief is a less thorough duplicate of the brief already filed by comScore.

While the Marketers contend that they bring a valuable and unique perspective

[1] The Marketers do not contend—nor would the Class assert—that comScore lacks adequate representation. As such, the Marketers may only file their brief if the Court finds that they have a direct interest in a related case, or that the Marketers bring a unique prospective or information beyond what the Parties bring.

[2] To the extent that the Marketers diverge from comScore at all, it is to announce that

through their brief, in reality they simply parrot comScore's major points. Repetition and reiteration are not proper purposes of *amici* briefs. "Whether to permit a nonparty to submit a brief as amicus curiae is, with immaterial exceptions, a matter of judicial grace." *Nat'l. Org. for Women, Inc.*, 223 F.3d at 616.

> The reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.

Voices for Choices, 339 F.3d at 545. For this reason, the Court "never grant[s] permission to file an amicus brief that merely duplicates the brief of one of the parties." *Nat'l. Org. for Women, Inc.*, 223 F.3d at 617. "The fact that powerful public officials or businesses or labor organizations support or oppose an appeal is a datum that is irrelevant to judicial decision making, except in a few cases . . . in which the position of a nonparty has legal significance." *Voices for Choices*, 339 F.3d at 545.

On each of the Marketers' major points, comScore has already spoken. At the beginning of their proposed brief, the Marketers spend a page-and-a-half singing comScore's praises as "standard-setters" in Internet commerce. (Proposed Brief of *Amici Curiae*, (App. Dkt. 4-1) (the "Am. Br.") at 4-5.) comScore makes the same point in its Petition, only in greater detail. (Petition at 2-6.) The Marketers' condensed repetition of those same points, complete with citations to comScore's Petition, adds nothing.

The Marketers' flawed "conditional certification" argument suffers from the

same fundamental flaw: it adds nothing new to the discussion and instead only gives this Court a longer record to sift through. (*Compare* Am. Br. at 8-9 *with* Petition at 10-11.) Likewise, when the Marketers repeatedly attack the District Court's treatment of the Supreme Court's recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), they echo the same point already asserted by comScore and, like comScore, fail to identify any reason why *Behrend* is relevant to this case. (*Compare* Am. Br. at 8 *with* Petition at 17 (both spending roughly one-half of a page summarizing the *Behrend* decision but failing to explain its relevance to this case).)

Finally, the Marketers rehash the same tired argument raised by comScore that class certification always leads to unbearable settlement pressure and should therefore be denied in this (and presumably every other) case. (*Compare* Am. Br. at 7, 9 *with* Petition at 18-20.)[2] Not only does the Marketers' brief present nothing more than a rephrasing of comScore's complaints about certification and settlement pressure, it also fails to recognize that the potential for a substantial finding of liability is no reason to deny class certification. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("The reason that damages can be substantial, however, does not lie in an 'abuse' of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person, 15 U.S.C. § 1681n(a)(1)(A), combined with [Defendant's] decision to obtain the credit scores of more than a million persons.").

[2] To the extent that the Marketers diverge from comScore at all, it is to announce that that the settlement value of this case is $10 million. (*See* Am. Br. at 7, n.7.) Again, the Marketers' viewpoints are not based on any real analytics, and serve only to distract.

> The bane of lawyers is prolixity and duplication, and for obvious reasons is especially marked in commercial cases with large monetary stakes. In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation . . . judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give [them] all the help [they] need for deciding the appeal.

Ryan v. Commodity Futures Trading Comm'n., 125 F.3d 1062, 1064 (7th Cir. 1997) (Posner, J., in chambers). As the Marketers' brief does little more than echo comScore's main points and arguments, the Court should deny their request to substitute quantity of briefing for quality.

II. The Marketers bring no unique perspective to this case, and instead merely represent an industry-wide attempt to lobby the Court and circumvent its page limitations.

