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VIA ECF

The Honorable Alan Albright
United States District Judge – Western District of Texas
800 Franklin Avenue, Room 301
Waco, Texas 76701

RE: Discovery Dispute in *Match Group, LLC v. Bumble Trading Inc., et al.*, Case No. 6:18-cv-00080-ADA

To the Honorable Alan Albright:

In preparation for an upcoming oral hearing on discovery issues at the Court's earliest convenience, this letter advises the Court of the nature of the present dispute.

I. The Court Should Overrule Defendants' Objection to Moving This Case Forward by Taking Video Depositions

Expert discovery is due to conclude on April 10, 2020. The *Daubert*/Dispositive Motion deadline is April 24, 2020. Trial is set for July 20, 2020. In parallel proceedings, a Final Written Decision in expected on the '811 Patent in September 2020, on the '023 Patent in November 2020, and on the '854 Patent in March 2021.

Defendants seek an extension because of the alleged inadequacy of remote depositions, particularly for experts. The nature of their extension request is continuously shifting, but Match understands that Defendants presently seek a month-long stay of the case based on the alleged inadequacies of remote depositions. ***At the same time, Defendants sought and took the remote deposition of Match's expert in the IPR proceedings on April 1, 2020, two days ago.*** Not once did Defendants suggest that this IPR deposition could not proceed because of the current COVID-19 crisis; instead, Bumble deposed Match's IPR expert from his house via remote connections, while the attorneys, witness, and court reporter complied with all relevant government guidelines and orders. Defendants' hypocrisy reflects an unfortunate opportunism: remote depositions are sufficient when Defendants want a matter to proceed, inadequate when they do not. Defendants are exploiting the country's COVID-19 crisis to attempt to allow their preferred venue, the IPRs proceedings, to leap ahead of this one.[1]

[1] This follows on a long history of Defendants' actions delaying scheduling issues in this case. For example, Defendants took four months (June to October) to negotiate ESI custodians and search terms, moving from one proposal (that Match had proposed too few custodians for

A. Background of the Dispute

This specific issue has been percolating for weeks. On March 18, 2020, as the country's COVID-19 concerns began, Defendants initially approached Match requesting a 30-day "stay" in light of the then-current COVID-19 concerns. Defendants backed off that position and requested a 30-day extension of both rebuttal report deadlines and expert discovery in a manner that did not impact the July 20, 2020 trial date—at least not "at [that] time."[2] Match indicated its willingness to discuss scheduling modifications as long as those discussions proceeded in an attempt to *resolve* COVID-19 issues—including preparing to take depositions by remote connection—and allowed for proceeding to trial on schedule. But instead of discussing how to make things work under the current conditions, Defendants dropped their request and did not request relief from the Court. Defendants reiterated at the time that they still "did not believe remote depositions were feasible"—despite having scheduled a remote deposition in the IPR—but that they did not need to "cross that bridge" yet.

The parties then served most of their rebuttal reports on the previously scheduled deadline, March 27, 2020. The parties agreed to move rebuttal reports for infringement and invalidity until April 2, 2020, based on minor issues related to source code review from the parties' experts on both sides.

Knowing that the expert discovery deadline was set for April 10, 2020—and knowing that Defendants had previously objected to video depositions—Match reached out to Defendants on March 27, March 30, and March 31 about getting expert deposition dates set. Defendants initially indicated that they were "working" on an answer for experts, ostensibly to look into their experts' availability. Then, on a phone call on March 31—with only eight remaining business days to conduct potentially 14 days of expert depositions[3]—Defendants indicated that they will seek an extension, and that the basis for that extension was "likely" based on the inadequacy of video depositions. The next day, April 1, 2020, Defendants indicated a request for a 60-day extension (including a continuance of the trial date) based on the inadequacy of video depositions and

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Bumble's counterclaim), to a new proposal (that only three custodians per producing side were warranted for the whole case), to finally a more reasonable scope of email discovery. These ESI delays ultimately necessitated a month-long extension of the fact discovery period because Defendants could not complete production in time, giving less room to maneuver in the remaining discovery period to proceed to trial as scheduled.

[2] The basis for seeking extensions of rebuttal report deadlines was based on Defendants' experts' inadequacy to review Defendants' *own source code*; i.e., Defendants had apparently refused to trust its own experts with their code.

[3] Under the operative discovery order, the parties are allotted 7 hours "per report." Match believes that at least some experts that served both opening and rebuttal reports could proceed in only a single day.

