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erroneously sued as Match.com

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

vs.

MATCH.COM,

Defendant.

Case No. CV11-3795 SVW (JEMx)

Hon. Stephen V. Wilson

Filed as Class Action

OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

Filed concurrently with:
1. Declaration of Sharmistha Dubey;
2. Declaration of Robert H. Platt; and
3. Request for Judicial Notice.

Action filed: April 13, 2011

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

After filing her putative class action complaint ("Complaint") nearly three weeks ago, Plaintiff Jane Doe ("Plaintiff") has now filed an "emergency" application asking this Court to shut down the online dating service operated by Defendant Match.com, LLC ("Match") until Match implements an undefined "screening" process on Match's millions of members to determine whether they have been previously convicted of sexual offenses. The breadth of the relief sought is astonishing. And yet Plaintiff has not presented the Court with *any* basis whatsoever to grant such extraordinary provisional relief.

First, conspicuously absent from Plaintiff's papers is any mention of the requirement that she show a likelihood of success on the merits. Plaintiff does not even argue that Match has a duty to screen its members—the core merits issue in this case. No legal authority for the imposition of such a duty is cited—or exists. Furthermore, when Plaintiff registered for the Match service, she agreed to Match's Terms of Use Agreement ("User Agreement"). The User Agreement clearly and conspicuously states that Match does not screen its members and that members are responsible for their own safety. Accordingly, Plaintiff has no basis for asserting that Match is legally required to screen its members. Match's announcement several weeks ago that it plans to implement a process to screen its approximately one million U.S. subscribers (i.e., paying members) against the National Sex Offender Registry within the next 60 to 90 days plainly does not mean that Match has conceded that any duty to do so exists and is irrelevant to Plaintiff's overreaching application.

Second, Plaintiff has not shown that she (or any putative class member) is likely to suffer irreparable harm. Plaintiff is no longer a Match subscriber and, therefore, will not be affected by any action that Match takes or does not take. Nor has Plaintiff shown that any class member is imminently threatened with sexual

assault as a result of her Match membership, much less that any such assault will be prevented if Match engages in screening. Instead, Plaintiff's "evidence" on this point consists solely of general statistics about sexual assault in the United States and the unsworn hearsay statement of the proprietor of a business that is engaged in screening employment candidates.

In short, Plaintiff's application for emergency relief is wholly unsubstantiated on both the facts and the law. The Court should deny the application.

STATEMENT OF FACTS

A. The User Agreement Between Plaintiff and Match Expressly States that Match Does Not Screen Its Subscribers.

Match operates the website located at www.match.com, a service enabling single adults to meet each other online. Before using the Match service, every member (which includes Plaintiff and every putative class member) must first agree to the terms of Match's User Agreement. (Declaration of Sharmistha Dubey ("Dubey Decl.") ¶ 5 and Exhibit A.) Section 7 of User Agreement states in uppercase letters and boldface font:

> **YOU UNDERSTAND THAT MATCH.COM DOES NOT IN ANY WAY SCREEN ITS MEMBERS, NOR DOES MATCH.COM INQUIRE INTO THE BACKGROUNDS OF ITS MEMBERS OR ATTEMPT TO VERIFY THE STATEMENTS OF ITS MEMBERS.**

(Dubey Decl., Exhibit A (emphasis in original).)

Thus, by assenting to the User Agreement, Plaintiff and the putative class members expressly acknowledged that Match does not screen its members.

B. Plaintiff's Complaint.

Plaintiff filed her Complaint in the Los Angeles County Superior Court on April 13, 2011. Match timely removed the action to this Court on May 4, 2011. (Docket No. 1.)

Plaintiff alleges that she was sexually assaulted by a man whom she met using Match's service, and that this man had been previously convicted of sexual assault. (Compl. ¶¶ 3, 19-20.) Plaintiff further alleges that Match does not screen its members to determine whether they have been previously convicted of sexual offenses. (*Id*. ¶¶ 2, 4, 5.)

Based upon these allegations, Plaintiff asserts a single claim for injunctive relief under Civil Code Section 1770(a)(10) for failure to "institute basic inexpensive screening processes to weed out known registered sex offenders." (Compl. ¶ 24.) Plaintiff seeks "[a]n injunction prohibiting [Match] from signing up further members until such basic screening is implemented," plus her attorney's fees. (*Id*., Prayer for Relief, p. 7.) She further seeks to certify a class consisting of all female subscribers of Match from August 2010 to the present. (Compl. ¶ 9.) [1]

C. Match Has Announced That It Intends to Begin Screening Subscribers Against the National Sex Offender Database.

On April 17, 2011, Match announced that it had made a business decision to begin screening its current and future subscribers against the National Sex Offender Database. (Dubey Decl. ¶ 7 and Exhibit B.) Match stated that it expected to be able to implement the screening process within 60 to 90 days. (*Id*.) Since then, Match has been evaluating the vendors that conduct such screening, as well as examining the feasibility of screening Match's more than one million current subscribers nationwide. (Dubey Decl. ¶ 7.)

