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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DZ RESERVE and CAIN MAXWELL (d/b/a MAX MARTIALIS), individually and on behalf of all others similarly situated,

Plaintiffs,

v.

META PLATFORMS, INC.,

Defendant.

Case No. 3:18-cv-04978 JD

META PLATFORMS, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR APPROVAL OF CLASS NOTICE PLAN

Date: June 9, 2022
Time: 10:00 a.m.
Court: Courtroom 11, 19th Floor
Hon. James Donato

I. INTRODUCTION

Consistent with this Court's directive, the parties worked together to submit a notice plan "on a joint basis, to the fullest extent possible." Dkt. 388 at 17. Meta Platforms, Inc. ("Meta") agrees that the forms of notice proposed by Plaintiffs—which include two types of in-product notifications, as well as email, traditional, and online media advertising campaigns—provide the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

However, the parties did not reach agreement on the content of the proposed notifications because Plaintiffs have refused to include *any* statement of Meta's defenses at all, other than a blanket denial of the allegations. That is not the law. When issuing Rule 23 class notice, courts should convey objective, neutral information about the nature of the class claims, including the defendant's defenses. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 174 (1989) ("[C]ourts must take care to avoid even the appearance of judicial endorsement of the merits of the action."); *see also* Fed. R. Civ. P. 23(c)(2)(B)(iii). Yet Plaintiffs are proposing a notice that recites their allegations in detail but limits Meta's position to a boilerplate, "Meta denies the allegations." That is not evenhanded, and it defeats the entire purpose of the notice to allow class members to evaluate adverse viewpoints in determining whether to opt out or be bound. This problem plagues both the in-app banner and the long- and short-form notices.[1] Each should be modified to be neutral, including by stripping Plaintiffs' one-sided language from the in-app banner notice or by adding Meta's defenses to the long- and short-form notices.

In addition, the Parties have conferred further regarding the timing for dissemination of class notice and agree that notice should occur on the later of 14 calendar days after the Court rules on Plaintiffs' motion or July 15, 2022. This will to allow time for the Ninth Circuit to consider

[1] Meta does not object to the language proposed for the in-app jewel notification, which is neutral, succinct, and should serve as a model for the in-app banner notice. By "banner" notice, Meta refers to both a "banner" that will appear at the top of the Ads Manager page and the text that appears in a box when an advertiser hovers over the banner. The text in the hover box is an extension of the banner text.

whether to take up Meta's Rule 23(f) petition and avoid the risk of confusing class members with premature notice while still allowing for notice sufficiently ahead of the trial date.[2]

II. BACKGROUND

The parties initially met and conferred regarding the forms and content of notice on April 19, 2022, and continued to have detailed discussions over the next 10 days about the best way to reach the most potential class members, including numerous emails regarding the feasibility and expected efficacy of potential forms of notice and their content.

After several requests from Meta, Plaintiffs first provided their proposed language for the in-product, short-form, and long-form notices on April 27, two days before the deadline to submit the notice proposal (and twelve days after Meta first requested it). The parties conferred the next morning with a focus on the in-product notifications, and Meta followed up with edits and comments to that notice the same day. On April 29, the parties continued to correspond about the content of the notices. Plaintiffs provided additional edits to the in-product notifications, and Meta followed up that afternoon with details about the technical feasibility of Plaintiffs' proposal, further edits to the in-product notifications, and targeted edits to the short-form and long-form notices that reflected the parties' correspondence to date and this Court's approach to (pre-settlement) class notice in the *Facebook Biometrics* litigation. After sending its proposed edits, Meta repeatedly followed up to discuss the language of the notices with Plaintiffs, but they declined to have a further call and ignored Meta's request that they identify any remaining areas of dispute before filing their motion.

Specifically, Meta requested: (1) to add language to the notices to set out Meta's defenses; and (2) to edit the expanded banner language that appears when users hover their mouse on the banner, in order to make it neutral. Plaintiffs refused to make those proposed changes, and submitted their motion regarding class notice without further conferring with Meta about the content of the notices.

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[2] If the Court takes up Meta's 23(f) notice, the Parties will meet and confer within two business days regarding whether the notice plan should be altered and will make a proposal to the Court on a joint basis, to the fullest extent possible.