Under the guise of providing unique perspective or knowledge to the Court, the Marketers' proposed brief actually performs two functions forbidden in *amicus* briefing. First, a cursory glance at the organizations (and their membership) joining in the Marketers' proposed brief shows that it is a cast of comScore's industry cohorts and their lobbying groups, seeking to let the Court know their vote in these proceedings. Second, the Marketers flatly admit that their proposed brief aims to support comScore with an argument—*i.e.*, development of class action law—waived by comScore, most likely due to page constraints. Because the Marketers' proposed brief is brought for two improper purposes, the Court should deny their motion for leave to file.

A. The Marketers' brief isn't a new perspective; it's a lobbying effort.

The Marketers pretend that they alone bring a wealth of knowledge and

experience—supposedly unattainable by either comScore or Plaintiffs—to this litigation, and that if the parties and the Court simply knew what the Marketers knew, a ruling in comScore's favor would unquestionably result. In reality, however, comScore is intimately involved in the Marketers' operations, and the Marketers' member companies are mainly comScore's industry cohorts, meaning that comScore brings with it the same perspectives, interests, and experience as the Marketers.

This Court has observed that, in some cases, *amicus* briefing can be appropriate where the "amicus has a unique perspective or specific information that can assist the court *beyond what the parties can provide*." *Voices for Choices*, 339 F.3d at 545 (emphasis added and citation omitted). Here, however, the Marketers bring the same perspectives and information as comScore, but simply hope to add volume (rather than uniqueness) to the Petition. To start, most of the Marketers are affiliated with comScore. The Digital Marketing Association, for example, awarded comScore the 2012 DMA Innovation Award.[3] Likewise, comScore is a research partner of the American Association of Advertising Agencies.[4] And comScore frequently makes presentations for the Association of National Advertisers, with its name appearing on their website 735 times.[5] Worse still is its relation to the Interactive Advertising Bureau, where comScore is not only a preeminent member,

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[3] *See DMA Announces 2012 Innovation Awards Winners*, DMA.org (Sept. 6, 2012), http://www.the-dma.org/cgi/dispannouncements?article=1640.

[4] *See Research Matters*, AAAA.org, http://www.aaaa.org/agency/pubs/Pages/default.aspx (last accessed May 3, 2013).

[5] *See site:ana.net comScore – Google Search*, Google, https://www.google.com/search?q=site%3Aana.net+comscore&aq=f&oq=site%3Aana.net+comscore (last accessed May 3, 2013).

but also a frequent collaborator.[6]

If the Marketers have some sort of industry-insider perspective to bring to the table, so too does comScore. And if the Marketers base their perspective on their member organizations' class action defense experience, (*see* Am. Br. at 2-3), comScore brings that same experience. Ultimately, while the Marketers seek to argue the industry view of the case, they ignore that comScore—as part of the same industry—is already doing that. In reality, the Marketers' brief is just an attempt to move their lobbying efforts from Capitol Hill to the courtroom.[7]

The Marketers' brief, then, is exactly the sort of brief that justifies many appellate courts' disfavor for amicus briefing in the first place. *See Nat'l. Org. for Women, Inc.*, 223 F.3d at 617 ("Amicus curiae briefs are often attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal.") Their motion for leave should be denied.

B. The Marketers' brief attempts to compensate for comScore's failure to make its points within the Court's page limit.

Referring to one aspect of their briefing that might bring a "unique perspective," the Marketers point out that their brief "focuses on the sparse case authority that

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[6] *See Associate Members*, IAB, https://www.iab.net/member_center/1521/1531 (last accessed May 3, 2013); *see also IAB and comScore Realease New Research on the Effectiveness of Online Local, Directory and Classifieds Advertising*, IAB (Mar. 13, 2006), https://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/4938.