[1] The injunction requested in Plaintiff's application is far broader than the one requested in her Complaint. (*Compare* Compl. ¶ 24 (seeking an injunction "prohibiting [Match] from signing up further members until such basic screening is implemented") *with* App. 2:2-3 (seeking an injunction "*prohibiting further member contact* until such time as an appropriate screening process has been implemented") (emphasis added).)

D. Plaintiff and Her Attorney Applauded Match's Decision to Screen Subscribers against the National Sex Offender Database—And Then Changed Their Minds.

Following Match's announcement, Plaintiff and her attorney began a media tour that included appearances on CNN, NBC's *The Today Show*, and ABC's *Good Morning America*. At that point, Plaintiff revealed her identity as television producer Carole Markin. (Platt Decl., Exhibit 2.) During interviews on April 18-19, 2011, Plaintiff described herself as the "Erin Brockovich of Online Dating." (*Id.*) Meanwhile, Plaintiff's attorney announced that he was "proud and happy to be a part of this bold effort to reduce the risks of further sexual assaults on women." (*Id.*)

On April 29, 2011, after the media coverage had faded away, Plaintiff's attorney contacted Match to discuss the steps that Match was going to take to screen subscribers and to offer his (and Plaintiff's) input. (Platt Decl. ¶ 5.) Match's counsel informed Plaintiff's attorney that Match was proceeding as it had announced, and that it did not require any input from Plaintiff or her attorney. (*Id.*) Plaintiff's attorney told Match's attorney for the first time that they did not believe Match should wait 60 to 90 days to implement the screening and that the screening should include local sex offender databases, not just the national registry. (*Id.*) When Match declined to alter its stated position, Plaintiff threatened a TRO and subsequently filed this application. (Platt Decl. ¶ 5 and Exhibit 3.)

ARGUMENT

I. PLAINTIFF HAS NOT REMOTELY SATISFIED ANY OF THE REQUIREMENTS FOR A TRO OR A PRELIMINARY INJUNCTION.

As the U.S. Supreme Court has made clear, a plaintiff may not obtain a TRO or a preliminary injunction unless he can establish: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*,

Inc., 555 U.S. 7, 24-25 (2008). Plaintiff does not even address—much less attempt to satisfy—any of these requirements.

Moreover, a plaintiff's request for injunctive relief must be "more closely scrutinized" where he seeks a "disfavored" injunction. *E.g.*, *Schrier v. University of Colorado*, 427 F.3d 1253, 1260-61 (10th Cir. 2005). A "disfavored" injunction is one that (1) disturbs the status quo, (2) is mandatory as opposed to prohibitory, and (3) provides substantially all of the relief that the applicant would obtain after a full trial on the merits. *Id.*

The injunction sought by Plaintiff is clearly disfavored. It seeks to upend—not preserve—the status quo. *See Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 704 (9th Cir. 1988) ("The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits."). That is because the injunction sought by Plaintiff is, at its core, mandatory: it seeks to compel Match to begin conducting background screening immediately, on pain of going out of business. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (a mandatory injunction "orders a responsible party to 'take action,' . . . 'is particularly disfavored,' and is 'not granted unless extreme or very serious damage will result and [] not issued in doubtful cases . . . .") (citations omitted). Finally, the relief sought by Plaintiff in her TRO application would provide all of the relief sought in her Complaint—and then some.

As shown below, Plaintiff's application should be denied because she does not address—much less satisfy—any of the four requirements for a TRO or a preliminary injunction, particularly under the heightened standard applicable here.

A. Plaintiff Cannot Demonstrate a Likelihood of Success on the Merits.

Plaintiff's application does not address her likelihood of success on the merits or even acknowledge such a requirement. Nor does it cite to any legal authority for the proposition that Match is required to screen its members. There is none.

Numerous state legislatures, including California's, have considered whether online dating and social networking services should conduct background checks on their members. For example, California State Assembly Bill 1681 (proposed in 2005) would have required online dating services either to screen members or to disclose that they do not conduct such screening. (Request for Judicial Notice, Exhibit A.) But this proposal was not enacted by the legislature. (*Id.*, Exhibit B.) To date, not a single state has passed a law mandating screening by online dating services. The only state to pass a law concerning screening is New Jersey, which merely requires that an online dating service disclose whether it performs background checks. *See* N.J.S.A. § 56:8-171(4)(b) (West 2008).

In compliance with the New Jersey statute, Section 7 of Match's User Agreement states:

> **YOU UNDERSTAND THAT MATCH.COM DOES NOT IN ANY WAY SCREEN ITS MEMBERS, NOR DOES MATCH.COM INQUIRE INTO THE BACKGROUNDS OF ITS MEMBERS OR ATTEMPT TO VERIFY THE STATEMENTS OF ITS MEMBERS.**

(Dubey Decl., Exhibit A (emphasis in original).)

