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. 11-cv-5807

PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO COMSCORE'S PETITION FOR LEAVE TO APPEAL CLASS CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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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

The District Court's class certification order, (Dist. Ct. Dkt. ("Dkt.") 186 (the "Decision")), in this case stands for no controversial proposition and presents no unique or interesting issues for review. Indeed, the Decision is perhaps most notable for how unremarkable it is. That is, it simply followed the long line of cases holding that "claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action." (Decision at 9 (citing *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)).) In fact, the Decision was so lacking in controversy that the facts upon which it is based were mainly established by comScore's own witnesses and experts.

Despite the hysteria that comScore tries to whip up, the reality is that in considering certification, the District Court carefully scrutinized each of Rule 23's requirements and went well beyond the pleadings, weighing substantial evidence obtained from fact and expert witnesses alike regarding the user license agreements ("ULAs") accompanying comScore's OSSProxy software, the process by which consumers became bound (or not) by such terms, and the common design and function of OSSProxy. In plain terms, the District Court performed the very type of rigorous examination comScore feigns was lacking—comScore just doesn't like the results.

Now, comScore resorts to making up "facts" out of whole cloth and pressing for the first time arguments never presented to the lower court. Likewise, it cannot make out an honest argument in satisfaction of the strict requirements for this Court to accept its Petition for Leave to Appeal, (App. Dkt. 1 ("PLA")). As with its substantive points, comScore chooses empty rhetoric over evidence in trying to create a false picture of the

supposed pressure it now faces to settle. And comScore doesn't even pretend that appeal will advance the development of class action law. For all these reasons, the Court should deny comScore's PLA.

BACKGROUND

In their complaint, Plaintiffs allege that comScore—an Internet analytics company—uses its proprietary tracking software to monitor and collect a continuous stream of sensitive data from consumers' computers without their informed consent. (*See* Dkt. 169.) comScore disseminates its tracking software by "bundling" it with free digital products, such as games and screensavers, offered by third parties. (*Id.* at ¶ 12.) As comScore's conduct was widespread, Plaintiffs brought a putative class action under the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701, *et seq.*, Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2510 – 22, and Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, and for unjust enrichment. (*See* Dkt. 169.)

After more than a year of discovery on class-wide issues, Plaintiffs moved for certification, which the District Court ultimately granted on the federal claims and denied on the unjust enrichment claim. comScore did not dispute Rule 23's numerosity and adequacy requirements, but nevertheless, the District Court, pointing to the record, described how both requirements had been satisfied. (Decision at 8, 13 – 14.) Next, as the merits of the case would turn on interpretation of form contractual language (*i.e.*, the ULA and the "Downloading Statement") and "whether OSSProxy's data collection violates the terms of [that language]," the District Court also found Rule 23's commonality and predominance requirements fulfilled. (*Id.* at 8 – 11.) Finally, the

District Court found typicality from ample evidence showing that Plaintiffs downloaded OSSProxy, and found the Class and Subclass ascertainable through their reference to objective criteria. (*Id*. at 11 – 13, 14 – 16.) In certifying, however, the District Court recognized that if future evidence so demanded, it could always amend the Class definition or decertify under Fed. R. Civ. P. 23(c)(1)(C). (*See* Decision at 11 n.4.)

STANDARD OF REVIEW

This Court permits a Rule 23(f) appeal only[1] when: (1) certification would put unreasonable pressure on the defendant to settle, or (2) appeal would facilitate the development of class action law. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 – 35 (7th Cir. 1999). However, "Rule 23(f) . . . must be used sparingly lest interlocutory review increase the time and expense required for litigation." *Asher v. Baxter Int'l Inc.*, 505 F.3d 736, 741 (7th Cir. 2007).

ARGUMENT

I. comScore Greatly Exaggerates the Supposed Pressure to Settle and Doesn't Even Address Whether Appeal Will Advance Class Action Law.

comScore argues that certification has "transformed this litigation into a single high-stakes roll of the dice," (PLA at 18), and begs this Court to review the lower court's decision because even "a pair of almost comically infirm claims," supposedly like those alleged here, are enough to force comScore into settlement. (*Id*. at 19.) comScore is disingenuous on this point. Based on what it's been telling the public, it hasn't felt and still doesn't feel any real pressure to settle. As for the second factor—whether an appeal will advance the development of the law—comScore doesn't even address it.

[1] Given that the Class here was certified in part, the first *Equifax* factor (whether that denial of class certification sounds the "death knell" of the plaintiffs' claims) is inapplicable.

First, and despite the picture it attempts to paint, comScore has not shown any evidence of undue settlement pressure,[2] nor does it suggest that it is now scrambling to get to the bargaining table. To this point, comScore has always been on a litigation—as opposed to settlement—track. From the inception of this case, comScore vowed to fight to the end, and it has not altered course since the Decision.[3] Thus, despite comScore's oblique statement that the Decision exposes it to "theoretical damages in the hundreds of millions of dollars . . . [an amount that] any rational actor . . . must hesitate to accept," (PLA 19), its public statements say otherwise. At most, comScore's PLA states the obvious: it, like any company, would rather not face such a large class action. That, however, is not enough for this Court to grant appeal. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002) (denying review where petitioner "failed to submit any evidence that the damages claimed would force a company of its size to settle without relation to the merits of the class's claims").