[7] *See* Kevin Bogardus, *Chamber of Commerce racks up $135 million lobbying tab for $2012*, The Hill (Jan. 22, 2013), http://thehill.com/business-a-lobbying/278533-chambers-of-commerces-lobbying-spending-topped-135-million-in-2012.

exists in contested certification of privacy class action cases," which demonstrates the Petition's importance "for the development of privacy class action jurisprudence generally." (App. Dkt. 4-2 at 6.) But the only thing "unique" about that discussion—which is, of course, one of three factors that appellate courts use to evaluate Rule 23(f) petitions—is that comScore chose not to address it. Thus, while *amicus* briefs are potentially useful when they address issues the parties *cannot*, they are improper when "intended to circumvent the page limitations on the parties' briefs," *Nat'l. Org. for Women, Inc.*, 223 F.3d at 617, or make up for a party's inability to concisely establish its position. In a literal sense, the Marketers are correct that their discussion is "unique" inasmuch as comScore chose not to address it. But comScore's tactical decisions (or omissions) do not mean that, now, "the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties *are able to do*." *Nat'l Org. for Women, Inc.*, 223 F.3d at 617 (emphasis added). Indeed, the Marketers tacitly admit this point by re-writing the standard this Court employs—suggesting that their additional briefing is appropriate because it provides "information . . . beyond what the parties *[have provided]*."[8] (Dkt. 4-2 at 7 (quoting *Nat'l Org. for Women, Inc.*, 223 F.3d at 617) (brackets in Marketers' briefing, but emphasis added).) Accordingly, the Marketers' brief does not provide a truly unique perspective, but rather seeks to make an argument waived by comScore.

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[8] Of course, the Marketers' re-writing of this Court's standard also improperly presumes that the Plaintiffs—*i.e.*, one of the "parties" in this matter—also will not (and, per the actual standard, *cannot*) provide briefing on whether "review of the Order would be important in the development of privacy class action jurisprudence." (*See* Dkt. 4-2 at 6-7.)

The Court considers three factors in determining whether to accept a Rule 23(f) appeal: (1) whether "denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation," (2) whether "grant of class status [could] put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight," and (3) whether "an appeal [would] facilitate the development of the law." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-835 (7th Cir. 1999). Neither the Parties nor the Marketers contend the first consideration justifies appeal. comScore spends the first 18 pages of its Petition attacking the District Court, and then only devotes the last page-and-a-half to the second consideration. (*See* Petition at 1-18, 18-20.) Out of room to address the final consideration within its 20-page limit, *see* Fed. R. App. 5(c), comScore now receives a life jacket from the Marketers, who use their proposed brief to both address the third factor and provide an additional three pages of briefing in comScore's favor. (*See* Am. Br. at 5-7.)

comScore—with its perspective, experience, and competent legal counsel—could have raised the "development of the law" argument, but for whatever reason chose not to. It could have, for example, spent less of its brief raising new factual assertions without citing to any evidence (whether submitted to the District Court, this Court, provided to Plaintiffs, or even presented now for the first time) or any aspect of the record. (*See*, *e.g.*, *supra* at 5-6.) It could have spent less of its brief arguing—for the very first time in this litigation, six hundred and two (602) days after Plaintiffs filed their original complaint—that the case should be dismissed in

favor of arbitration. (*See* Petition at 5, 9, 20.) Or it could have spent less time insinuating impropriety in the District Court's practice of encouraging parties to discuss their respective settlement positions. (*See id.* at 20.) It didn't. Instead, comScore made the tactical decision to inject new issues into the litigation instead of addressing this Court's Rule 23(f) factors. It cannot now rely on the Marketers to save the day with "an end run around" its page limitation. *See Nat'l. Org. for Women,* 223 F.3 at 617.

Because the Marketers' "unique perspective" is really just an attempt to circumvent the page limits on comScore's Petition, and—by their own admission—simply provide this Court with "information . . . beyond what the parties [have provided]," (Dkt. 4-2 at 6 (quoting *Nat'l Org. for Women, Inc.*, 223 F.3d at 617) (brackets in Marketer's briefing)), the Court should deny the motion for leave to file.

