SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SEAN RAD,

Plaintiff/Counterclaim-Defendant,

PAUL CAFARDO, GARETH JOHNSON, ALEXA MATEEN, JUSTIN MATEEN, and RYAN OGLE,

Plaintiffs,

v.

IAC/INTERACTIVECORP, MATCH GROUP, INC., and MATCH GROUP, LLC,

Defendants/Counterclaim-Plaintiffs.

Index No. 654038/2018
IAS Part 39

Motion Sequence No. ___

Oral Argument Requested

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE RELATING TO THE 2016 TINDER HOLIDAY PARTY

WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000 (phone)
(212) 403-2000 (facsimile)

Attorneys for IAC/InterActiveCorp, Match Group, Inc., and Match Group, LLC

Dated: May 13, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

PRELIMINARY STATEMENT

Q. Sitting here today, do you believe that the holiday party had anything to do at all with the valuation? . . .

A. No, I don't think so.

– Justin Mateen Tr. at 256:3-7.

This case involves a commercial dispute about a contractual process to value Tinder and provide liquidity for Tinder's option holders. But plaintiffs hope to turn the trial into something more sensational by presenting the jury[1] with accusations that Greg Blatt, the former CEO of Tinder and a key witness for defendants, sexually harassed and assaulted former plaintiff Rosette Pambakian at the December 2016 Tinder holiday party. These accusations are irrelevant to the parties' contractual dispute. If allowed, they would be highly prejudicial to defendants and would greatly expand the length and complexity of trial. The holiday party should be litigated in the California lawsuit where Blatt and Pambakian are parties and their dueling claims of defamation and sexual misconduct are being litigated. It should be excluded from trial here.

Plaintiffs' theory of relevance is a pretext. According to plaintiffs, the Match board engaged in a "scheme" to remove Sean Rad as CEO of Tinder and insert Blatt in that role, all so that Blatt could take the helm of the upcoming valuation and cheat Rad and the other Tinder option holders. Then, according to plaintiffs, when Rad reported the holiday party to Match on April 27, 2017, months after the party and just as the valuation process was getting under way, the Match board failed to conduct a real investigation or fire Blatt immediately, all so that Blatt could finish the job of corrupting the valuation.

[1] Defendants do not believe that plaintiffs are entitled to a jury but assume a jury for purposes of this motion.

Plaintiffs, however, have adduced no evidence of any of this. Rad was replaced as CEO after repeatedly showing his immaturity and ineffectiveness. No evidence has turned up suggesting that anyone believed at the time that Rad's removal as CEO was motivated by the upcoming valuation. And as for the Match board, plaintiffs took the deposition of only one Match director, Ann McDaniel, formerly head of HR at *The Washington Post*, who testified that while Blatt had acted inappropriately and deserved to be sanctioned, his conduct did not warrant termination because Pambakian, Blatt and another employee in the hotel room with them all indicated that the interaction was consensual.

But more importantly, neither McDaniel nor anyone else has lent support to the notion that the Match board wanted to corrupt the Tinder valuation, thought Blatt was doing that, or viewed Blatt as a necessary means to achieve that end. The "scheme" theory is a lawyer's invention — advanced by plaintiffs for the improper purpose of trying to put irrelevant but highly prejudicial evidence before a jury.

The undue prejudice to defendants of allowing evidence concerning the Tinder holiday party vastly outweighs any possible showing of relevance. Plaintiffs' tactic is to use Pambakian's accusation of sexual misconduct to stigmatize Blatt and defendants in the eyes of a jury. Any questioning of Pambakian's credibility will be met with charges that defendants are "victim shaming" — a scurrilous accusation that has already been leveled — and must be punished by awarding plaintiffs damages.

The highly inflammatory questioning at deposition provides a glimpse of what lies ahead.

[redacted]

[redacted]. None of this has any place in a Commercial Division contractual valuation case.

In addition to being irrelevant and prejudicial, the Tinder holiday party will become a trial within a trial, burdening the Court and the parties and confusing the jurors with a lengthy presentation having nothing to do with the contract dispute. Defendants estimate that trial of the valuation dispute without the holiday party tacked on would take three weeks. Including the holiday party could add up to two additional weeks of trial time. Thus far, multiple depositions have focused exclusively on the holiday party. Other witnesses central to the valuation spent inordinate amounts of their deposition time testifying about the holiday party. And additional witnesses who have not yet been deposed and who have nothing to say about the Tinder valuation will need to be called at trial, including outside and in-house lawyers involved in the investigation and additional Match directors.[2]

On top of that, plaintiffs have identified two experts who also have nothing to say about the valuation but who will instead be presented to try to buttress Pambakian's accusations. Ex. 1; Ex. 2.[3] [redacted]

[2] Under the scheduling order governing this case, if someone on one side's trial witness list hasn't been deposed, the other side has the right to depose that witness.

[3] "Ex." refers to the exhibits to the accompanying Affirmation of Stephen R. DiPrima.

