UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

DEFENDANT TIKTOK INC.'S OPPOSITION TO MOTION TO ACCEPT MASS OPT-OUTS

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I. INTRODUCTION

Defendant TikTok Inc. ("TikTok") respectfully opposes the mass motion filed by a few law firms who solicited and submitted 2,254 opt-out requests *en masse* that were rejected by the Settlement Administrator (ECF No. 207) (the "Motion"). The Motion should be denied because these mass opt-outs are expressly prohibited by the Settlement Agreement for the reasons the Court identified in its September 30, 2021 Memorandum Opinion and Order preliminarily approving the Settlement Agreement (ECF No. 161). These mass opt-outs were also improperly solicited using deceptive advertising that ignored and disregarded the Court-approved class communications. In addition to the problems inherent in the solicitation of mass opt-outs, the motion seeking to validate these opt-outs *en masse* is being used to mask the fact that the opt-out requests are plagued with individual defects, such that they would have also been rejected on an individual basis. The abundance of defects is yet another ill consequence of the mass opt-out process and provides yet another reason why courts enforce prohibitions on such mass opt-outs.

II. THE SETTLEMENT EXPRESSLY PROHIBITS OPT-OUTS SOLICITED AND SUBMITTED *EN MASSE*

By way of background, the Settlement Agreement requires the following individual action by each class member seeking to opt-out of the Settlement: (1) "*the Class Member* must complete, sign, and mail to the Settlement Administrator a Request for Exclusion"; (2) "*using a form to be agreed on by the Parties*"; and (3) that "must be *signed by the Class Member* seeking exclusion *under penalty of perjury*." Settlement Agreement ("Agmt.") § 10.1 (emphasis added).

The Settlement Agreement further requires that each individual seeking exclusion provide information necessary to confirm their intention, identity, and contact information: "(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." *Id.*

The Settlement Agreement expressly disallows "mass" opt-outs that are solicited, prepared, and mailed in by a law firm on behalf of a mass of individuals to opt them out of the settlement: "So-called 'mass' or 'class' opt-outs shall not be allowed." Agmt. § 10.1. Different from "class" opt-outs in which one individual seeks to opt-out a class of others without each individual's personal involvement, "mass" opt-outs occur when numerous individual opt-outs are solicited and submitted jointly as part of a coordinated campaign by the same law firm or group of firms.

Pursuant to Section 10.1 of the Settlement Agreement, the parties prepared a Request for Exclusion form that was submitted to the Court for review on April 20, 2021 and then posted to the Settlement Website prior to dissemination of the Class Notice in November 2021. Declaration of Anthony Weibell submitted herewith ("Weibell Decl."), ¶ 2.

During the opt-out period, the Settlement Administrator received just 28 valid individual opt-out requests, but also 4,036 invalid opt-out requests that were submitted *en masse* by the law firms that filed the present Motion. *Id.* ¶ 3. Most of these mass opt-outs did not use the approved Exclusion Request form, and at least 1,782 of them were duplicative—filed on behalf of the same person as other requests—leaving 2,254 unique individuals included in the mass opt-outs. *Id.* Because these 2,254 opt-outs solicited and submitted *en masse* violated the Settlement's prohibition against mass opt-outs, the Settlement Administrator rejected them as facially invalid.

Although the Settlement Administrator did not thereafter conduct an individual review of each of these opt-outs to determine whether they otherwise complied with the exclusion requirements, a review of the requests submitted with the Motion shows that more than a thousand of them were also individually defective for various reasons, as explained in Section V below.