III. The Marketers do not present a single case that will be materially affected by this litigation, and instead only seek to prevent the development of potentially consumer-friendly case law.

Through their proposed *amici* briefing, the Marketers decry the class action abuses they feel their members suffer, and express their concern that the District Court's ruling will harm its members' future litigation prospects. But to warrant *amicus* briefing, this Court requires more. To have an interest sufficient to allow briefing, a would-be *amicus* needs "a direct interest in another case, and the case in which he seeks permission to file an amicus brief may, by operation of stare decisis or res judicata, materially affect that interest." *Nat'l. Org. for Women*, 223 at 617.

In their proposed brief, the Marketers contend that "[a] growing number of *amici* members are being subjected to a steady pulse of putative class actions challenging

the use of [cookie] technology and attendant disclosures to consumers in cases that attempt to shoehorn invasion of privacy claims into federal statutes aimed at other conduct." (Am. Br. at 2.) Leaving aside that this case has nothing to do with "cookie" technology, the Marketers do not identify a single case facing them or their members that is in any way related to, or will be affected by, this litigation.

Thus, without doing so, the Marketers cannot meet their burden of showing involvement in a case where this Court's Rule 23(f) decision will have preclusive or controlling effect. *See Nat'l. Org. for Women, Inc.*, 223 F.3d at 617. Absent a showing of such involvement, the Marketers cannot establish a direct interest sufficient to justify their presence in this case.

IV. In addition to failing to satisfy any of this Court's requirements for an amicus brief, the Marketers' brief misrepresents the facts and nature of this litigation.

Finally, the Marketers' proposed brief isn't only deficient, it's dishonest. Throughout their brief, the Marketers repeatedly employ two tactics: they interject confusion by misstating the facts, and they conjure a parade of horribles that will follow if certification is upheld, including threatening the very existence of Internet commerce. Such tactics, however, do nothing to "assist the judges by presenting ideas, arguments, theories, insights facts, or data," *Voices for Choices*, 339 F.3d at 545, and instead place the Marketers' brief with "the vast majority of [amicus briefs] which have not assisted the judges," *Ryan*, 125 F.3d at 1063.

Presumably hoping to confuse the Court and expand the apparent relevance of the pending Rule 23(f) decision, the Marketers (like comScore in its Petition) make up facts to support their desired legal arguments. Stoking fears of a commercial

collapse, the Marketers contend that "this case and others like it implicate foundational internet communication and commerce technology (the so-called 'cookie' software) and related disclosures developed as industry best practices." (Am. Br. at 2.) But this case doesn't involve cookies. At all. The word "cookie" appears nowhere in the operative Complaint. (*See* Dkt. 169.) Nor does it appear in Plaintiffs' memorandum in support of their motion for class certification, (Dkt. 154), or their reply in support thereof, (Dkt. 184). Unsurprisingly, it does not appear in the District Court's Certification Decision either. (Dkt. 186.) This dearth of references to cookie technology makes sense, because this case isn't about cookies. Rather, it's about comScore's OSSProxy tracking software, OSSProxy's user license agreement ("ULA"), and whether Class members consented to comScore's collection and use of the information collected via OSSProxy. (*See* Dkt. 154 at 27-32.) Thus, the Marketers' references to case law dealing with cookie technologies is just another unwarranted attempt to expand the scope of the supposedly (but unfounded) negative effects that upholding certification would cause. (*See* Am. Br. at 6.)

Of course, through their attempt to expand the relevance of the case, the Marketers hope to, without factual support, assert that certification would be ruinous to the online advertising industry. Thus, the Marketers claim, given the supposedly fundamental internet technologies at issue in this case, a certification decision here will put insurmountable settlement pressure not only on comScore, but also on any defendant in every other online advertising class action. (Am. Br. at 2, 9-10.)

