Jane Doe v. Match.com Doc. 19

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JANE DOE, individually, and on behalf of all others similarly situated

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANE DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MATCH.COM,

Defendants.

Case No.: CV11-03795 SVM (JENx)

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMNARY INJUCTION

Hearing Date: May 23, 2011

Time and Location: 1:30 pm,

Courtroom 6
(Hon. Stephen V. Wilson)

I. INTRODUCTION

None of Defendant's contentions provide a valid defense to Plaintiffs' request for relief. Defendant is a for-profit provider of services to consumers and therefore subject to Cal. Civ. Code §1770(a)(10). It is therefore liable for intentional false advertisement that falls below reasonable consumer expectations.

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The four-part Winter test set by the U.S. Supreme Court has been satisfied: there is a likelihood of success on the merits; irreparable harm is likely if no action is taken; the balancing of equities is in Plaintiff's favor; and the public has a clear interest in having clear guidelines for effective sex offender screening.

Plaintiff and Plaintiff's counsel have attempted to meet and confer with Defendant on several occasions and have been met with inflexible refusals, requiring that this motion be made. Therefore, sanctions are not appropriate against Plaintiff but should be considered against Defendant and its attorneys for this misconduct.

II. POINTS AND AUTHORITIES

A. Plaintiff is an appropriate class representative.

Since this Court pointed out in its TRO ruling that Carole Markin had no standing to be a class representative since she had stopped paying for Match service, Ms. Markin has renewed her subscription as a paying member. (See Ex. 1, Supplemental Decl. Carole Markin)

Even though Ms. Markin's profile has never been removed from Match.com's member base, and she has received e-mails inquiring of her availability for dates (none of which she has answered), she has eliminated this issue by her recent re-subscription. She has done this in order to properly represent a class of current subscribers, so this Court may decide the more crucial issue of what type of sex offender screening Match.com should implement.

Therefore, Defendant's first contention is without basis.

B. Plaintiff has submitted expert declarations while defendants have not.

At no point in its Opposition has defendant offered one iota of admissible evidence to rebut Plaintiff's well-documented position on adequate screening. Therefore, Plaintiff's evidence is now undisputed: no direct expert testimony was submitted! Instead, the defense submits a declaration of one of its Executive VPs,

not an independent source, who claims that some other person, not under oath, said that screening could not begin at this time. (Decl. of Dubey). Even though defendant has known of Plaintiff's position for weeks, and even though Defendant is one of the most powerful and sophisticated companies in the world, with one of the biggest law firms in the country representing it, Defendant and its attorneys arrogantly and inexcusably offer no testimony on the central issue in dispute: when and how will sex offender screening take place.

Therefore, Plaintiffs submit that the only admissible evidence before this Court on the subject of screening is the independent expert opinions of Mallette and Merkl, not the hearsay from a Match.com VP. Defendant's legal assertions that Plaintiff's experts are not conversant with Match's internal computer technology may be appropriate for cross-examination. They are not the basis for exclusion of such evidence.

Defendant's argument that Plaintiff's experts are incompetent presupposes that the only expert would be a Match.com expert, since Match.com alone is knowledgeable on its internal workings. This argument is consistent with Match.com's approach to this case: only Match.com knows what is best.

It is ironic that Defendant would require that Plaintiffs research every database in the country to satisfy its burden when Defendant itself cannot manage to submit even one declaration from one expert on screening in support of its position. In point of facts, the Plaintiffs' Declarations are quite specific in mentioning databases that are effective and those that are not. At least one of these experts will be available in court to testify and be cross-examined.

Plaintiffs believe, on the other hand, that Defendant is now prohibited from calling such experts to court since they failed to submit any declarations from them, when they could have.

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C. The Winters test has been met justifying issuance of an injunction if proper screening is not implemented at once.

Defendants agree that the four-pronged Winters standard for a preliminary injunction is controlling in this case. *Winter v. Natural Res. Def. Council (2008) 129 S. Ct. 365, 374*. This four-part test has been satisfied by Plaintiffs.

Plaintiffs respectfully maintain that there request is for a negative injunction prohibiting defendant from signing up additional members. Match.com can choose not to implement adequate screening and simply not sign up new members, which makes Plaintiff's request one that could qualify for the lower standard of proof: likelihood of success.