III. THE COURT'S PRELIMINARY APPROVAL ORDER APPROVED AND EXPLAINED THE NEED TO PROHIBIT SOLICITATION OF MASS OPT-OUTS

It is "clearly within the court's discretion to turn away attempts by lawyers to opt-out class members *en masse*." *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 241 (3rd Cir. 2002). Courts routinely approve class settlements with prohibitions on mass opt-outs because "[c]lass actions and class settlements would lose their effectiveness if internal struggles among different plaintiffs' lawyers and factions of plaintiffs were paired with an easy way to fragment the class." *Hallie v. Wells Fargo Bank, N.A.*, No. 12-00235, 2015 WL 1914864, at *4 (N.D. Ind. Apr. 27, 2015). Accordingly, there is an "overwhelming amount of law denying mass opt-outs." *Larson v. AT&T Mobility LLC*, No. 07-5325, 2009 WL 10689759, at *3 (D.N.J. Jan. 16, 2009). Courts will also block attempts by law firms seeking to solicit masses of individuals to opt-out of a class settlement. *See, e.g.*, *id.* ("The Court also finds that [defendant] is not obligated to provide to [opt-out counsel] the names and contact information of each of his class members, such that he might effect an opt-out on behalf of each named individual.").

Here, the Court's memorandum opinion on preliminary approval explained and approved the need for the Settlement to prohibit solicitation of mass opt-outs by law firms. *See* ECF No. 161 at 30-31. The Court shared the view of other courts that class members should be required to personally complete, sign, and mail in their requests for exclusion because electronic and Internet technology "makes it easier for third parties and their counsel to file unauthorized mass opt-outs." *Id.* (quoting *In re CenturyLink Sales Pracs. & Sec. Litig.*, No. 17-2832, 2020 WL 3512807, at *3 (D. Minn. June 29, 2020)).

Because they lack the traditional attorney-client relationship where a client and attorney individually discuss the client's individual situation, mass opt-outs are particularly prone to encouraging opt-outs from those who are uninformed, vulnerable, easily-misled, frauds, imposters,

double-dippers (*i.e.*, both opting out and submitting a claim under the settlement), or even fictitious. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 17-2800, 2020 WL 256132, at *26 (N.D. Ga. Mar. 17, 2020) ("[T]he personal signature requirement decreases the likelihood that services encouraging mass objections or opt-outs file unauthorized or fictitious objections.").

As this Court recognized, mass opt-outs are also "highly indicative of a conclusion that . . . counsel did not spend very much time evaluating the merits of whether or not to opt-out in light of the individual circumstances of each of their clients and in consultation with them." ECF No. 161 at 31 (quoting *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex.*, 910 F. Supp. 2d 891, 939 (E.D. La. 2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014)); *see also Hallie*, 2015 WL 1914864, at *4 (the goal of enforcing mass opt-out prohibitions in class settlements is to "heighten[] the likelihood that each class plaintiff will make an informed, individualized decision whether to opt-out, and courts want to encourage this careful decisionmaking process").

The Court further explained that "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.'" ECF No. 161 at 30-31 (quoting *CenturyLink*, 2020 WL 3512807, at *3-4 (collecting cases); citing *In re Deepwater Horizon*, 819 F.3d 190, 197 (5th Cir. 2016) (noting that this "common and practical requirement" is "consistently enforced" in MDLs)); *see also In re Chesapeake Energy Corp.*, --- F. Supp. 3d ----, 2021 WL 4776685, at *21 (S.D. Tex. Oct. 13, 2021) ("Group opt-outs are disfavored, and individual opt-out requirements are not unduly burdensome.").

The prohibition on solicitation of opt-outs *en masse* is the best and preferred solution to the mass opt-out problem. The alternative, of course, is for defendants to demand a "blow-out" or

"blow-up" provision that would terminate the settlement when a certain number of opt-outs is reached. *See* Federal Judicial Center, *Manual for Complex Litigation* § 22.922 (4th ed. 2004) ("Defendants often condition a settlement in a Rule 23(b)(3) class on having the number of opt-outs remain at or below a certain percentage or number of absent class members, commonly known as a 'blow-out' clause."). Blow-up provisions are bad for the class because there is a significant risk that mass opt-outs will blow-up the settlement, ruin the benefits of the settlement for the vast majority of class members, and result in a complete waste of the court's and parties' settlement-approval efforts. Here, Plaintiffs' Lead Counsel obtained the optimal result for the Class by negotiating a class settlement that uses a prohibition on solicitation of mass opt-outs in lieu of a blow-up clause to address the mass opt-out problem. *See* Agmt. § 10.1. This negotiated benefit to all parties cannot be disregarded.

Given the express terms of the Settlement Agreement and the Court's preliminary approval decision, the Settlement Administrator's rejection of these mass opt-outs should be affirmed.