But the Marketers' fear-mongering is inapt for at least two reasons. First, as discussed above, this isn't a cookie case and there are no fundamental internet technologies at issue here, only comScore's proprietary tracking software and the specific ULAs accompanying its installation. Thus, the common questions identified by the District Court can be answered on a class-wide basis because of (1) the specific (and common) functions of OSSProxy and (2) the specific (and common) terms of OSSProxy's ULA. (*See* Dkt. 186 at 9.) There is no reason to conclude that this comScore-centric analysis will compel a certification finding in every other (unidentified) class action against the Marketers and their members.

Second, even if this was an online advertising case (which it is not), upholding certification here would not put insurmountable settlement pressure on the Marketers and their members in other litigation. To that end, comScore has publicly characterized the District Court's Certification Decision as a good thing because it narrowed the scope of the litigation, has stated that it looks forward to "educating" Judge Holderman about its tracking practices at the merits stage of this case, and has repeatedly stated that it will not settle.[9] If certification did not cause

[9] *See*, *e.g.*, Dan Kaplan, *Judge says lawsuit against comScore can proceed as class action*, SC Magazine (Apr. 5, 2013), http://www.scmagazine.com/judge-says-lawsuit-against-comscore-can-proceed-as-class-action/article/287708/ ("This was a procedural decision and not a negative finding on any action on the part of comScore . . . In fact, with this finding, the court reduced the scope of the litigation.") (statement from comScore spokeswoman); Becky Yerak, *Judge gives class-action status to comScore privacy suit*, Chicago Tribune (Apr. 5, 2013), http://articles.chicagotribune.com/2013-04-05/business/chi-judge-gives-classaction-status-to-comscore-privacy-suit-20130405_1_comscore-class-action-status-annual-report (a comScore spokeswoman stating that Judge Holderman's opnion was "a procedural decision and not a negative find on any action on the part of comScore [and that] [w]e will continue to educate the court on our practices, which we have had a limited opportunity to do given the focus to date on procedural matters."); *see also comScore Response to Edelson McGuire Lawsuit*, comScore,

comScore to feel settlement pressure, it strains credulity to believe that upholding certification here will place insurmountable settlement pressure on other defendants in unrelated (and unidentified) actions.

Thus, despite the Marketers' lamentations, upholding the certification of Plaintiffs' claims would not result in the imminent demise of Internet commerce as we know it. The Marketers' brief engages in fear-mongering, plain and simple. As such, it fails to assist the Court in assessing the issues that actually *are* important to the case, and the Marketers' motion for leave to file should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs-Respondents and the Class respectfully urge the Court to keep the briefing simple and deny the Marketers' motion for leave to file *amici curiae* briefing.

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http://www.comscore.com/About_comScore/Privacy/comScore_Response_to_Edelson_McGuire_Lawsuit (last accessed May 3, 2013) ("In our view, we can only guess that Edelson [LLC] has taken this action because they either a) don't understand how we do what we do, or b) they think that like many class action defendants, we will pay simply to make them go away. Maybe both. *In either case*, they are mistaken.") (emphasis added); *cf. Form 10-K Annual Report* at 31, comScore, Inc. (Feb. 20, 2013), http://files.shareholder.com/downloads/SCOR/2455061675x0xS1158172-13-4/1158172/filing.pdf ("[w]e are otherwise *not* presently a party to any pending legal proceedings the outcome of which we believe, if determined adversely to us, would individually or in the aggregate have a material adverse impact on our consolidated results of operations, cash flows or financial position.").

Dated: May 3, 2013

Respectfully submitted,

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Certificate of Service

I certify that, on May 3, 2013, I filed the foregoing Plaintiffs-Respondents' Response in Opposition to Motion for Leave to File Brief of *Amici Curiae* using the Court's electronic filing system. I also certify that a courtesy copy of the foregoing was sent to counsel for Defendant-Petitioner comScore, Inc. and the putative *amici curiae* by First Class and electronic mail using the addresses indicated below:

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