Second, review of the Decision will not advance a "poorly developed" area of class action law, *Blair*, 181 F.3d at 835, because its analysis simply "interpret[s] a form contract . . . [which] present[s] the classic case for treatment of a class action." (Decision

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[2] In its enthusiasm to paint itself as a victim, comScore criticizes the District Court for urging it to explore settlement. The District Court's statements regarding settlement were nothing more than routine. (*See* Apr. 23, 2013 Hrg. Transcr. (attached hereto, in relevant part, as Appendix) at 6 – 11); *see also* Fed. R. Civ. P. 26(f)(2) (requiring parties to "consider . . . the possibilities for promptly settling or resolving the case"); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights,* 616 F.2d 1006, 1013 (7th Cir. 1980) ("The law generally favors and encourages settlements.").

[3] *See comScore Response to Edelson McGuire Lawsuit*, comScore, http://www.comscore.com/About_comScore/Privacy/comScore_Response_to_Edelson_McGuire_Lawsuit (last accessed May 3, 2013); *see also*, *e.g.*, *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/ ("In fact, with this finding, the court reduced the scope of the litigation.") (statement from comScore spokeswoman).

at 9 (citing *Keele*, 149 F.3d at 594).) Regardless, comScore doesn't even address this requirement and has waived any right to claim it applies.[4] *See Hentosh v. Herman M. Finch Univ. of Health Scis./The Chicago Med. Sch.*, 167 F.3d 1170, 1173 (7th Cir. 1999).

II. The District Court Conducted a Rigorous Analysis of the Facts and Law Relevant to Each of Rule 23's Requirements.

Skipping past the Rule 23(f) standards, comScore brings a scattershot of confused arguments aimed at the District Court's Rule 23 findings. Each misses the mark.

A. The District Court correctly identified several common issues that predominate and will generate common answers.

comScore posits that for commonality to exist, every foreseeable issue must be a common one. But that is not the test. Citing to *Wal-Mart Stores, Inc. v. Dukes*, the District Court explained that "what matters to class certification is not the raising of common 'questions'—even in droves"—but, rather, the capacity of the litigation to provide common answers on those questions (or even just one of them). (Decision at 9 (citing 131 S. Ct. 2541, 2551 (2011)).) Under that guidance, the lower court articulated issues for which the lawsuit will generate common answers, including:

- Whether comScore is a party to the ULA and the Downloading Statement;
- What third-party rights, if any, comScore has under the ULA and Downloading Statement to receive and use the data OSSProxy collects;
- The scope of any consent consumers granted to comScore by agreeing to the ULA and the Downloading Statement; and
- Whether OSSProxy's uniform collection of information from computers exceeds the scope of any consent given.

[4] This point was additionally addressed by Plaintiffs in response to the request for leave to file by putative *amici curiae*. (App. Dkt. 6-1 at 18 – 21.)

(Decision at 9 – 10.) Weighing the undisputed record evidence,[5] the District Court determined that common answers will result because (1) the same ULA terms were presented in substantially the same way to the Class and Subclass, (*id.* at 2 n.1, 9); and (2) OSSProxy "operates in a substantively identical fashion on all computers, regardless of the brand name under which it is distributed or the operating system of the computer," (*id.* at 10 (citing Dkt. 155, Ex. A, at 91:8 – 92:9; Dkt. 155, Ex. C, at 2)).

comScore attacks these findings on three grounds. First, it simply disagrees with the District Court and insists that common questions do not predominate. Second, it accuses the District Court of "conditionally" certifying the Class. Third, it claims the District Court's prior rulings are irreparably inconsistent with the Decision. Each argument blatantly twists both the facts of the case and the District Court's reasoning.

1. The District Court identified several common questions that predominate in this litigation.

comScore claims that the "District Court's conclusion that class-wide questions predominate over individualized ones was manifestly erroneous" because: (1) whether Plaintiffs consented to OSSProxy's data collection, the scope of any consent, and whether it was exceeded are supposedly individualized and meritless, and (2) statute of limitations defenses are inherently individualized. comScore's arguments are lacking.

a. There is little question that the issues most central to this case turn on comScore's uniform conduct – not individual user behavior.

Tellingly, although comScore argues that individual issues of Class member behavior predominate, it ignores that the District Court articulated and based its

[5] (*See* Decision at 2 n.1 ("The parties do not dispute the key facts relevant to the class certification motion, nor do they request an evidentiary hearing.").)

decision upon actual facts giving rise to several common and predominating issues.

To start, the District Court recognized—as comScore now ignores—that because comScore isn't a contracting party to the ULA, whether comScore had any rights under it "to use the information OSSProxy collects[,] is a question common to the entire class." (Decision at 9; Dkt. 154 at 17 – 18 (citing to terms of ULA).) Of course, if comScore had no permission to collect, use, or sell *any* data from the Class, then the exact data it collected or attempted to collect from each Class member is irrelevant—all collection would be unauthorized.