[redacted] None of this evidence could conceivably assist the factfinder in resolving the parties' contractual valuation dispute.

In addition to being irrelevant, prejudicial and distracting, the Tinder holiday party accusations rest on the testimony of a witness, Pambakian, who has been paid and promised [redacted] by Sean Rad and his litigation finance hedge fund — the two largest beneficiaries of a significant verdict in this lawsuit. Those payments, which are addressed in defendants' separate litigation funding motion, are unlawful and unethical, dwarfing the size of the miniscule option claim Pambakian contributed to the funding arrangement. The payments weigh heavily against allowing irrelevant, highly prejudicial testimony from a witness who has been tainted to engulf the trial of what should be a contractual valuation dispute.

This is not an effort to try to "silence" Pambakian and sweep her accusations under the rug. Pambakian is not a party here. She is not bringing sexual harassment or assault claims in this case. Her holiday party claims against Blatt, Match and IAC were brought in California, where Blatt has countersued Pambakian and Rad for defamation, a claim that withstood a motion to dismiss. In her California action, Pambakian stated that "the pending litigation in New York state court (the 'Valuation Case') is unrelated to Plaintiff's claims here." Ex. 3 at 7. She is right. California is where Pambakian, Blatt, Match and IAC should have their claims and defenses related to the Tinder holiday party adjudicated.

This motion is timely and should be addressed now. An *in limine* motion may be brought at any time. Even if the Court assumes that the core of what plaintiffs' experts offer is true, nothing from expert discovery will bear upon this motion. And a prompt decision will allow the Court and the parties to determine how long trial will take and which fact and expert witnesses to call. A ruling in defendants' favor also will save a substantial amount of trial preparation

expense and free up weeks of Court time necessary to handle the pre-trial motion practice related to the sexual misconduct accusations. For example, the motion, if granted, would moot plaintiffs' motion to obtain privileged interview notes from the holiday party investigation.

Defendants respectfully request that the Court exclude all evidence concerning the Tinder holiday party and subsequent internal investigation from the trial of this matter.

BACKGROUND

A. What this case is about: The Tinder valuation and merger

In 2012 and 2013, Plaintiffs Sean Rad and Justin Mateen worked on developing Tinder and received equity-based compensation agreements so they could benefit if Tinder performed well. Dkt. 2 (Compl.) ¶ 72. In 2014, Rad and Mateen renegotiated these arrangements. *Id.* ¶¶ 72, 76. Because Tinder was a private company with no public market price, the March 2014 agreements provided that two independent investment banks would value Tinder in a "Qualifying Valuation Process." Ex. 4 (Settlement Plan) § 2, Sch. A § 2. At four scheduled opportunities, with the first set for May 15, 2017, all Tinder option holders could "put" their options back to the company and achieve liquidity at the value for Tinder set by the banks. *Id.* § 2(a). Under the agreements, Rad had the right to participate in the valuation process and advocate his views of Tinder's valuation. Ex. 5 (Rad Funding and Governance Agreement) § 4(a); Ex. 6 (Rad Option Agreement) § 10(d)(iii); Ex. 4 Sch. A § 2.

Toward the end of 2014, Rad was removed as Tinder's CEO after the company became embroiled in a sexual harassment lawsuit brought by Whitney Wolfe, a former executive who went on to found Bumble, a Tinder competitor. *Id.* ¶¶ 86, 92. In mid-2015, the Tinder board allowed Rad to reclaim the CEO title under the supervision of Greg Blatt, Match's then-Executive Chairman, who was appointed to the newly created position of Tinder Executive Chairman. *See id.* ¶ 96; Ex. 7. As Tinder began to underperform, Blatt took on a greater role at

Tinder in mid-2016, when virtually all of Rad's direct reports were assigned to report to Blatt. *See* Ex. 8; Ex. 9. In December 2016, Rad gave up the CEO title, which was formally assumed by Blatt. Compl. ¶ 114. As McDaniel testified, Rad's removal had nothing to do with the valuation scheduled for five months later. Ex. 10 (McDaniel Tr.) at 303:25-304:7.

Pursuant to the compensation arrangements, a Qualifying Valuation Process was conducted in mid-2017. Two banks — Barclays and Deutsche Bank — were hired to determine Tinder's value. Compl. ¶ 134. Rad and his advisers from Wilson Sonsini and Jefferies participated in the process from start to finish, created and presented to the banks two sets of projections for Tinder, and attended over ten meetings with the banks over eight weeks. *See* Ex. 11 at 32.

On July 13, 2017, Barclays and Deutsche Bank delivered their valuations of Tinder, which averaged to $3 billion. Compl. ¶ 134; *see also* Exs. 11, 12. The valuation decks resolved the areas of disagreement between Tinder management and Rad concerning Tinder's projections. *See, e.g.*, Ex 11 at 10-17. Sometimes the bankers agreed with Tinder management, sometimes they agreed with Rad, and sometimes they came up with their own approach. [redacted] As Rad alleged in his complaint and conceded at deposition, the banks conducted themselves "professionally and diligently." *See* Compl. ¶ 134; Ex. 15 (Rad. Tr.) at 14:14-17.