"availability of source code" issues.[4] This follows on prior correspondence in which Defendants indicated that the trial date would certainly be moved and anyone who believed otherwise was "living in dreamland." Apparently reluctant to make this request to the Court, Defendants shifted back to a 30-day request when Match indicated that it was going to ask for a telephonic hearing on the issue. Defendants current proposed schedule ostensibly allows for trial to proceed on schedule. But Defendants still maintain their objection to video depositions, and their proposed schedule orders that *nothing* happen in the case between now and April 30th—while contemplating a window of 7 business days for potentially 14 full days of expert depositions. Given that remote depositions will almost certainly be as necessary in May as they are today, Defendants' goal is clear: they are simply angling for a 30-day stay now so that, in a month, Defendants will truly need a continuance of trial.

Match has always indicated that it is amenable to extending the current April 10, 2020, deadline to at least April 17, 2020, and potentially beyond to allow sufficient time for all experts to sit for their depositions. It also indicated its flexibility to consider additional time to facilitate video depositions. But this is not a discussion Defendants are willing to have. They have no interest in solving practical issues caused by COVID-19, they merely want to maneuver with an eye toward moving the trial date. As their behavior with the IPR expert deposition makes clear, Defendants have no qualms pressing forward with remote depositions in their preferred venue.

B. The Court Should Overrule Any Objection to Remote Depositions.

As the Court's Standing Orders concerning COVID-19 makes clear, COVID-19 is an obvious and pressing public health emergency. But as those same Orders also make clear, business, including the courts, can and should continue. Dkt. 166 (ordering that "all hearings for civil cases will continue as scheduled, but will occur telephonically"). The parties and their counsel can remain safe, remain healthy, and responsibly take precautions to slow the spread of COVID-19 while continuing to proceed toward resolution of their dispute. Particularly in a competitor case of this magnitude, the perceived merits of remote depositions as compared to live ones is not a reason to halt this case. This is particularly true where one competitor, Bumble, has incentive to derail the trial date, has proposed one extension that requires moving the trial date, is currently proposing an extension that likely achieves that same goal, and has taken inconsistent positions between this litigation and the IPRs specifically to seek tactical advantage of the situation.

Not surprisingly, the issue of video depositions in the present environment has been addressed already in other jurisdictions with heavy patent dockets. For example, Judge Payne denied relief from scheduling deadlines that was based in part on a preference for live depositions, reasoning that "[w]hile the Court is sympathetic to the preference for in-person depositions, under the current circumstances that preference will have to yield to video for many of the remaining depositions." March 19, 2020 Order *in Uniloc 2017 LLC v. Google Inc.*, 18-cv-493-JRG-RSP (E.D. Tex.). Judge Gilstrap has also entered multiple orders highlighting the need for, and adequacy of, video depositions under the current circumstances. March 12, 2020 Order *in Image*

[4] The parties have now completed their technical reports.

Processing Technologies v. Samsung Electronics, et al., 20-cv-50-JRG (E.D. Tex.) ("These depositions may be taken through remote connections so that no one needs to travel to or from Korea."); March 12, 2020 Order *in St. Lawrence Commc'ns v. Amazon.com, Inc.*, 19-cv-0027-JRG (E.D. Tex.) ("Both parties are well-versed in the technological innovations that would remotely produce high quality witness depositions.").[5] Video depositions and telephonic/video hearings are simply the new way of life in litigation for the foreseeable future.

Nor would allowing for video depositions provide any asymmetries at trial. Both parties would proceed with remote depositions for the various witnesses remaining. Even assuming remote depositions are inferior to live depositions in some respects, proceeding with them does not provide either side any tactical advantage. In contrast, delaying this case and not the IPRs would provide Defendants with precisely the tactical advantage they seek.

Moreover, granting Bumble's requested continuance would reward apparent gamesmanship. Bumble initially raised this issue almost two weeks ago, and Match responded that video depositions would suffice. At that time, Bumble dropped the issue without bringing it to the Court. Instead, Bumble waited until its video deposition of Match's IPR witness was done to seek relief now. The reason for this timing is apparent: Bumble wanted its preferred venue to catch up and pass this one.

COVID-19 presents a number of uncharted issues to be addressed. And Match has always been willing to work with Defendants in good faith to address those issues while working to prepare this case to go to trial on schedule. But, as their inconsistent positions make clear, Defendants are not seeking to solve COVID-19 issues; they are seeking to gain from them. The Court should overrule Defendants' objection to remote depositions.

II. CONCLUSION

Match and IAC respectfully request that the Court overrule Defendants' objection to video depositions. In light of that ruling, the parties will meet-and-confer concerning a proposed schedule that does not stay the case for 30 days and does not impact the operative trial date.

Regards,

John F. Summers

[5] Similarly, the Supreme Court of Texas has ordered all state courts—without the participants' consent—to "[a]llow or *require* anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, or court reporter, but not including a juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means . . . ."

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record on April 3, 2020.

/s/ John F. Summers
John F. Summers