Further, whether comScore makes commercially viable efforts to filter confidential information and additionally purge its systems of inadvertently collected data—as promised in the ULA—are questions common to everyone. As before, that comScore chose not to address those questions in its class certification briefing, even though they were featured by Plaintiffs, (Dkt. 154 at 20 – 23), doesn't diminish their import, (*see* Decision at 4 (recognizing the "filter" and "purge" questions); Dkt 184 at 9 – 10).[6]

Continuing—and again unmentioned by comScore—*after* discussing the above two overarching, common, and potentially dispositive questions of consent and functionality, the Decision goes on to discuss several ways that OSSProxy's actual collection of data potentially exceeded the scope of consent that are common to

[6] Though it didn't argue the point below, comScore now writes off the difference between "filtering" data (as promised in the ULA) and "fuzzifying" it (OSSProxy's actual treatment of confidential information) as "lawyers' semantic quibbles, invented for a lawsuit." (PLA at 15 n.11.) But no lawyer "invented" that difference—rather, it was identified in this case by *comScore*, and explained through its Rule 30(b)(6) designee, who testified that in his (and comScore's) opinion "filtering and fuzzifying are two different things." (Dkt. 154 at 24 (citing transcript testimony).) Likewise, one of comScore's own expert witnesses testified at his deposition that, contrary to its promise, comScore does not "purge" any inadvertently collected confidential personal information. (*Id.* at 22 n.25 (citing Ex. O at 65:19 – 66:6).)

everyone, "regardless of individual behavior":

> other potential violations of the scope of consent *are common to all plaintiffs regardless of individual behavior*, such as the allegation that OSSProxy collects the names of every file located on a user's computer and the names of the 25 websites the user visited prior to downloading OSSProxy, or the allegation that OSSProxy exceeds the scope of consent by selling the data it collects.

(Decision at 10 – 11) (emphasis added.) These conclusions were drawn from Plaintiffs' *uncontested* expert witness's findings, which—based on a review of OSSProxy's source code—detailed its uniform collection of specific information from *every* consumer it tracked and monitored. (*See id.* at 2 (citing Dkt. 155, Ex. C).) Further still, even the issues that comScore claims are "individualized" involve the uniform operations of OSSProxy in accessing the exact same programmatically-defined data files and sections of memory located on *every* Class member's computer.

These are just some of the actual, undisputed record facts the District Court carefully considered when it found "a variety of common questions that can be resolved on a classwide basis." (Decision at 9.) comScore simply refuses to face them. Given that *all* of these questions—even though only *one* is needed for certification—stem from the uniformity of comScore's conduct, each will generate common Class-wide answers. Thus, the District Court's commonality and predominance findings should stand.

b. comScore's repeated statute of limitations challenge cannot defeat the District Court's analysis and findings.

Likewise, the District Court's finding that the federal claims' two-year limitations periods are "unlikely to present any significant difficulties" is well-reasoned. (Decision at 17 – 18.) comScore contends that it has no way of telling when a Class (or Subclass)

member installed OSSProxy and, thus, a mini-trial will be necessary to determine whether each claim is time-barred. But because comScore concealed and misrepresented its data collection practices,[7] no Class member could have discovered the violations, and the limitations period was tolled for everyone. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). What's more, comScore's data collection, use, and disclosure practices are ongoing, bringing all Class members' claims within the limitations period anyway. *See Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992). Further still, such hypothetical limitations challenges "have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." *Bowen v. Grome*, No. 11-139-GPM, 2012 WL 2064702, at *5 (S.D. Ill. June 7, 2012) (quoting Herbert H. Newberg & Alba Conte, *Newberg on Class Actions* 4.26 (3d ed. 1992)).

Changing course, comScore now derides the lower court for not making an evidentiary finding "on this important question," and says that "[i]f it had, it would have learned that of the approximately ten million machines in the U.S. that have downloaded the software since 2005, fewer than 450,000 showed any activity during the last full month for which data is available." (PLA at 16.) However, comScore never

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[7] For example, comScore's own witnesses confirmed that comScore neither filters nor purges PII as promised. (Dkt. 154 at 20 – 23 (citing deposition testimony).) Likewise, while the ULA represents that the software "may report on devices connected to your computer and your network, such as the type of printer or router you may be using," the software reports on far more, including content and activity on the device. (*See* Dkt. 155, Ex. C at 6.) And while the ULA states that OSSProxy will "monitor[] all of the internet behavior that occurs," comScore neglects to mention that it also seeks out internet usage data predating OSSProxy's installation. (*Id.*) comScore cannot explain how Class members were supposed to know that—as confirmed by its own witnesses—comScore simply did not do what it promised to do through the ULAs, which makes its conduct common, disguised, and ongoing.

presented this fact to the District Court, or even hinted that it wanted the court to ask this question. Consequently, this argument too is waived. *See Domka v. Portage Cnty.*, 523 F.3d 776, 784 (7th Cir. 2008) ("[T]o reverse the district court on grounds not presented to it would undermine the essential function of the district court.") (citations and internal quotation marks omitted). Furthermore, this new "factual" argument—devoid of any evidentiary support—says nothing about how many Class members' claims arose within the two-year limitations period.[8] The District Court's well-reasoned evidentiary determination should therefore stand.