Following the valuation process, Tinder significantly outperformed everyone's expectations, including Rad's. In 2018, Tinder booked more than $420 million in earnings, nearly $200 million more than Rad himself had predicted during the mid-2017 valuation process. Post-valuation, largely as a result of Tinder's success, Match's stock price has quintupled. But because Rad chose to cash out and not bet on Tinder, he didn't benefit from that success.

After watching Tinder outperform all expectations, Rad boiled over and sued. The gravamen of his complaint is a claim for breach of contract. Plaintiffs allege that defendants "undermine[d]" the valuation process and "cheat[ed] the Tinder Plaintiffs out of billions of dollars" by giving Barclays and Deutsche Bank "false, misleading, and incomplete financial information and projections for Tinder." Compl. ¶¶ 1, 7-8. Plaintiffs also allege that the merger of Tinder into Match following the 2017 valuation breached the March 2014 agreements because it was a "pretext" intended "to deprive the Tinder Plaintiffs and other optionholders of their right to participate in the future upside of Tinder." *Id.* ¶ 16.

B. What this case should NOT be about: The Tinder holiday party.

The interaction between Greg Blatt and Rosette Pambakian underlying Pambakian's harassment and assault accusations occurred in a hotel room on December 9, 2016 following the Tinder holiday party, months before the Tinder valuation process commenced. Many details of that encounter are now vigorously disputed. But what's not disputed is that the encounter was brief, that the two were fully clothed at all times, that there were two other Tinder employees in the room, and that Pambakian never said "stop" or anything like it. It's also undisputed that no one in the room ever reported the matter to Match. The morning after, Pambakian told the two other employees who were in the hotel room, [redacted] and [redacted], that it would be "bad" if the "antics" from the night before "got out," but invited them to "rehash it" amongst themselves "as often as possible 😂." Ex. 16.

The encounter only came to the Match board's attention because Rad reported it months later, on April 27, 2017, after targeting Blatt as the obstacle to the valuation he desired. Days before he made the report, Rad wrote the following to his advisers at Jefferies about Blatt, in an email that Rad destroyed but that Jefferies retained: "Fuck him. We're at war. We will destroy

him. This is going to be the biggest lesson of his life. He will be a changed man… excited for him :)." Ex. 17.

Rad's complaint alleges that he reported the holiday party on April 27, "immediately" after learning about it. *See* Compl. ¶¶ 129-30. But in truth, he and Mateen joked about the incident as early as February 2017, with Mateen texting Rad that the "dokhtar" (Persian for girl) was "making out" with Blatt after the party. Ex. 18.

When Rad unleashed his allegations against Blatt, he did so against Pambakian's wishes. Rad's motives weren't lost on Pambakian, who texted a friend the morning after Rad made his report: "I'm just super scared of how this could play out for me. Things were finally going well with work. And then this happens. Money really is the root of all evil." Ex. 19.

Rad's report prompted an investigation under the supervision of the Match board, led initially by Match's head of HR, Lisa Nelson, and General Counsel, Jared Sine. Two outside firms, Proskauer Rose and Wachtell Lipton, subsequently joined the investigation. Nelson and Sine interviewed Pambakian on May 1, 2017. [redacted] was interviewed by Sine and Nelson the same day. Pambakian was interviewed again by IAC lawyer Edward Ferguson and Sine on May 3, and a third time by Sine on July 4. Blatt was interviewed by IAC General Counsel Gregg Winiarski and Ferguson on May 3 and outside counsel on May 19.

In deposition, Nelson testified that Pambakian "never implied or suggested that assault or harassment took place" and "absolutely did not ever suggest, state or imply that the physical contact with Greg Blatt was uncomfortable, unwelcome or that she told him to stop." Ex. 20 (Nelson Tr.) at 155:13-15, 208:5-8. Nelson instead understood the encounter as "consensual." *Id.* at 177:12-15. Nelson also testified that Pambakian reassured Nelson that "everything was going well" in Pambakian's working interactions with Blatt. *Id.* at 441:18-19.

Two weeks after Pambakian was interviewed, she drafted a note to Blatt: "We both know what happened here … Maybe I haven't made it obvious enough but I absolutely adore you – I admire and respect you and I would never intentionally or maliciously do anything that would jeopardize your reputation or your job – not for anything. You've been good to me over the years and I'll always be grateful to you for that." Ex. 21.

Following the encounter, Pambakian maintained a close professional relationship with Blatt. She repeatedly praised his leadership, invited him to socialize, and expressed dismay when it was announced that he would leave the company. For example:

- After Blatt announced he was leaving the company and would no longer be Pambakian's boss, she expressed sadness at his impending departure, writing, "You'd literally have to resurrect Steve Jobs and make him ceo for anyone to be excited about this." Ex. 22. Pambakian assured Blatt, "You did well. If you didn't know already, everyone has a lot of respect for you. You're crazy smart and talented and you care. We are lucky to have you. Just wish we can keep you longer." Ex. 23.
- Pambakian also encouraged Blatt to stay on as CEO: "Stay . . . . Things aren't perfect but it's not difficult to make it better." Ex. 24.
- And Pambakian continued to socialize with Blatt long after he announced his departure. In a group chat among Pambakian, Blatt, and Brian Norgard, Tinder's former Chief Product Officer, from November 2017, Norgard invited Blatt to join them for drinks, and Pambakian added: "GB – don't say no. Our fragile hearts can't take any more rejection." Ex. 25.