Even applying the "higher bar" described by this Court as necessary for mandatory injunctions, there is now no screening of any kind being conducted by Match.com to eliminate convicted sex offenders from its membership. Neither is there a definitive date to begin such screening, though Match.com announced its intention to do so more than a month ago. This means that Match.com, despite knowledge of this and other rapes, currently uses no form of screening whatsoever. It simply promises to do so when it has decided it is ready, depending on a number of factors within its sole discretion.

This Court is not obliged to accept that promise and is not required to entrust the safety of Match.com paying members solely to the discretion and the judgment of Match.com. Instead, in the face of Plaintiff's evidence that screening can take place now, in a more effective way, this Court has the power to decide that Match.com should do so immediately absent valid reasons.

1. Likelihood of Success.

Since Defendant has failed to provide any admissible evidence contrary to Plaintiffs' position, Plaintiffs will succeed on the merits.

To succeed on the merits Plaintiff must show likelihood of prevailing on her claim under Cal. Civ. Code 1770(a)(10). That section prohibits a commercial

provider of goods or services from "[a]dvertising … with intent not to supply reasonably expectable demand." This statute is to be read **liberally** in favor of consumers.

It is undisputed that Match.com is such a commercial provider. Furthermore, **Match.com admits that it has contemplated sex offender screening for years and rejected the idea until after the instant lawsuit was filed**. It even refused such screening to attorney for Plaintiffs who requested in writing that it do so in light of the facts of Carole Markin's rape. (See Ex. 2A to the Motion). However, within a few days of filing a lawsuit, covered by the national press, Match.com suddenly reversed itself on April 17, 2011.

Plaintiff claims through Declaration that she expected that she was paying for a reasonably safe introductory service that might lead to a serious relationship, not to sexual assault by a convicted sex offender. Since Match.com advertisements fail to acknowledge the risk inherent to dating such sex offenders, it constituted false advertising as defined in the statute.

Furthermore, since Defendant has submitted no evidence to the contrary, Plaintiff has shown that she will succeed on the merits under the statute.

In addition, Defendant's reliance on their disclaimer does not make Plaintiff's claim less likely to succeed. As stated in the Demand Letter (Ex. 2A to Motion), the exculpatory language of this disclaimer is prohibited by California law and against public policy. *It is not appropriate that Match.com use this disclaimer to avoid responsibility where it profits handsomely from membership of its subscribers while knowingly putting them at grave risk*. This Court should not excuse Match.com based on the legalese that its lawyers have written and that every member is must sign. See Cal. Civ. Code §1668, Civ. Code §1770(a)(19).

Defendant's contention that their service has "no duty" in this case flies directly in the face of the consumer protection laws requiring that services not be falsely advertised in violation of reasonable consumer expectations.

Thus, in the absence of evidence to the contrary Plaintiff has proven that that Match.com falsely, intentionally advertised its services for profit and that the services were below reasonable consumer expectations.

2. Irreparable Harm

Defendant's chief contention that irreparable harm cannot be shown because Plaintiff is not a Match.com subscriber has been vitiated by her recent renewed membership. (See Supp. Decl. of Carole Markin.)

Defendant next contends that even if Plaintiff succeeds, there can be no 100% guarantee of screening. That however, is not the point. The point is that Match is being asked simply to implement better, safer screening methods than they propose based on declaration of experts submitted by Plaintiff. Defendant is asked to do so promptly instead of according to its self-appointed schedule.

Simply because no screening system is 100% fail safe, there is no excuse to not employ a method that is reasonably safe and economical. This Court, not Defendant, motivated by its own self-interests, should be the judge. And this Court is not prohibited from looking at the facts to decide what method should be ordered.

As stated in the moving papers, a victim of rape may live years needing psychiatric help and enduring psychological torment. Ms. Markin states that she continues to suffer from intimacy problems to this day. Her level of trust has changed and affected every aspect of her life. Department of Justice Statistics show date rapes occur in the millions annually. Match.com is the most profitable online dating service in the world. These facts forebode imminent irreparable harm unless safe screening methods are employed.