2. The District Court's ruling was based on the undisputed evidence before it and was in no way "conditional."

After articulating the many common and predominating questions presented above, the District Court noted that whether OSSProxy's data collection exceeds the scope of consent *could* depend on the behavior of each individual Class member, but only "*in certain respects*." (Decision at 11 (emphasis added).) But those respects—such as the collection of iTunes playlists only from iTunes users, (*id.*)—do not negate the many common questions forming the core of the Decision.

comScore isn't satisfied. Of course, its PLA omits *any* discussion of the common questions discussed above (*none of which* turn on individual class member conduct), and—seizing upon the District Court's routine reference to Rule 23(c)(1)(C)[9]—it insists

[8] While comScore claims the District Court lacked any information about OSSProxy downloads prior to 2009, its own interrogatory responses, cited by the District Court to support numerosity, establish that over 1 million people downloaded OSSProxy in the last five months of 2008 and over 2 million downloaded it in 2009. (Decision at 8 (citing Dkt. 155, Ex. B at No. 7).)

[9] Specifically, and citing to Rule 23(c)(1)(C), the District Court observed that "if litigation on the merits reveals OSSProxy has not exceeded the scope of the plaintiffs' consent in a way common to the entire class . . . [then the court] may reevaluate its class certification decision."

that certification was "conditional" and, therefore, improper. But comScore forgets that "courts remain under a continuing obligation to review whether proceeding as a class action is appropriate, and may modify the class or vacate class certification pursuant to evidentiary developments arising during the course of litigation." *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D. Ill. 2003) (citing *Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130,* 657 F.2d 890, 896 (7th Cir. 1981).)[10]

Nor does the sparse authority cited in support of its "conditional certification" theory lend comScore any aid. In *Isaacs v. Sprint Corp*., for example, this Court reversed a certification order because the district court improperly "certified the case to proceed as a class action *before* making any of the determinations . . . that Rule 23 makes prerequisite to certification." 261 F.3d 679, 682 (7th Cir. 2001) (emphasis added). Here, by contrast, the District Court articulated several common questions by citing to the record evidence before it, (*see*, *e.g.*, Decision at 8 – 11), which was derived from the testimony of five fact witnesses, including from the person largely responsible for designing OSSProxy, comScore's Chief Technology Officer Michael Brown; three expert witnesses; and tens of thousands of pages of documentary evidence, including OSSProxy's source code. (*See* Dkts. 156-1 – 156-20; 175-1 – 175-23; 185-1 – 185-3.) As such, the District Court did not "put off until a later time the required inquiry into the factual and legal requirements of Rule 23,"(*see* PLA at 10), making *Isaacs* entirely inapt.

comScore also finds no help from *American Honda Motor Co. v. Allen*, where this

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(PLA at 10 (citing Decision at 11, n. 4.).) This observation makes sense—especially because it was comScore that moved to bifurcate discovery in this matter. (Dkts. 66 and 67.)

[10] *See also In re Gen. Motors Corp.*, 55 F.3d 768, 792 n.14 (3d Cir.1995) (noting that any certification is in some sense "conditional" because under Fed. R. Civ. P. 23(c)(1) courts may modify or decertify a class until final judgment on the merits).

Court remanded a certification order because the district court failed to resolve the defendant's *Daubert* challenge before certifying. 600 F.3d 813, 817 (7th Cir. 2010). Here, comScore never challenged Plaintiffs' expert's testimony and the District Court's findings were based on the *undisputed* evidence adduced—not mere pleadings.

Ultimately, nothing in the District Court's Decision was conditioned upon the future presentation of evidence. Instead, the District Court merely acknowledged, as it had to, that it may decertify the Class if appropriate based on future evidence.

3. The District Court's findings of commonality aren't undercut by any prior rulings.

Finally, comScore says it is "mystified" by the District Court's commonality findings (which were based on the form ULA and Downloading Statement) because they supposedly contradict the District Court's prior denial of comScore's motion to dismiss or transfer venue. comScore's attack fails for two reasons.

First, comScore's reference to its supposed right to arbitrate Plaintiffs' claims is laughable. In addition to forgetting that it has *never* sought, and in fact has expressly disclaimed, arbitration in this case,[11] comScore raises this argument for the first time on appeal, even though Plaintiffs relied on the ULA throughout their motion. (*See*, *e.g.*, Dkt. 154 at 28 – 31.) Consequently, the argument is waived. *Alioto v. Town of Lisbon*, 651

[11] The idea that comScore asserted, or even can assert here, that Plaintiffs' claims are subject to arbitration is fanciful. First, **comScore has never moved to compel arbitration**, nor has it raised arbitration as an affirmative defense to any of the three complaints filed in this case. See *Welborn Clinic v. MedQuist, Inc.*, 301 F.3d 634, 637 (7th Cir. 2002) (litigating a claim is clearly inconsistent with any perceived right to arbitration). Despite its representations to this Court, its previously denied Rule 12 motion did not "[seek] to invoke the ULA's forum-selection and arbitration clauses." (PLA at 9.) Rather, through that motion, comScore *only* sought to enforce a "forum selection clause" that, by its terms, *only* applied to "**non-arbitral action[s] or proceeding[s].**" (Dkt. 15 at 5.) Second, the arbitration issue has nothing to do with the propriety of certification, and thus, falls outside the scope of the PLA.