Nonetheless, Rad relentlessly pressured Pambakian to support his allegations. As part of that effort, Rad secretly recorded his private conversations with Pambakian, without her consent,

on at least six occasions. These recordings reveal Rad's continuing obsession with damaging Blatt, Match and IAC: "They're going to get punished hard, all of them . . . like whole building is burning to the ground, all of it." Dkt. 574 (Second Amended Compl.) at ¶ 94.

While Rad now claims that the Match board "whitewashed" the investigation of his allegation as part of a board-led "scheme" to corrupt the valuation, *see* Compl. ¶¶ 14, 131, 133, there is not a shred of evidence that Match's board of directors linked either the holiday party investigation or the board's subsequent disciplinary actions against Blatt to influencing the Tinder valuation in any respect.

C. Where Pambakian's claims should be litigated: California

In August 2019, Pambakian filed an action in California against Blatt, IAC and Match, alleging that Blatt harassed and assaulted her. Pambakian is represented in her California lawsuit by Grant & Eisenhofer, the law firm founded by Stuart Grant, the principal behind the firm funding this lawsuit. Blatt responded with a defamation countersuit against Pambakian and Rad, alleging that they conspired to make false allegations of sexual harassment and sexual assault against him. Blatt, IAC and Match moved to compel arbitration of Pambakian's claims against them. In December 2019, the district court granted the motion. *Pambakian* v. *Blatt*, 2019 WL 7286935 (C.D. Cal. Dec. 20, 2019). Pambakian is appealing that ruling. *Pambakian* v. *Blatt*, Case No. 2:19-cv-07053, 9th Cir. Dkt. No. 59. The district court also sustained Blatt's defamation claim in part, holding that Pambakian's and Rad's actions were not protected by the "fair and true reporting privilege." *Blatt* v. *Pambakian*, 432 F. Supp. 3d 1141, 1149 (C.D. Cal. 2020). That ruling is also pending appeal. Case No. 2:19-cv-07053, 9th Cir. Dkt. No. 59.

ARGUMENT

THE TINDER HOLIDAY PARTY SHOULD BE EXCLUDED

Under CPLR 4011, this Court has the power to "regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." Under this rule and the Court's inherent power, a party may obtain a "preliminary order . . . excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence." *State of N.Y.* v. *Metz*, 671 N.Y.S.2d 79, 83 (1st Dep't 1998).

Even relevant evidence is "not necessarily admissible." *People* v. *Primo*, 96 N.Y.2d 351, 355 (2001). "[A] court may, in its discretion, exclude relevant evidence if its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, confusing the issues or misleading the jury. Evidence of merely slight, remote or conjectural significance will ordinarily be insufficiently probative to outweigh these countervailing risks." *Id*.; *see also* *Mazella* v. *Beals*, 27 N.Y.3d 694, 709 (2016) ("To be admissible, evidence must be relevant and its probative value outweigh the risk of any undue prejudice."); *People* v. *Miller*, 6 N.Y.2d 152, 157 (1959) (courts will exclude evidence "calculated to appeal to the passion and sympathy of the jury and, hence, unduly prejudice the defendant").

I. THE TINDER HOLIDAY PARTY IS IRRELEVANT.

Pambakian's accusations of sexual misconduct against Blatt and an alleged Match board "cover- up" are irrelevant to the parties' dispute over the Tinder valuation and merger. The valuation issues will focus primarily on the information provided to the banks and, in particular, the competing projections advanced by the two sides. The disagreement over the projections involves issues such as Tinder's expectations for its new product offerings, trends in registrations, expected marketing spend, and Tinder's likely growth trajectory. And the merger

issues will focus on the contractual provisions governing IAC's right to effectuate corporate transactions involving its wholly owned subsidiaries.

What happened in the hotel room between Pambakian and Blatt, the timing and substance of Rad's report of the incident to Match, his motives for making the report, and the thoroughness of the investigation that followed could not be further afield from these issues. A jury's views, for example, on whether the hotel room encounter was consensual or whether Pambakian's conduct fits a harassment victim paradigm would not tend to prove or disprove any of the facts pertinent to the Tinder valuation and merger.

The "scheme" theory advanced by plaintiffs is purely conjectural and wholly void of proof. The theory posits that the board whitewashed its investigation of Rad's allegation so that it could keep Blatt on the job to tank the valuation. Nelson has testified, however, that Pambakian never claimed at the time that she was harassed or assaulted. *See, e.g.*, Ex. 20 (Nelson Tr.) at 155:13-15, 177:12-15, 208:5-8. And the only Match director to be deposed has testified to her understanding that the encounter between Blatt and Pambakian was consensual. *See* Ex. 10 (McDaniel Tr.) at 198:11-200:22.

