NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOTSTRATEGY CO., individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. META PLATFORMS, INC., FKA Facebook, Inc., Defendant-Appellee.	No. 21-17056 D.C. No. 3:20-cv-00170-WHA MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted November 14, 2022
San Francisco, California

Before: RAWLINSON and HURWITZ, Circuit Judges, and CARDONE,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

This putative class action by dotStrategy Co. claims that Facebook, Inc.[1] violated the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, through misleading representations about its advertising charges. Two kinds of charges are at issue: (1) "click-based" charges, under which dotStrategy paid a fee for each click on its advertisements, and (2) "impression-based" charges, under which dotStrategy paid a fee for each one-thousand occasions that an advertisement was displayed to a Facebook account.

The district court granted summary judgment in favor of Facebook—finding "no genuine dispute that [Facebook's] invalid clicks statement was anything but true in our case" and that "Facebook never represented that it would not charge for invalid *impressions*." Reviewing the summary judgment *de novo*, *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011), and the district court's denial of class certification for abuse of discretion, *Castillo v. Bank of Am., NA*, 980 F.3d 723, 728 (9th Cir. 2020), we affirm.

1. dotStrategy ran only two click-based ad campaigns, and the district court correctly found that "[t]here is absolutely nothing in the record suggesting that Facebook charged plaintiff for a click by a fake account in either of these two campaigns." Thus, as the court noted, there was no evidence that Facebook's

[1] Although Facebook, Inc. has changed its name to Meta Platforms, Inc., we refer to the appellee, as did the district court, as "Facebook."

allegedly misleading statement—"You will not be charged for clicks that are determined to be invalid"—"was anything but true," and the statement did not violate the UCL.

2. "A district court abuses its discretion" by denying a request to continue summary judgment "only if the party requesting a continuance can show that allowing additional discovery would have precluded summary judgment." *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1076 (9th Cir. 2019) (cleaned up). There was no abuse of discretion here. The district court reasonably stated that dotStrategy cannot "expect that Facebook's otherwise meritorious motion should be deferred indefinitely because it is 'plausible' that Facebook will find some evidence of nominal harm to the plaintiff." Moreover, dotStrategy "stipulated to forgo any further fact or expert discovery in the case unless and until the appellate court reverses or vacates the district court's order denying class certification."

3. The UCL prohibits "not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public," *Kasky v. Nike, Inc.*, 45 P.3d 243, 251 (Cal. 2002) (cleaned up), analyzed under a reasonable-consumer test, *see Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1017 (9th Cir. 2020). dotStrategy does not challenge the district court's conclusion that Facebook never expressly "represented that it would not charge for invalid *impressions*" but argues that it was

misleading "for Facebook to say that it will not charge for invalid clicks" but then "charge for impressions delivered to fake accounts." But Facebook clearly explained the differences between the charging practices to advertisers, who had the general option to choose under which system they would be billed. A reasonable advertiser would also know that it was being charged a much higher rate for clicks than impressions. And, as the district court noted, "[n]o reasonable consumer would have been misled by the fact that Facebook required its users to use the name they go by in everyday life to believe that Facebook guaranteed that every account on its platform necessarily did so." Indeed, Facebook expressly disclosed that "fake" accounts make up an estimated 5% of its monthly active users.

4. Because the district court properly granted summary judgment on dotStrategy's claims, it also did not abuse its discretion in denying class certification for the proposed classes. *See O'Shea v. Littleton*, 414 U.S. 488, 494–95 (1974).

AFFIRMED.