F. 3d 715 721 (7th Cir. 2011).

Second, comScore's premise fails: there is no tension between the District Court's Rule 12(b)(3) ruling and the Decision. Early in the case, comScore's Rule 12(b)(3) motion to dismiss or transfer tested the pleadings against a declaration from a comScore employee, who testified that the Plaintiffs consented to the ULA and its forum selection clause. (Dkt. 31 at 2.) Plaintiffs, however, alleged in their initial complaint that they didn't assent to the ULA because the hyperlink to its full terms was obscured. The District Court, based on that record, concluded that "the forum-selection clause was not reasonably communicated" to the Plaintiffs, and therefore could not be enforced by comScore. (*Id.* at 4 – 5.) The District Court thus denied the motion to dismiss.

The District Court's Rule 12(b)(3) finding on whether Plaintiffs agreed to the ULA and Downloading Statement (a separate matter from comScore's ability to enforce them), however, was preliminary and not the final word on the issue.[12] *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 – 76 (7th Cir. 2001) (Ruling on a motion to dismiss is not the final word on the factual sufficiency of claims.) Regardless, no part of the 12(b)(3) ruling concluded, as comScore asserts (without citation) now, that "the issue of consent was an individual one to be determined by the circumstances of each class member's download experience." (*See* PLA at 9.) Indeed, nothing of the sort appears anywhere in the early Rule 12 order. (*See generally* Dkt. 31.)

Much later, at the certification stage, the District Court—as required—looked beyond the pleadings and made findings regarding the suitability of class-wide

[12] Ultimately, comScore could have moved for relief or raised the point in its class certification briefing. Instead, it chose to do nothing and raise the issue for the first time—improperly—on appeal. *See Alioto*, 651 F.3d at 721.

adjudication. Based on the record evidence, the District Court found that every Class member agreed to either the form ULA or Downloading Statement. That finding, in turn, gave rise to a variety of common questions suitable for class-wide resolution.

Some of the common questions ask whether comScore can enforce the ULA at all—necessarily including the transfer of venue clause—because "[comScore] is not listed as a contracting party" and may not have any rights as "third-party beneficiary" because the ULA expressly states that no such rights exist. (Decision at 9; Dkt. 156, Ex. I at 7 ("Third Party Rights" and "ENTIRE AGREEMENT" clauses).) Others are specific to the Subclass, because even comScore has long admitted that Subclass members were not presented with a functioning hyperlink to the ULA during OSSProxy's installation. (Dkt. 14 at ¶ 6.) And still others ask whether OSSProxy's operation exceeded the scope of any consent granted under the ULA. (Decision at 10.) Whether comScore has any rights under the ULA (including any right to enforce its provisions), or went beyond them, has been and continues to be a central question in this case—and merits discovery will answer those questions in the Class's favor.

Thus, while the two decisions utilized different standards, the District Court reached compatible conclusions in each. Looking forward, comScore's ability to enforce the ULA *at all* is a common and predominating issue central to this litigation.

B. The District Court Was Well Within Its Discretion to Find That Both Dunstan and Harris Downloaded and Installed comScore's Software.

comScore's next attack, this time against typicality, also fails. Selectively quoting the Class definition to exclude those who "have had" OSSProxy installed onto their computers, comScore argues that "the district court's treatment of the serious

'typicality' issues in this case constituted an abrogation of its responsibilities" because to "possess a claim against comScore in this action, an individual must, in the words of the class definition, have 'downloaded and installed comScore's tracking software . . .' But on that basic, threshold issue, the claims of both named plaintiffs are fatally flawed." (PLA at 11.) But the District Court found typicality only after reviewing the uncontested record evidence and concluding that Dunstan and Harris each downloaded and installed comScore's software. (Decision at 11 – 13; *see also* Dkt. 156, Ex. P, No. 1; Dkt. 156, Ex. Q, No. 1.) Here, comScore utterly fails to demonstrate how the District Court abused its discretion to weigh the evidence and arguments before it.