More to the point, simply criticizing the holiday party investigation doesn't make it relevant. For the investigation to be relevant, plaintiffs must establish a link with the valuation — in particular, some desire on the Match directors' part to enable and encourage Blatt to tank the valuation. But there is nothing but speculation to support any supposed nexus. There is no evidence that the Match board had any input into the Tinder projections or knowledge of Blatt's communications with Tinder employees concerning the valuation or his interactions with the banks. And there is certainly no evidence that any Match director chose not to terminate Blatt —

a long serving and highly successful senior executive with no prior sexual harassment allegation against him — for reasons having to do with the valuation.

And while plaintiffs now say that Blatt should have been fired immediately as Tinder's CEO, all that means is someone else would have had the job. There is no evidence that the Match board thought that Blatt was specially equipped to handle the valuation, let alone "corrupt" it. The notion that some other CEO might have been more favorable to Rad's views if the Match board itself actually wanted to suppress the valuation, which is the entire premise of plaintiffs' scheme theory, is nonsensical.

More than two years into this case, and despite plaintiffs receiving expansive document discovery and taking 20 fact depositions, plaintiffs' scheme theory is completely unsubstantiated:

- When asked by plaintiffs' counsel if the valuation process had anything to do with the holiday party investigation, Barry Diller, IAC's Executive Chairman and controlling stockholder, responded: "Absolutely not." Ex. 26 at 381:9-14.
- There is no document or testimony from Match linking the valuation and the holiday party investigation, or the Match board's response to it, in any respect.
- Nor is there any evidence suggesting that the Match board believed there was impropriety in connection with Blatt's handling of the valuation — the Match board never even received the Tinder projections used by the banks, the bank presentations, the bank valuation decks or any written materials concerning the valuation.
- Plaintiffs took only one deposition of a Match director, asked her the most cursory questions about the valuation, and wholly failed to establish any wrongdoing on the board's part concerning the valuation. Ex. 10 (McDaniel Tr.) at 68:2-11, 75:18-76:95.

- The only investigator plaintiffs deposed, Lisa Nelson from HR, had no involvement in the valuation beyond providing some information on head counts and testified that it "[i]n no way, shape or form" influenced her work on the investigation. Ex. 20 (Nelson Tr.) at 153:19, 356:3-25, 416:17-21.
- And while plaintiffs questioned Blatt extensively about what happened in the hotel room, they never questioned him on his communications with the board about the valuation.

In the end, even plaintiffs are unable to conjure a link between the Tinder holiday party and the valuation. As noted, Justin Mateen, a plaintiff in this case and the second-largest holder of Tinder options, was asked that question and conceded that he doesn't believe there was any link. *See* Ex. 27 (Mateen Tr.) at 256:3-7 ("Q: Sitting here today, do you believe that holiday party had anything to do at all with the valuation?" "A: No, I don't think so."); *id.* 256:9-14 ("Q: Do you have any understanding as to why we're talking about the Tinder holiday party in this litigation concerning the valuation process?" "A: I don't know. I mean, it's just when [Rad] learned more about it.").

Pambakian told the California courts much the same thing, advising that her assault and harassment claims were "unrelated" to this case. *See* Ex. 3 (*Pambakian* v. *Blatt*, Dkt. 45) at 7; Ex. 28 (Pambakian Tr.) at 234:10 ("Yeah, they're two separate situations.").

In addition to being wholly unsupported and conjectural, plaintiffs' scheme theory has also become incoherent. In response to defendants' contention that he reported the holiday party only to advance his own agenda, Rad now says that, no, disclosure of the holiday party would have *hurt* Tinder's value. As he put it, "[A] company's value doesn't go up when there's a potential sexual assault case, it goes down." *See* Ex. 15 (Rad Tr.) at 169:6-16, 341:11-15. But if that's the case, on Rad's logic, if the Match board really wanted to lower Tinder's value for

purposes of the valuation, they would have had no hesitation firing Blatt if they thought it was warranted. Plainly, plaintiffs' reliance on the holiday party *now* is nothing more than a tactic to inflame a jury.

II. PAMBAKIAN'S ACCUSATIONS OF SEXUAL HARASSMENT AND ASSAULT ARE HIGHLY PREJUDICIAL.

The Court of Appeals has squarely held that "evidence of unrelated bad acts, the type of propensity evidence that lacks probative value concerning any material factual issue, and has the potential to induce the jury to decide the case based on evidence of defendant's character" should be excluded. *Mazella* v. *Beals*, 27 N.Y.3d 694, 710 (2016). In *Mazella*, the Court of Appeals reversed a civil trial verdict where the admission of evidence of such "unrelated bad acts" had "unduly prejudiced the jury" and "tainted" the jury's "deliberative process." *Id*. at 697, 710; *see also* Decision & Order on Motion, *Darabont* v. *AMC Network Ent. LLC*, 2021 WL 810402, at *4 (N.Y. Co. Mar. 3, 2021) (Cohen, J.) (citing *Mazella* and granting motion to preclude).