IV. THE MASS OPT-OUTS WERE IMPROPERLY SOLICITED

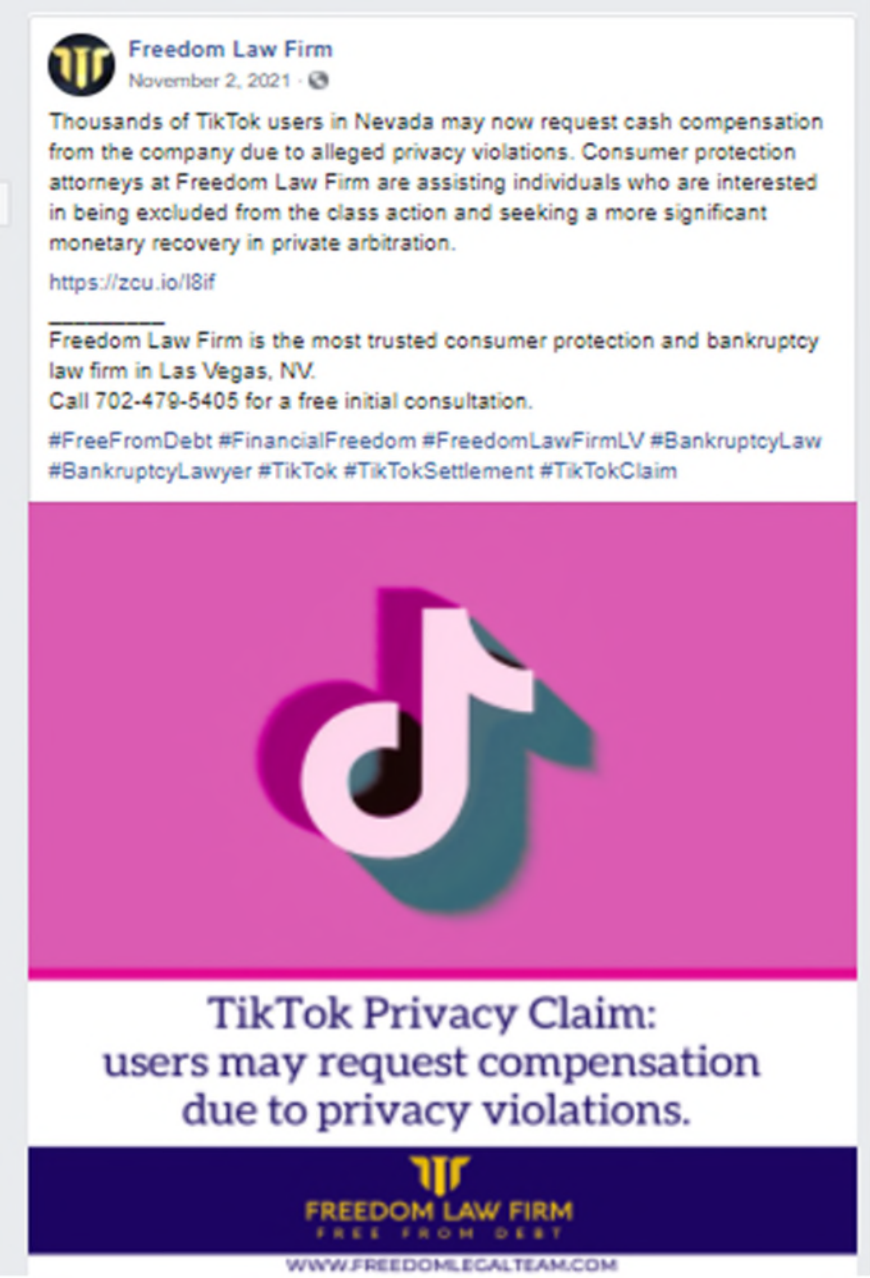
Separate from the submission of mass opt-outs, the manner in which the mass opt-outs here were improperly *solicited* also illustrates the concerns that courts have raised with mass opt-outs. *See* Federal Judicial Center, *Manual for Complex Litigation* § 21.33 (4th ed. 2004) ("Objectors to a class settlement or their attorneys may not communicate misleading or inaccurate statements to class members about the terms of a settlement to induce them to file objections or to opt-out.").