Citing record evidence step-by-step, the District Court explained that "Harris downloaded OSSProxy on March 9, 2010 . . . and tried to remove it" that same day. (Decision at 4 (citing Dkt. 176, Ex. P, at 83:14 – 16; 98:18 – 99:15; 103:24 – 104:10).) The District Court further noted that, while Harris downloaded OSSProxy from the website macupdate.com, where his website profile has no record of the download, the website doesn't require users to "log in" to their profiles to make downloads. (*Id.* at 4 – 5 (citing Dkt. 176, Ex. P, at 71:15 – 18, Ex. Q; Dkt. 185 ¶¶ 5 – 8).) After weighing this and other evidence, including Harris's public website postings discussing his experiences with OSSProxy at the time he downloaded it, and after considering the "list of 'unique problems'" that comScore believed make Harris atypical, the District Court concluded that there was "ample evidence" that Harris downloaded the software. (*Id.* at 12 – 13.) *Cf. Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976 (7th Cir. 2011) (district courts have broad discretion in evaluating certification).

Likewise, the District Court also carefully reviewed the factual record and determined that Dunstan downloaded comScore's OSSProxy software in September 2010, after which Dunstan believes it caused problems with his computer (even though his computer may have been affected by viruses around that same time). (Decision at 5 (citing Dkt. 176, Ex. S, No. 6; Dkt. 176, Ex. U).) The District Court explained that "Dunstan used a program called 'PC Tools Spyware Doctor' to remove OSSProxy within about one day of downloading it." (*Id.* (citing Dkt. 176, Ex. T, No. 6; Dkt. 176, Ex. U (virus logs confirming OSSProxy was removed)).) The District Court also acknowledged that Dunstan's wife has access to his computer, (*id.* (citing Dkt. 176, Ex. V., at 26:7 – 18)), but—after weighing all the evidence, including that presented by comScore—found "ample evidence" to show he was the one who downloaded the software and that his claims are typical. (*Id.* at 12 – 13); *see Ervin*, 632 F.3d at 976.[13]

In the end, the District Court didn't require comScore to prove that Plaintiffs didn't download the software. (*See* PLA at 13.) Rather, it weighed the evidence before it—including evidence provided by comScore—before concluding the Plaintiffs are members of the Class and Subclass and their claims are typical. comScore's statement that it supposedly can't find a record of either Plaintiff[14] isn't enough to overcome (1) the evidence showing Plaintiffs had the software downloaded onto their computers,

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[13] Ultimately, however, it doesn't even matter whether Dunstan or his wife downloaded the software. Regardless of who actually downloaded and installed OSSProxy, there is no dispute that Dunstan "ha[s] had . . . downloaded and installed comScore's tracking software onto [his] computer[]." (Decision at 1; *see also* Dkt. 175 at 20 (noting that an "authorized user" of the computer can consent on computer owner's behalf).)

[14] Although comScore now claims that Jeff Dunstan's name doesn't appear in its records, (PLA at 6), they raise the argument for the first time on appeal. More importantly, that Dunstan's "name" does not appear in comScore's records does not mean that comScore lacks *any* information identifying Dunstan, such as email or home address. (*See*, *e.g.*, Dkt. 156, Ex. A at 21.)

and (2) the discretion of the District Court to draw conclusions from the evidence before it. *Cf. Robinson v. Sheriff of Cook Cnty.*, 167 F.3d 1155, 1157 (7th Cir. 1999) (Even "the fact that the named plaintiff in a class action turns out not to have a meritorious claim does not doom the class action . . . That would imply that [a] class representative [requires] a 100 percent chance of prevailing . . . .").

C. The Class and Subclass Are Ascertainable Because They Are Defined by Reference to Objective Criteria.

comScore next rails against the District Court's determination that the Class and Subclass are ascertainable. Calling the analysis "casual and misguided," comScore chides the District Court for supposedly failing to determine whether it could identify specific Class and Subclass members at the certification stage. (PLA at 13.) But ascertainability does not require naming of specific Class members at the certification stage. Instead, "'[a]n identifiable class exists if its members can be ascertainable by reference to objective criteria.'" *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 – 18 (N.D. Ill. 2012) (quoting *Manual for Complex Litigation § 21.222*, at 270 (4th ed. 2004)); *see also Crosby v. Soc. Sec. Admin. of U.S.*, 796 F.2d 576, 580 (1st Cir. 1986) (quoting 3B *Moore's Federal Practice* 23.04[1], at 23-119 ("'[M]embership of the class must be capable of ascertainment under some objective standard.'").

Here, the Class consists of everyone who, since 2005, has had comScore's software downloaded and installed onto their computers. (Decision at 1.) The Subclass consists of those Class members not presented with functional hyperlinks to the ULA before installing the software. (*Id.*) Thus, the District Court used "a mechanical and objective standard, in no way an individualized 'causal'" or subjective "determination on the

merits," *Union Asset Mgt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 640 (5th Cir. 2012), and given its failure to argue that the Class definitions are subjective or individualized, comScore's half-hearted ascertainability challenge fails.

comScore's real challenge asserts its own supposed inability to verify individuals' Class membership "without corroboration," (PLA at 13), but that is a challenge to manageability, not ascertainability. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 352 (S.D.N.Y. 2002) (where issues concern identifying class members rather than defining them, "[t]his problem . . . is primarily one of manageability, and not ascertainability."). Even that challenge fails, however, because the facts comScore uses to makes its point were not presented to the District Court, and are only now being presented to this Court in the form of unsupported factual assertions made by comScore's appellate lawyers.[15] (*See*, *e.g.*, PLA at 14 (asserting without any evidentiary support that "comScore possesses email addresses for *fewer than 3%* of the panelists).) In any event, comScore's manageability challenge is "largely illusory," as the evidence necessary to prove each individual's Class membership "would be within the knowledge of the potential class members, and a party would need a good faith basis to believe that he or she satisfies the class definition before making a representation to [the] court to that effect." *G.M. Sign, Inc. v. Franklin Bank,*