Courts recognize, moreover, that evidence of sexual misconduct is particularly prejudicial, even if mentioned in passing. For example, in *L-3 Commc'ns Corp.* v. *OSI Sys., Inc.*, a breach of contract case, plaintiff sought to question one of defendant's executives and a key witness on a sexual harassment investigation into that executive's conduct. 2006 WL 988143, at *7-8 (S.D.N.Y. Apr. 13, 2006). The district court excluded the evidence, finding that "[t]he naked presentation of [details regarding a previous sexual harassment charge] may be of a sufficiently inflammatory or prurient nature to be significantly prejudicial." *Id*. at *8 ("allegations of sexual harassment are highly prejudicial").

Likewise, in *Ortega* v. *O'Connor*, the Ninth Circuit affirmed the district court's exclusion of evidence of sexual harassment, stating that "sexual harassment, like other forms of discrimination and personal abuse, 'deservedly carries a unique stigma in our society,' and

courts, therefore, should exercise caution in allowing its introduction when its probative value is relatively weak." 146 F.3d 1149, 1165 (9th Cir. 1998).

Plaintiffs clearly intend to stigmatize Blatt and defendants with Pambakian's accusations, hoping that it will redound to their benefit on the valuation issues. Plaintiffs' counsel's questioning of witnesses amply demonstrates the stigmatizing nature of those accusations. At deposition, [redacted]. Counsel likewise asked Match's head of HR: "Have you read about the Harvey Weinstein trial where one of Weinstein's main defenses in the case was that many of his accusers had acted friendly … after the alleged rapes and assaults have occurred?" Ex. 20 (Nelson Tr.) at 104:12-18; 107:19.

Plaintiffs have also probed the prurient details from the night of December 9, 2016, [redacted] It is inconceivable that defendants could expect to obtain a fair trial where their lead witness in a contractual valuation dispute will have to switch back and forth from testifying about Tinder's financial prospects in mid-2017 to testifying on these subjects. But, of course, that is plaintiffs' aim.

Plaintiffs' counsel's questioning of Pambakian was no less prejudicial, and was clearly designed to stigmatize Blatt and defendants with accusations of unrelated bad acts. At one point, counsel asked Pambakian whether she was "afraid [Blatt] was going to try to rape [her]." Ex. 28 (Pambakian Tr.) at 403:2-3. It is hard to imagine a more inflammatory subject. But of course, plaintiffs' counsel knows that too.

And Blatt and Pambakian weren't the only witnesses to get questions like this. [redacted]

Plaintiffs' tactic is as obvious as it is improper. The hope is that by inflaming a jury and invoking the "#metoo" movement, they can engineer a win and an outsized verdict for Rad and his litigation funder. As a fallacious premise for this tactic, [redacted] — nearly three times the market value of Match, which owned 100% of Tinder and other highly profitable dating businesses. Plaintiffs appear to believe that a jury inflamed by accusations of sexual misconduct will punish defendants despite the facts.

In short, the "probative value" of the holiday party evidence does not come close to outweighing the "risk of any undue prejudice" it so plainly poses. *Mazella*, 27 N.Y.3d at 709.

III. PAMBAKIAN'S ACCUSATIONS, IF ADMITTED, WOULD SIGNIFICANTLY EXPAND TRIAL AND CONFUSE A JURY.

This Court is "duty bound to assure fairness and avoid unnecessarily protracted or confusing presentation of evidence." *Feldsberg* v. *Nitschke*, 49 N.Y.2d 636, 643 (1980). *In limine* motions are routinely granted on "issues [that] . . . risk[] becoming 'mini-trials' on

tangential issues." *Manning* v. *New York University*, 2001 WL 62872, at *4 (S.D.N.Y. Jan. 24, 2001). And as the courts recognize, litigating sexual harassment allegations is "likely [to] create a 'trial within a trial'" when parties dispute "(1) whether the incidents occurred; (2) how they were perceived by [the alleged victim]; and (3) whether [the alleged victim's] subjective perception of having been sexually harassed was a genuine reaction." *U.S.* v. *Yagi*, 2013 WL 10570994, at *7 (N.D. Cal. Oct. 17, 2013).

Because the parties here contest virtually every material fact regarding the holiday party events, the significance of Pambakian's interactions with Blatt over the following year and the nature of Match's internal investigation, litigating the holiday party will become a trial within a trial, requiring testimony from numerous witnesses with nothing to say about the valuation. Indeed, that is plaintiffs' goal.