For example, one of the ads run by the law firms who filed the Motion deceptively advertised that TikTok users could "prequalify for possible compensation" as part of a lawsuit against TikTok. But the ad failed to mention that a class settlement had already been reached to provide significant compensation to class members, failed to note that the law firm running the ad was not appointed counsel for class members, failed to note that class members were already being

represented in the lawsuit by Class Counsel appointed by the Court, and failed to mention that all U.S. TikTok users automatically qualified for compensation without needing to "prequalify" for compensation:

One of the other law firms that filed the Motion distributed a similarly deceptive and misleading solicitation for mass opt-outs. While this solicitation gestures toward the existence of a settlement, it does not include any information on the actual terms of the settlement, much less link to the Court-approved settlement notice or settlement website. Even more problematic, the ad deceptively encourages class members to "seek[] a more significant monetary recovery in private arbitration" without warning class members that any attempt to do so would forever forfeit their right to a payment from the existing Settlement. Nor does the ad warn class members of the very

high risk that any individual claims brought in arbitration would fail and result in no recovery at all for the class member. In addition, the ad includes hashtags like "#FreeFromDebt" and "#BankruptcyLaw," which are otherwise *non sequiturs* in the context of this privacy matter, and thus appears targeted to class members who are economically vulnerable and more susceptible to misinformation:



Such mass solicitations are simply unethical because the law firms seeking to opt-out masses of class members have little to lose and everything to gain, while individual class members who mistakenly respond to these ads may unknowingly forfeit all rights under the Settlement without ever being told the Court has found the Settlement fair, reasonable, and adequate for class members. Notably, both of the above ads appear to have been run after the public announcement of the MDL Settlement but prior to distribution of the Class Settlement Notice by the Settlement Administrator, thereby preempting the Court-approved notice and potentially misdirecting class members to these law firms instead of to the Court-appointed class counsel and the Court-approved notice and settlement website.

Courts have criticized such deceptive conduct in the solicitation of mass opt-outs. As noted by another court in this District, "[m]isrepresentations about the suit to class members gives rise to 'an obvious potential for confusion and/or adversely affecting the administration of justice' in class proceedings." *Mullen v. GLV, Inc.*, 334 F.R.D. 656, 661-62 (N.D. Ill. 2020) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 n.12 (1981)). Moreover, "[c]ommunications that are potentially coercive by encouraging individuals to opt-out can affect a class member's decision to participate in the suit, undermining Rule 23's policy of ensuring that this is an informed choice based on unbiased information." *Id.* (collecting cases).

Indeed, in the *Facebook* BIPA class action frequently cited in the settlement approval papers here, a law firm that engaged in similar conduct was made to cease solicitation and to send a curative notice to the thousands of class members who had responded to their misleading solicitation of mass opt-outs. *See In re Facebook Biometric Info. Privacy Litig.*, 522 F. Supp. 3d 617, 623 (N.D. Cal. 2021), *aff'd*, No. 15-03747, 2022 WL 822923 (9th Cir. 2022); Tr. of

Proceedings at 13:14-16, *In re Facebook Biometric Info. Privacy Litig.*, No. 15-03747 (N.D. Cal. Sept. 22, 2020), ECF No. 487 (ads soliciting opt-outs "cannot be disruptive" to the settlement).

Similarly, courts have held that "[i]mproper communications from non-parties that attempt to do an end run around the court-approved notice of settlement are particularly concerning: the class notice is 'crucial to the entire scheme of Rule 23' in that it provides a neutral description that enables class members to conduct an 'independent analysis of their own self-interest' in determining whether to object to or opt-out of a settlement." *Chalian v. CVS Pharmacy, Inc.*, No. 16-8979, 2020 WL 7347866, at *4 (C.D. Cal. Oct. 30, 2020) (quoting *Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 490 (E.D. Pa. 1995)). One U.S. Circuit Court of Appeals further decried the biased "one-sided" nature of ads soliciting mass opt outs: "Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal." *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1203 (11th Cir. 1985). Accordingly, "courts have taken various curative actions to prevent court-approved class notification materials from being nullified by competing and inaccurate information." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-1720, 2014 WL 4966072, at *31 (E.D.N.Y. Oct. 3, 2014) (collecting cases).