Given this disclosure and the absence of any applicable legal authority, Plaintiff has no basis for claiming that Match has a legal duty to conduct screening of any kind on its members. Contrary to Plaintiff's unsupported assertion, the fact that Match has announced that it will screen subscribers against the National Sex Offender Database does not create any legal duty to conduct screening or constitute any concession of such a duty by Match.

B. Plaintiff Has Failed to Demonstrate Irreparable Harm in the Absence of Preliminary Relief.

Irreparable injury is "the single most important prerequisite for the issuance of a preliminary injunction." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2nd Cir. 2005.) It is not enough to show that irreparable injury is merely possible.

Plaintiff must show that such harm is "likely." *Winter*, 555 U.S. at 28 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

Plaintiff does not come close to satisfying this requirement. Nowhere in Plaintiff's application—which notably does not contain a declaration from Plaintiff—does she even claim that she will suffer any harm if Match does not implement the screening she seeks. That is because Plaintiff ceased to be a Match subscriber months ago. (Dubey Decl. ¶ 6.) Accordingly, Plaintiff could not possibly suffer any harm if her application were not granted.[2]

Instead, Plaintiff appears to focus on the unnamed putative class members, arguing in her application that "Match.com's proposal and announcement of instituting sex offender screening within 60-90 days through use of the federal sex offender data bank is insufficient to protect against a known, grave, imminent risk of danger to female members of Match.com who continue to use defendants [sic] online dating site for meeting companions." (App. at 2:24-3:2.) But no class has been certified. And, even if a class were to be certified, Plaintiff could not represent the class because, as a *former* Match subscriber, she would not be a member of it. *See Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962) (litigants "cannot represent a class of whom they are not a part").

Moreover, Plaintiff offers no evidence of the purported "grave, imminent risk of danger to female members of Match.com." Her threadbare allegations of harm are made "on information and belief." (App. at 3:13-14 ("On information and

[2] For the same reason, Plaintiff lacks standing to maintain this lawsuit, which seeks only injunctive relief. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (to be entitled to injunctive relief, a plaintiff must prove that she is "under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent"). Plaintiff's lack of standing constitutes an independent basis for denying her application.

belief, Plaintiffs submit that other sexual predators are currently using this dating site.").) The only "evidence" submitted by Plaintiff is the declaration of her attorney and an unsworn, double-hearsay email from one Russell Mallette of Catalyst Data Services, LLC, opining that he "feel[s] that the National Sex Offender Database search is inherently inadequate," and that he "believe[s]" that his company could implement a "more thorough" search "within 5 business days without question." (Declaration of Mark Webb, Exhibit 2.) Whatever Mr. Mallette's unsworn hearsay opinion may be evidence of, it is not evidence of irreparable harm to anyone.[3]

C. The Balance of the Equities Tips Entirely in Match's Favor.

In determining whether to issue preliminary injunctive relief, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 31. Here, the scale is tipped fully to one side. Plaintiff seeks a preliminary injunction "prohibiting defendant Match.com from allowing further member contact until such time as an appropriate screening process has been implemented . . . ." (App. at 2:1-2.) In other words, Plaintiff seeks to shut Match down. Yet there will be *no* effect on Plaintiff, no longer a Match subscriber, if the requested relief is granted or denied—and she does not assert otherwise.

D. Public Policy Favors Denying the Requested Relief.

Courts deciding an application for preliminary injunctive relief must also consider its effect on "the public interest." *Winter*, 555 U.S. at 25, 31 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). Here, the public interest strongly favors denying Plaintiff's application.

[3] Needless to say, if Plaintiff's counsel has brought this emergency application with the aim of obtaining employment for his preferred vendor, that would be an abuse of process of the highest order.

Certainly, the public has an interest in preventing sexual assault arising out of the use of online dating services. But numerous state legislatures have considered the issue and have unanimously determined that requiring companies such as Match to conduct background checks is not the way to accomplish that goal. There is no reason for this Court to substitute its judgment for the judgment of those state legislatures—particularly in the context of a factually and legally baseless application for extraordinary preliminary relief that would shutter a large and successful business.

CONCLUSION

For the reasons discussed above, Match respectfully requests that this Court deny Plaintiff's application and respectfully suggests that the Court consider the imposition of appropriate sanctions for the filing of an application so lacking in factual and legal basis.[4]

Dated: May 5, 2011

MANATT, PHELPS & PHILLIPS, LLP
ROBERT H. PLATT
JOSEPH E. LASKA

By: /s/ Robert H. Platt
Robert H. Platt
Attorneys for Defendant
MATCH.COM, LLC,
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[4] *See*, *e.g.*, 28 U.S.C. § 1927 ("Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees . . . ."); Fed. R. Civ. P. 11.