The deposition testimony illustrates the degree to which the holiday party could swamp this commercial dispute. While Pambakian claims she went to the hotel room to escape Blatt, in a text message within hours of the encounter to [redacted] discussing what had happened in the hotel room, [redacted], the other employee in the hotel room, wrote: "Our head of PR [Pambakian] was promoting it." Ex. 31. At her deposition, [redacted] was subjected to endless, repetitive questioning that studiously avoided her contemporaneous text message and instead focused on her testimony that Pambakian "was excited" that Blatt was coming up to the room, [redacted].) at 352:6-8; was "primping in front of the mirror getting ready" before he arrived, *id.* at 243:22-24; and that she believed Blatt and Pambakian's interaction was "mutual," *id.* at 357:7-13. One of Pambakian's subordinates and former friends, [redacted], also contradicted Pambakian by testifying that Pambakian had a "crush" on Blatt and, contrary to Pambakian's assertion that she only had one brief conversation with Blatt, was by his side for

much of the holiday party. [redacted] at 19:1-8; 136:13-15. [redacted] testified that, in the days after the party, Pambakian recounted the hotel room encounter to her with a "playful" tone, "like telling a friend about her interaction with someone she's interested in." *Id.* at 23:10-15. [redacted] further testified that she and Pambakian spoke "countless times" about the encounter, and she never heard Pambakian describe it as non-consensual. *Id.* at 30:21-31:4; 166:18-20. [redacted] likewise, was questioned unendingly in an attempt to undercut her credibility.

And as for [redacted] he had previously worked for Pambakian and attended their annual joint birthday party dinner just before his deposition in this case. [redacted] at 34:11-13. [redacted] contradicted Pambakian's account of what happened in the hotel room in critical respects, and described what he saw as "spooning," *id*. at 68:2-10, not the aggressive physical assault that Pambakian now alleges. While [redacted] now says that incident was non-consensual, he was on the same bed only a few feet from Pambakian and Blatt in the hotel room, did nothing to intercede, and never reported the incident to anyone at the company. *Id.* at 75:23-76:5; 144:15-20; 156:10-12.[4]

The overarching question is why ***any of this*** matters to this case. Is it intriguing? To some. More fascinating than mundane disputes over Tinder's projections? To a jury, one would assume. But relevant to the valuation or merger claims? Not at all.

And make no mistake, the holiday party "mini-trial" won't be over quickly. Discovery has already spawned an array of disputes over the incident. For example:

- Pambakian claims that she had no interest in Blatt at the time of the holiday party, but [redacted] testified that Pambakian had a "crush" on Blatt and that "they did have a flirty

[4] The admissibility of this opinion testimony from [redacted] about another person's state of mind will be the subject of a motion in limine if the Court permits plaintiffs to go down this road.

relationship, and she did talk about her interest in him." [redacted]) at 30:9-15; 136:12-15. [redacted] also testified to seeing Pambakian and Blatt "flirt" prior to the holiday party. [redacted] at 121:2-5.

- Pambakian testified that at the holiday party, she had only one brief conversation with Blatt. But her text message to Norgard the following morning, coupled with [redacted] eyewitness testimony, make clear that Pambakian spent hours with Blatt at the party. *Compare* Ex. 28 (Pambakian Tr.) at 314:315:5 *with* Ex. 34 ("I was with [Blatt] the whole last two hours . . . ."); [redacted] at 18:16-19:8.
- Pambakian testified that Blatt made a lewd sexual remark to her out of the blue. But others testified that the two were having a flirtatious conversation in which both engaged in sexually charged banter. *Compare* Ex. 28 (Pambakian Tr.) at 58:11-13, 123:1 [redacted] at 23:16-24 (testifying that Pambakian recounted Blatt's comment as "within the context of her also making a comment. So her tone was really like [they] were both kind of reciprocating these comments to each other.").
- Pambakian claims she did not touch Blatt's chest at the party. Ex. 28 (Pambakian Tr.) at 272:5-8. But former plaintiff Jonathan Badeen testified that he observed Pambakian "touching [Greg's] chest at one point." Ex. 36 (Badeen Tr.) at 235:1-4. And [redacted] likewise confirmed that Pambakian told her she "had been rubbing [Blatt's] chest and telling him that she thought he was sexy." [redacted] at 22:18-22.
- Pambakian claims that she went to the hotel room to "escape" and "hide" from Blatt and that she told [redacted] "Greg is being really inappropriate. I have to get out of here." Ex. 28 (Pambakian Tr.) at 140:9-15; 285:2-12. But neither [redacted] nor [redacted] recall

Pambakian telling them that she wanted to escape Blatt. [redacted] Tr.) at 146:22-25; [redacted] Tr.) at 354:14-19. [redacted] recalls that Pambakian wanted room service and that Pambakian told her she wanted to go to [redacted] room because she was hungry. *See* [redacted] Tr.) at 80:12-81:14; 354:14-19.