[15] comScore's own evidence shows the feasibility of corroboration, as it has already identified in a declaration submitted to the District Court many methods to verify the past or present existence of OSSProxy on an individual's computer, including a technique to extract a unique identifier from a computer that can then be matched with data stored on comScore's servers. (*See* Dkt. 103, Ex. A at 3 – 13.) Likewise, comScore admits that it "maintains an active re-contact program, where panelists who have uninstalled the software are asked to reinstall." (Dkt. 156, Ex. B. at 3.) Further, it is also possible to cause "pop-up" windows to appear on the screens of computers running OSSProxy, also aiding in corroboration. (Dkt. 156, Ex. I at 3.)

S.S.B., No. 06-cv-949, 2008 WL 3889950, at *6 (N.D. Ill. Aug. 20, 2008).

Accordingly, because the Class and Subclass are defined purely by reference to objective criteria, and comScore itself presented ways to corroborate membership, (*see*, *e.g.*, Dkt. 103, Ex. A at ¶¶ 3 – 13), comScore's confused ascertainability challenge fails.

III. *Comcast Corp. v. Behrend.*

Last, comScore suggests that the District Court's treatment of the Supreme Court's recent decision in *Comcast Corp. v. Behrend* is "at minimum . . . a reason for this Court to grant Rule 23(f) review." (*See* PLA at 17 (citing 133 S. Ct. 1426 (2013).) Aside from that statement, comScore offers no reason why *Comcast* matters to this case. (*Id.*)

First, if *Comcast* even has any relevance, comScore waived the right to assert it. *Comcast* was issued before the Decision, yet comScore didn't bother to file any notice of supplemental authority with the District Court. Nor did comScore seek reconsideration based on *Comcast* (or any other argument for that matter). Thus, by failing to raise the argument in the District Court, comScore waived it on appeal. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012).

Second, comScore's argument fails because *Comcast* has no relevance to class certification in this case. The District Court correctly noted that the Supreme Court's *Comcast* holding "came from its assumption, uncontested by the parties, that Rule 23(b)(3) requires that damages must be measurable based on a common methodology applicable to the entire class *in antitrust cases*." (Decision at 19 n.9 (emphasis added).) comScore, for its part, summarizes the *Comcast* decision, but never explains its relevance to this case, (PLA at 17), nor can it. Plaintiffs do not need to establish a damages model

for their SCA and ECPA claims; the statutes supply a built-in model awarding statutory damages to prevailing plaintiffs. *See* 18 U.S.C. §§ 2520(c), 2707; (*see also* Decision at 18). Thus, that the *Comcast* plaintiffs' damages model—by their damages expert's own admission—could not calculate the damages on a class-wide basis, *see* 133 S. Ct. at 1434, does not undercut Plaintiffs' argument in this case that common questions predominate.[16] In short, *Comcast*—standing alone or in the context of this case—provides no basis for accepting comScore's PLA.

CONCLUSION

Because comScore does not meet Rule 23(f)'s requirements and its attacks on the Decision fail, the Court should deny comScore's Petition for Leave to Appeal.

Dated: May 6, 2013

Respectfully submitted,

Mike Harris and Jeff Dunstan, individually, and on behalf of all others similarly situated,

By: /s/ Ari J. Scharg
One of Plaintiffs' Attorneys

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[16] As to Plaintiffs' CFAA claims, nothing in *Comcast* purports to disturb the well-established principle that certification is proper, even when "it may be that if and when the defendants are determined to have violated the law separate proceedings of some character will be required to determine the entitlements of the individual class members to relief." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (collecting authorities).

Certificate of Service

I certify that, on May 6, 2013, I filed the foregoing Plaintiffs' Response in Opposition to comScore's Petition for Leave to Appeal Class Certification Order Pursuant to Fed. R. Civ. P. 23(f) 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 to the addresses indicated below:

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEFF DUNSTAN and MIKE HARRIS, individually and on behalf of a class of similarly situated individuals, Plaintiffs, vs. comSCORE, INC., a Delaware corp., Defendant.	No. 11 C 5807 Chicago, Illinois April 23, 2013 9:58 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES F. HOLDERMAN

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MR. STACK: Yes.

THE COURT: Okay. Because I noticed the Court of Appeals didn't set a reply date.

MR. SCHAPIRO: They didn't set one and --

THE COURT: But they are not expecting, the judges of the Court of Appeals aren't expecting a reply.

MR. SCHAPIRO: It may depend on what the other side says. But if we reply at all, we would ask to do it right away.