To make matters worse, certain law firms will now use new Internet technology to make mass opt-outs *appear* like individually signed opt-outs and give the appearance that class members have made an individually-considered decision to opt out in consultation with counsel. *See* 1 Elizabeth J. Cabraser, *Litigating Tort Cases* § 9:16 (2021) ("Unauthorized opt-out campaigns are nothing new to class action settlements . . . . However, the era of the Internet has enabled increasingly cheap and far-ranging opt-out campaigns to be launched, challenging the ability and will of the courts to protect the integrity of the class certification and settlement notification

process by ensuring that only court-authorized, complete and accurate communications reach class members."). Using such technology, the law firms here seem to have run online ads to solicit names, contact information, and consent from class members and then used this information to automatically generate individual requests for exclusion with electronically generated "signatures."

This technology does not change the fact that these firms are still soliciting and submitting opt-out requests *en masse* to disrupt the Court-approved settlement. All of the same concerns discussed with traditional mass opt-outs still apply to these mass-auto-generated individual electronic opt-outs. *See In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1244, 1246 (N.D. Cal. 2000) ("The court is particularly troubled by the distribution of a 'notice' not authorized by the court and by the assembly-line pre-authorization of class 'opt-outs.'"); *Georgine*, 160 F.R.D. at 490, 497 (voiding opt-outs solicited *en masse* by non-settling lawyers who "exposed class members to one-sided, misleading claims that likely will prohibit a 'free and unfettered' decision to opt-out of the class").

As in the cases cited above, the mass opt-outs here should be rejected for improperly seeking to disrupt the Rule 23 class action process and the court-approved class settlement.

V. THE MASS OPT-OUTS ARE PLAGUED WITH INDIVIDUAL DEFECTS

In addition to the problems inherent in the solicitation and submission of mass opt-outs, the motion to validate these opt-outs *en masse* is being used to mask the fact that the individual opt-out forms are plagued with individual defects that would have disqualified them on an individual basis. Notably, the Settlement Administrator initially received 4,036 opt-out requests *en masse* from these laws firms but later discovered that at least 1,782 of them were duplicative of each other, leaving just 2,254 non-duplicative opt-out requests. Because the Settlement Administrator rejected all of these for violating the Settlement's prohibition on mass opt-outs, none

of them were individually reviewed by the Settlement Administrator for compliance with the Settlement terms and Preliminary Approval Order. However, a review of the exhibits to the Motion shows that at least 1,037 of them suffer from various defects. *See* Weibell Decl., Ex. A.

Class members seeking to have their opt-outs accepted by the Court bear an individual burden to show the Court that they submitted a valid opt-out request. *Allianz Glob. Invs. GMBH v. Bank of Am. Corp.*, 463 F. Supp. 3d 409, 438 (S.D.N.Y. 2020) ("The class member must show that [opt-out] notice was effectively and timely communicated."); *In re Graniteville Train Derailment*, No. 05-115, 2010 WL 11229662, at *2 (D.S.C. Feb. 8, 2010) ("It is Plaintiff's burden to prove that he properly opted-out of the class settlement."). Notably, the Motion relies on dated, out-of-circuit authority to argue that any "reasonable indication" of an intent to opt-out will suffice. *See* Mot. at 11 (quoting *In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1291 (10th Cir. 1974); *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982)). But the Seventh Circuit has explicitly rejected *Four Seasons* and *Plummer's* "reasonable indication" approach as "difficult if not impossible to administer," recognizing that defects matter. *In re Navistar Maxxforce Engines Mktg. Sales Pracs. & Prods. Liab. Litig.*, 990 F.3d 1048, 1052 (7th Cir. 2021). "Following mechanical rules is the only sure way to handle suits with thousands of class members." *Id.* at 105.