No one but Match.com knows the exact numbers of reported sexual assaults from on-line dating from their site. Yet, Match.com has refused to produce that evidence even though it is available to them. This Court ought not reward Match.com with a ruling in its favor while Match.com withholds the very evidence

they claim is necessary to prove irreparable harm. (See Objection to Request for Witnesses filed by Defendant on May 16, 2011).

Therefore, the showing of irreparable harm requirement has been met.

3. Balance of Equities

Defendant has been most gallant in volunteering to do ***its own*** balancing of the equities in this case in place of having the Court do so. Without spending much of this Court's valuable time in opposing that suggestion, Plaintiff submits and requests that this Court alone has the authority, neutrality, and wisdom to balance equities in this case.

Defendant's dilemma described in their brief of imminent shut down is one of their own doing: it was they who refused every occasion upon which they were invited in good faith to explore a compromise position. (See Decl. of Mark L. Webb).

Therefore, Defendant's contention that it faces a shutdown of its entire operation is disingenuous, as it is a result of their **own** stubbornness. Further, their pretense of concern for the well fare of their members who may be deprived the ability to use their service is both incorrect and just as disingenuous: Plaintiffs' merely request no further members be allowed to join absent proper screening, not a shut down of the entire operation.

Conversely, Plaintiffs stand to be subjected to countless, needless additional sexual assaults should inadequate screening methods be employed without examination by this Court.

4. Public Interest

Match contends that the failure of legislature to enact laws requiring sex offender screening excuses them from having to do so. However, this is far from the first time that a corporation was subject to a standard of safety before laws were enacted requiring them to do so. Strict product liability is an area of law that was decided judicially long before statute. Many other examples of legal and social

progress being made through judicial decisions can be cited and were handed down time and time again, making subsequent legislation inevitable. The fact that the legislature has not yet passed laws on this subject in no way precludes this Court from issuing an order in this case.

It has long been realized that the judiciary is the most accessible of the three forms of government, if not the quickest. When grave danger is at risk, it is only appropriate that the courts be available.

5. Balance of Equities and Public Interest factors weigh overwhelmingly in Plaintiff's favor.

The Ninth Circuit in the *Alliance* case realized that some cases might call for preliminary injunctions when one of the four categories under Winters might overwhelmingly weigh in favor of injunction. *Alliance for the Wild Rockies v. Cottrell (9th Cir. 2011) 632 F.3d 1127*. Plaintiffs submit that this case, involving the risk of sexual predator attack on any given date, demonstrates a strong weight in favor of public interest as well as in balancing the equities. Therefore, Plaintiff, respectfully request that this court take the Alliance holding into consideration.

D. Sanctions

This is not the first time that the defense attorneys have warned Plaintiffs about sanctions; earlier it was for filing what they called a "frivolous" claim at the outset. Apparently any person or attorney who dares to question the power and authority of Match.com and its huge legal team must face their wrath for daring to questioning their authority. However, in our system of justice, as in our right to free speech, it is crucial that individuals display the character and courage to stand up for what they believe is right and not be punished for taking that stand. Yet defense attorneys threaten sanctions even while they themselves refuse to meet and confer as required by Local Rules.

It is in this Court's discretion not only to refuse this request but also to grant Plaintiff's request for sanctions as a result of wasting this Court's time by refusing

to even discuss a compromise. (See Decl. of Mark. Webb). It should be noted that no such request for sanctions was made in the moving papers and is only now made as a response to Defendant's attempts to bully a rape victim and her attorney.

III. CONCLUSION

The sole reason this case is before this Court as a contended matter is because the Defendant has refused to even discuss alternatives for appropriate sex offender screening. Plaintiff Jane Doe has nothing material to gain from this suit since no monetary compensation is requested. This matter is simply one of public safety. It is for this Honorable Court, not for Defendant or its attorneys alone, to decide whether Match's intended techniques are prompt or reliable enough.

Plaintiffs have submitted expert declarations; Defendants have none. Should this Court decide this case on the evidence and on the equities, and in realization that Defendant has refused several earnest offers to meet and confer, Plaintiffs respectfully submit that the evidence calls for a preliminary injunction.

DATED: May 18, 2011 THE LAW OFFICE OF MARK L. WEBB

BY: /s/

Mark L. Webb