THE COURT: Okay. And let me -- I noticed in your last footnote on page 20 of your petition, footnote 15, you quote a number of dates in transcript where I have encouraged settlement and you say, "This is also a case in which, for whatever reasons, the district judge has expressed a desire for settlement from the outset of the case."

That's a standard practice that I engage in in all cases. You probably, as you sat through the morning motion call, heard me encourage settlement, as you would if you sat through any morning motion call, because I always want the lawyers to be thinking about settlement.

If you are implying that somehow in this case I desire to more than encourage a settlement, you're wrong. And so I just wanted to know what it was -- when you said "for whatever reasons," what reasons were you thinking were in my mind when I encouraged settlement on each of those dates, as I

do in almost every case pending before me?

MR. SCHAPIRO: Your Honor, we meant nothing pejorative about it, but in the --

THE COURT: It sounded pejorative to me.

MR. SCHAPIRO: It was -- if it was inartfully written, that "for whatever reasons" was meant to say --

THE COURT: Well, I want to know what the reasons are.

MR. SCHAPIRO: -- that we're not proposing.

THE COURT: I'd like to know what -- when you say "for whatever reasons," what reasons were you thinking were in my head?

MR. SCHAPIRO: That was an effort, if perhaps clumsy, to not come out and say that we think the reason is anything one way or another. But the cases in the 23(f) context say that when a class is certified, pressure to settle becomes an issue that might make it more likely to be granted.

THE COURT: I asked you about settlement before I certified the class.

MR. STACK: Your Honor, I think the --

THE COURT: I would like to know an answer to that question.

MR. STACK: The answer is we --

THE COURT: Mr. Stack?

MR. STACK: We don't believe there were any improper

or pejorative reasons. Well, what happens, though, Your Honor, is you have to look at it from the viewpoint of the client. The first time the issue of settlement was before Mr. Schapiro and I were here, that was a month after the lawsuit was filed, and there was a -- Mr. --

THE COURT: That sounds logical.

MR. STACK: Well, except it's a class action suit that's seeking a staggering amount of money, Your Honor. And so --

THE COURT: Many, many, many class actions settle, and they settle early on because the parties get together and they evaluate the circumstances agreed upon a class and settle the case.

MR. STACK: Okay.

THE COURT: That's been my experience for more than 20 years.

MR. STACK: No, and I understand that, Your Honor. So I think from the viewpoint of the client, the client felt, "Goodness, we're under a lot of pressure here to settle. This lawsuit's just filed. There's been nobody looking at the merits of this."

THE COURT: I am sure you dispelled that.

MR. STACK: I wasn't there at that time. I came in later, Your Honor.

THE COURT: Well, I am sure when you came in, you

dispelled it, Mr. Stack.

MR. STACK: I think --

THE COURT: I have known you for a long time.

MR. STACK: I think, Your Honor, there's really more to it. I think what Mr. Schapiro's argument is is that one of the issues that they look at is after the class is certified, there is inordinate pressure to settle. The Seventh Circuit has talked about that. And there has been -- I think the client at this point would obviously feel that in this situation right now. That's one of the reasons we suggest that it may be a good time to take a look at the decision.

On the 23(f), Your Honor, one of the things that *Blair* said is that they -- they're willing to take these cases at this point even for the development of the law. They made a point that even a deferment is a good thing. There is very little law on this issue that --

THE COURT: Well, there is no question that your appeal is going to go ahead.

MR. STACK: I mean --

THE COURT: At least to the point --

MR. STACK: The petition.

THE COURT: -- that the court -- yeah, the petition.

MR. STACK: Yeah.

THE COURT: That the court is going to evaluate your petition --

MR. STACK: Right, right.
THE COURT: -- and then will make a determination about whether there will be an addressing of the merits.
MR. STACK: But if Your Honor -- and I understand in reading this now that that was probably --
THE COURT: Well, especially when it came --
MR. STACK: -- poorly, poorly written, Your Honor.
THE COURT: -- in for review. It was more of a, "Gee, and our judge in the District Court has been talking about settlement for months, so obviously he's trying to force us to settle."
MR. STACK: No.
THE COURT: The answer is that's not the situation. I want you to think about it, as I always do. And for you to somehow misconstrue my concern, please tell your client that there will be a complete evaluation, as I believe I already have done in connection with the class certification.
I am going to go ahead and grant the stay. We are going to set the case for a further status on the 30th of May, and we will see what the Court of Appeals has done by then, because I am sure they will have ruled by that point.
MR. SCHAPIRO: Thank you, Judge.
MR. BALABANIAN: Thank you, Your Honor.
MR. SCHARG: Thank you, Your Honor.
MR. STACK: We do apologize for that terminology. We

did not mean it to sound the way I guess it did.

THE COURT: Okay.

MR. STACK: We'd never suggest anything other than fair dealing by this Court on this case.

THE COURT: I am trying to do my best at it.

MR. STACK: I know. Thank you, Your Honor.

MR. BALABANIAN: Thank you, Your Honor.

MR. SCHAPIRO: Thank you.

MR. SCHARG: Thank you very much.

THE COURT: All right.

(Proceedings concluded.)