- Pambakian testified that [redacted] and [redacted] left the hotel room bed that she and Blatt were on at some point during the encounter, but both [redacted] and [redacted] testified to being on the bed during the entire encounter. *Compare* Ex. 28 (Pambakian Tr.) at 285:21-286:19 *with* [redacted] at 65:11-14; 73:17-21; 75:23-76:5; [redacted].
- Pambakian testified that after Blatt "climbed on top" of her and "groped" her, she "finally got away from him off the bed," but he "grabbed [her] arm, pulled it down, and pulled [her] back onto the bed." Ex. 28 (Pambakian Tr.) at 57:19-23; 140:1-8. Neither [redacted] nor [redacted] confirm or support this. [redacted] at 82:15-20; 154:7-155:2; [redacted] at 358:21-359:12. Instead, [redacted] recalls hearing "giggling," "kissing," and "smooching sounds." [redacted]) at 356:21-357:13. And [redacted] recalls seeing them "spooning." [redacted] at 68:2-10.

The collateral factual disputes stemming from the holiday party accusations implicate not just Pambakian's credibility, but Rad's as well:

- Rad alleged in his complaint that he reported the incident to Match Legal on April 27 "immediately" after he became aware of it. Compl. ¶ 130. But Pambakian testified that she told Rad everything after a podcast taping on February 3, 2017, nearly three months before Rad's report. Ex. 28 (Pambakian Tr.) at 47:8-19; Ex. 37.

- In his deposition, which occurred after Pambakian's, Rad switched gears and claimed that he did learn about the encounter on February 3. Ex. 15 (Rad Tr.) at 128:7-141:18. But on February 11, 2017, Rad expressed surprise ("Wow") when Mateen texted that Pambakian was "making out" with Blatt after the party. Ex. 18 (PLS0008589).
- Rad claims that after his February 3 conversation with Pambakian, he recounted her assault claim — which was a "big deal" — to two other Tinder employees, who were friends of Pambakian, over a sushi dinner on February 16. Ex. 15 (Rad Tr.) at 151:9-18. But Rad could not explain why neither of the two even remembers this purported conversation. Ex. 15 (Rad Tr.) at 152:6-21; Ex. 38 (Ogle Tr.) at 263:15-16; Ex. 36 (Badeen Tr.) at 241:24-242:7.
- Acknowledging that the timing allegation in his complaint is false, Rad now claims he reported the incident to Match Legal on April 27 after his counsel advised him that he had "no choice but to report this." Ex. 15 (Rad Tr.) at 154:15-19, 180:3. But he has no explanation for why he waited so long to inform counsel if he learned of Pambakian's holiday party accusation on February 3. *Id.* at 156:16-19.

If the holiday party remains in the case, all of these disputes and more will have to be tried. On top of that, plaintiffs expect a jury to hear from four experts whose only contribution is to offer opinions related to Pambakian's holiday party accusations. *See* Ex. 1; Ex. 2; Ex. 39; Ex. 40. But to what end? By directing the focus of trial onto such "collateral matter[s] that ha[ve] no direct bearing on any issue in the case," the holiday party evidence will inevitably swamp the trial and confuse the jury with prurient, highly prejudicial irrelevancies. *Crooms* v. *Sauer Bros. Inc.*, 853 N.Y.S.2d 29, 31 (1st Dep't 2008).

IV. THE IMPROPER WITNESS PAYMENTS TO PAMBAKIAN WEIGH IN FAVOR OF EXCLUSION.

In addition to being irrelevant, prejudicial and confusing, the holiday party accusations turn upon the testimony of a witness who has received [redacted] of dollars in improper witness payments and has a preferential right to receive [redacted] more. These issues are addressed at greater length in defendants' litigation funding motion, but weigh heavily in favor of excluding a mini-trial on irrelevant sexual harassment and assault allegations that depend on the testimony of a witness who has been tainted.

CONCLUSION

Defendants respectfully request that this Court enter an order excluding the admission of any and all evidence, testimony, or argument relating to the Tinder holiday party, including (1) plaintiffs' allegations that Pambakian was sexually harassed or assaulted by Greg Blatt; and (2) defendants' internal investigation of, and response to, the holiday party encounter.

Dated: New York, New York
May 13, 2021

WACHTELL, LIPTON, ROSEN & KATZ

By: /s/ Marc Wolinsky

Marc Wolinsky
Stephen R. DiPrima
Carrie M. Reilly
Nathaniel D. Cullerton
Shaun E. Werbelow
Brittany A. Fish
51 West 52nd Street
New York, New York 10019
(212) 403-1000
MWolinsky@wlrk.com

Attorneys for IAC/InterActiveCorp, Match Group, Inc., and Match Group, LLC

CERTIFICATION

I certify that Defendants' Memorandum of Law in Support of Motion to Exclude Evidence Relating to the 2016 Tinder Holiday Party complies with Rule 17 of Section 202.70 (Rules of the Commercial Division of the Supreme Court). I certify that the above referenced memorandum contains 6,971 words, excluding the caption, table of contents, table of authorities, and signature block. I further certify that I relied on Microsoft Word, a word-processing system, to determine this word count.

Dated: New York, New York
May 13, 2021

By: /s/ Marc Wolinsky
Marc Wolinsky
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for IAC/InterActiveCorp, Match Group, Inc., and Match Group, LLC