Here, the 2,254 individuals who are a part of the mass motion to have their opt-outs validated by the Court have not met their individual burden of proof, and many of them have no hope of doing so because their requests are missing required information and elements.[1]

[1] The law firms that filed the Motion have suggested that the defects in their submissions should be excused because the full list of required information was not listed in the FAQs and Class Notice on the Settlement Website, even though it was listed in multiple other places on the Settlement Website (namely, the Settlement Agreement, the Court's order granting preliminary approval, and the "Exclusion Form" on the website). Such an argument is easily rejected because the Motion itself lists the requirements, admits the law firms knew what information was required, and claims

Many of the mass forms are not just missing information, but actually contain fictitious information, such as the demonstrably fictitious phone number made up entirely of the number "5." ECF No. 208-2 at 216. Other opt-out requests are even more egregious. For example, one of the purported opt-outs submitted by these firms was filled out and signed by a class member with the fictious name "wob wob!!!!!" (exclamation marks included in the name field and in the electronic signature), and another was filled out and signed by "JaydenDropemOff frog" (though the signature inexplicably reads "BIG DOA"):

ECF No. 208 at 85, 131. It is difficult to believe that opt-outs signed "wob wob!!!!!" and "BIG DOA" were the result of an informed, individual discussion with counsel about the pros and cons of opting out of the Settlement.

Beyond the 1,782 duplicate opt-out requests caught by the Settlement Administrator, the exhibits to the Motion still contained several duplicates that raise troubling questions about how these opt-out requests were harvested and prepared. Some individuals appear to have signed multiple *different* opt-out forms on the same day. *See* ECF No. 208-2 at 64, 234, 434; *id.* at 62,

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that their opt-out requests contained all of this required information. *See* Mot. at 2 ("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."). If these law firms were unsure about the requirements, they could always just use the Exclusion Form provided on the website or email the Settlement Administrator for clarification.

265, 273. Although counsel for the opt-outs claims these are merely erroneous duplicates (*see* ECF No. 220 ¶ 4), upon inspection, there are discernable differences in the signatures and layouts of the forms. Such discrepancies suggest that the forms submitted to the Court with the Motion may not be the same documents presented to these class members for signature (if any forms were actually signed at all), but rather may have been pieced together by the law firm to add required information after the fact.

In addition to duplicate opt-out forms, many individuals listed as opt-outs later personally submitted a claim form under penalty of perjury to the Settlement Administrator to receive a *payment* from the Settlement, thereby contradicting and superseding their request for exclusion. Weibell Decl. ¶ 3. To include such individuals in the Motion to validate their opt outs is fraudulent.

Raising even more questions, the opt-out law firms filed a supplemental declaration more than a week after their motion in which they admit that they entirely omitted the opt-out requests for *fourteen* of their clients and belatedly seek to have those requests validated three months after the deadline. *See* ECF No. 220 ¶ 5; ECF No. 220-1. Such untimely requests should be disregarded. Moreover, their supplemental declaration compounds—rather than resolves—the confusion created by the initial filing, as even this limited batch of tardy opt-outs presents a variety of facial defects. For instance, there are forms that lack essential address information, such as city and state (ECF No. 220-1 at 5) or street address (*id.* at 3). One entry even reads as follows: "My full address is: N/A (UNABLE TO SUBMIT FORM WITHOUT SIGNING THIS PAGE)." *Id.* at 15.

The abundance of defects in the mass opt-outs provide an independent basis on which the Court should deny the Motion and another good reason why courts enforce prohibitions on such mass opt-outs.

VI. CONCLUSION

For all these reasons, the Motion should be denied. However, because class members may have been victims of the law firms that solicited their opt-outs *en masse*, TikTok does not object to providing a 14-day or other reasonable time period for the individuals listed in the Motion to participate in the Settlement and obtain a monetary recovery by submitting a claim to the Settlement Administrator.

Respectfully submitted,

DATED: April 27, 2022

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: */s/Anthony J Weibell*
Anthony J Weibell

Lead Counsel for all Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2022, the foregoing document was filed electronically through the Court's Electronic Case Filing System. Service of this document is being made upon all counsel of record in this case by the Notice of Electronic Filing issues through the Court's Electronic Case Filing System on this date.

/s/Anthony J Weibell
Anthony J Weibell