IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: TIKTOK, INC., CONSUMER PRIVACY LITIGATION	MDL No. 2948
	Master Docket No. 20-cv-4699
	Judge John Z. Lee
This Document Related to All Cases	Magistrate Judge Sunil R. Harjani

OPPOSED[1] MOTION TO ACCEPT MOVANTS' TIMELY AND VALID REQUEST FOR EXCLUSION FROM THE SETTLEMENT, IN THE ALTERNATIVE, OBJECTIONS TO CLASS SETTLEMENT FOR FAILURE TO PROVIDE NOTICE REGARDING THE OPT OUT PROCEDURE

Movants are 2,254 people each of whom, individually signed and submitted a timely opt out form, requesting to be excluded from the class action settlement. Declaration of Michael Kind ("Kind Decl.") ¶ 39, Exh. B; Declaration of Yana Hart ("Hart Decl.") ¶ 3, Exh. E; Declaration of Joshua B. Swigart ("Swigart Decl."), ¶ 3, Exhs. G, H. The Settlement Administrator wrongfully, and without any authority, determined that Movants' individually signed exclusion requests were "mass opt outs" and, therefore, not allowed. Although it is unclear why the Settlement Administrator determined these individually signed opt outs to be "mass" opt outs, the only plausible, yet absurd, explanation of their rejection is that the 2,254 opt outs were sent inside of several envelopes as opposed to 2,254 envelopes. No opt outs were jointly signed by multiple

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[1] TikTok, Inc. opposes Movants' motion; Plaintiffs in this matter have indicated that they take "no position" on the instant motion.

Movants. Therefore, the Settlement Administrator wrongfully determined that those exclusion requests were "class opt outs" and therefore not allowed.

This motion is based upon the accompanying memorandum of points and authorities, all papers and records on file herein and on such oral arguments which may be presented at the hearing of the motion.

I.   INTRODUCTION

It is fundamental to Due Process that an absent plaintiff be allowed to remove herself from a class action settlement, if she so choses.

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

Opt-out rights play a central role in class actions because the class actions bind parties who are not central participants, imposing res judicata effect on their individual rights. Therefore, courts absolutely must protect the rights of the absentee class members allowing for them to follow reasonable and clear instructions for submitting their exclusion requests. *See id.*

Movants, following the Court's Preliminary Approval Order ("Order") (Dkt. 162) and the class Notice instructions, submitted their individual exclusion requests, within each of the 2,254 exclusions stating: (i) the name of the Action; (ii) the person's or entity's full name, address, email address and telephone number; (iii) a specific statement of the person's or entity's intention to be excluded from the Settlement; (iv) the identity of the person's or entity's counsel, if represented; and (v) the person's or entity's authorized representative's signature and the date on which the request was signed. Kind Decl., Exh. B; Hart Decl., Exh. E; Swigart Decl., Exhs. G, H. Each request for exclusion contains specific language, showing the class member's informed consent, and intent to be excluded from the class settlement. *See id*. Each Movant has individually signed his or her request for exclusion. *Id.*

First, each individual request for exclusion provided all of the information required by the class Notice and the Court's Order. *See id*. Since Movants complied with the Notice requirements, Due Process requires that their opt out requests be honored. *Phillips Petroleum Co.* 472 U.S. at 812. The Settlement Administrator erroneously deemed these individual opt outs as "mass opt outs" for an unknown reason. In fact, none of the concerns raised in this Court's September 30, 2021, Order, regarding "class opt outs" are present here. Counsel for the Movants did <u>not</u> provide a single signed opt out form for all 2,254 individuals. Each Movant signed an individual exclusion request, that included an unequivocal intent to opt out of the class settlement. Therefore, the Court must accept the Movants' valid exclusion requests, and grant this instant Motion.

Second, if more was required from the absentee plaintiffs who wish to opt out, then the Notice violated Movants' due process rights by failing to advise them of these additional requirements. *See Phillips Petroleum Co.,* 472 U.S. at 812 ("The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *In re Sys. Software Assocs. Sec. Litig.,* Master File No. 97 C 177, 2000 U.S. Dist. LEXIS 3071, at *30 (N.D. Ill. Mar. 8, 2000) ("[D]ue process requires that an absent plaintiff be provided with the opportunity to opt out of the proposed class."); *Chaffee v. A&P Tea Co.,* Nos. 79 C 3625, 1991 WL 5859, at *2 (N.D. Ill. Jan. 16, 1991) (The "notice requirement of Rule 23 is designed to guarantee that those bound by the ruling in a class action were accorded their due process rights to notice and an opportunity to be heard."). Here, each Movant complied with the Court's Preliminary Approval Order and the Notice requirements. Nevertheless, the Settlement Administrator "invalidated" these individual exclusion requests. Should the Court determine that the Opt Outs were, in fact, invalid, the Movants object on the grounds that the Notice was not sufficiently clear to meet the Due Process requirements and Rule 23's requirement for "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23.