III. ARGUMENT

A. Plaintiffs' Proposed Long-Form and Short-Form Notices and In-Product Banner Are Not Neutral And Should Be Modified To Avoid Confusion

Rule 23 requires that any class notice include a statement of the "class claims, issues, or defenses," Fed. R. Civ. P. 23(c)(2)(B)(iii), which courts have explained "must be neutral." *Adoma v. Univ. of Phoenix, Inc.*, No. CIV. S-10-0059 LKK, 2010 WL 4054109, at *2 (E.D. Cal. Oct. 15, 2010) (citing *Hoffman-La Roche*, 493 U.S. at 174 ("courts must be scrupulous to respect judicial neutrality" in "oversee[ing] the notice-giving process")). "To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action." *Hoffman-La Roche*, 493 U.S. at 174. An evenhanded statement of the case is necessary for class members to determine whether or not they should opt out of the class. *See In re NVIDIA GPU Litig.*, 539 F. App'x 822, 825 (9th Cir. 2013) (notice is only "satisfactory" if it provides "sufficient detail to alert" class members as to whether they have "adverse viewpoints"); *Camp v. Alexander*, 300 F.R.D. 617, 621 (N.D. Cal. 2014) ("The best practicable notice envisioned by Rule 23 'conveys objective, neutral information about the nature of the claim and the consequence of proceeding as a class.'" (citation omitted)). Plaintiffs' long- and short-form notices, as well as the in-product banner notification, run afoul of this neutrality requirement.

1. Plaintiffs' Long- and Short-Form Notices Are Inappropriately One-Sided

Plaintiffs refused to incorporate language describing Meta's defenses into the long- and short-form notices, insisting instead on a one-sided description of their claims that violates the neutrality required for class notice and risks confusing Meta's advertising customers. Plaintiffs' proposed language recites their allegations of fraud in detail without including *any* description of Meta's position, other than a boilerplate statement that Meta "denies all of Plaintiffs' allegations." Indeed, the proposed long-form notice includes a header that says "What is Facebook's Response?" but Plaintiffs refused to include the response Meta provided. For the notices to "avoid even the appearance of judicial endorsement of the merits of the action," *Hoffman-La Roche*, 493 U.S. at 174, Meta's description of its defenses (set forth below) must be included.

Consistent with this principle of neutrality, courts routinely approve class notices only where the notice includes sections explaining *both* plaintiffs' claims and defendants' specific responses to them. For example, in *In re Facebook Biometrics Information Privacy Litigation*, following class certification but before settlement, this Court approved a class notice that included a statement of Meta's (then Facebook's) defenses:

> Facebook denies Plaintiffs' claims in their entirety. Facebook denies that its technology is regulated by BIPA. It also contends that it gave the Class Members adequate notice and obtained their consent to use facial recognition technology on their photos. Facebook denies that any Class Member has been aggrieved by its alleged conduct. It denies that any Class Member may recover damages.

No. 3:15-CV-03747-JD (N.D. Cal.) (Dkt. 393-1). Likewise, this Court has approved of defense language in other cases involving consumer fraud and UCL claims where notice was sent out before a settlement or trial. *See Milan et al v. Clif Bar & Company*; No. 3:18-cv-02354-JD (N.D. Cal Dec. 6, 2021) (Donato, J.) (Dkt. 218-1) (form notice included defendant's arguments that the statements are true and not misleading, that there is no price premium attached to challenged statements, and that class members are not entitled to any relief); *Meek v. Skywest, Inc. et al.*, No 3:17-cv-01012-JD (N.D. Cal.) (Donato, J.) (Dkt. 173-1) (providing a lengthy summary of UCL defenses). This is standard. Yet without giving any reason, Plaintiffs included a robust description of their allegations, but rejected Meta's request to respond substantively at all. *See* Dkt. 411 at 2.

To remedy the current imbalance in both the long- and short-form notice, Meta proposes adding the following statement regarding its defenses (Ex. 1 at 2, 4, 6):

> Facebook denies all of Plaintiffs' allegations. Facebook maintains that it provides accurate and informative disclosures about Potential Reach. Facebook has also explained to its advertisers (who understand) that despite Facebook's efforts to de-duplicate accounts, there are some users who have multiple accounts which may impact Potential Reach estimates. Facebook does not charge advertisers based on Potential Reach estimates, but instead charges based on actual results which are provided in real time to advertisers. Facebook denies that any Class Member has been damaged because advertisers do not set their budgets in reliance upon "Potential Reach" estimates, but rather based on estimated and actual results.

2. <u>Plaintiffs' Expanded In-Product Banner Notification Is Inappropriately One-Sided And Unclear</u>

Plaintiffs' proposed in-product banner notification is both impermissibly one-sided and too long and unwieldy for an in-product banner notification. Banner notifications are not designed to

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