Third, should this Court find any deficiency within the signed opt out requires (which Movants do not believe exists), and in an abundance of caution, Movants request additional time

to cure any such deficiency and/or provide the Movants with an opportunity to be heard. There is no question that Movants acted in good faith and timely submitted their unequivocal exclusions from the class settlement. However, since Movants each unequivocally, and individually, requested to be opted out of the settlement, this Court should rule that Movants' requests are valid and opt Movants out of the class.

II.   STATEMENT OF FACTS

A. Preliminary Approval Orders.

On September 30, 2021, this Court overruled the objects by Brian Behnken and Joshua Dugun, requesting to be allowed to "opt out *en masse* by means of a single unsigned, electronic filing from their lawyers." Dkt. 161, pp. 30. The Court recognized the potential for "unauthorized mass opt-outs" and ruled that "individual signatures" were required. *Id.* "For this reason, courts have routinely enforced the requirement that class members individually sign and return a paper opt-out form as 'vital' to ensuring 'that the class member is individually consenting to opt out.'" Dkt. 161. As the result, the Court ordered:

> Requests for Exclusion ("Opt-Outs"). Any Settlement Class Member who does not wish to participate in the Settlement must submit a Request for Exclusion to the Settlement Administrator stating his or her intention to be excluded from the Settlement. For a Request for Exclusion to be valid, it must set forth: (i) the name of the Action; (ii) the person's or entity's full name, address, email address and telephone number; (iii) a specific statement of the person's or entity's intention to be excluded from the Settlement; (iv) the identity of the person's or entity's counsel, if represented; and (v) the person's or entity's authorized representative's signature and the date on which the request was signed.

Dkt. 162, pp. 6, ¶ 10 (Oct. 1, 2021).

Notably, while "individual signatures" were required, <u>this Court did not require people to directly submit their individually signed exclusions requests to the administrator</u>. *See id.* <u>Nor was counsel banned from submitting such requests</u>. *See id.* Similarly, there was no requirement that each of the individual opt outs be placed in a separate envelope for mailing; which, if known, Movants would have completed. *See id.*

B. **Class Notice.**

The Notice to the Class Members provided as follows:

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you do not want benefits from the Settlement, and you want to keep the right to sue or continue to sue Defendants on your own about the legal issues in this case, then you must take steps to get out of the Settlement. This is called excluding yourself—or it is sometimes referred to as "opting out" of the Settlement Class.

10. How do I get out of the Settlement?

To exclude yourself from the Settlement, you must send a timely letter by mail to:

> Musical.ly and/or TikTok Class Action
> Attn: Exclusion Request
> P.O. Box 58220 Philadelphia, Pennsylvania 19102

Your request to be excluded from the Settlement must include: (i) the name of the Action; (ii) your full name, address, email address and telephone number; (iii) a specific statement of your intention to be excluded from the Settlement; (iv) the identity of your counsel, if represented; and (v) your signature and the date on which the request was signed.

Your exclusion request must be postmarked no later than **January 31, 2022**. You cannot ask to be excluded on the phone, by email, or at the Settlement Website.

You may opt out of the Settlement Class only for yourself or your minor child.

Class Notice, Kind Decl., Exh. A. pp. 6.[2]

While the notice required to be signed by claimants (as they are – Exhs. B, E, G, H), there

was no limitation on *who* can facilitate this submission to the Settlement Administrator. *Id.* To the

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[2] *See also* Dkt. 196, Exh. B (directing the individuals wishing to opt out to use www.tiktokdataprivacysettlement.com website, which contains the same notice within the "Important Documents") (*see https://angeion-public.s3.amazonaws.com/www.TikTokDataPrivacySettlement.com/docs/TikTok+Long+Form+Notice+(website)+v3+draft+20211019.pdf*)

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