

1 Robert C. Fellmeth (SBN 49897) / cpil@sandiego.edu  
2 Elisa Weichel (SBN 149320) / eweichel@sandiego.edu  
3 Christina Riehl (SBN 216565) / criehl@sandiego.edu  
4 Center for Public Interest Law  
5 Children's Advocacy Institute  
6 University of San Diego School of Law  
7 5998 Alcala Park  
8 San Diego, CA 92110  
9 Tel: 619-260-4806 / Fax: 619-260-4753

6 Attorney for *Amicus Curiae*  
Center for Public Interest Law and Children's Advocacy Institute

8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11 ANGEL FRALEY; PAUL WANG; SUSAN  
12 MAINZER, JAMES H. DUVAL, a minor, by  
13 and through JAMES DUVAL, as Guardian ad  
14 Litem; and W.T., a minor, by and through  
15 RUSSELL TAIT, as Guardian ad Litem;  
individually and on behalf of all others  
similarly situated,

16 Plaintiffs,

17 v.

18 FACEBOOK, INC., a corporation; and DOES  
1-100,

19 Defendants.

Case No. CV 11-01726 RS

**UPDATED *AMICUS CURIAE***  
**MEMORANDUM OF THE CENTER FOR**  
**PUBLIC INTEREST LAW AND**  
**CHILDREN'S ADVOCACY INSTITUTE**  
**IN OPPOSITION TO PROPOSED**  
**SETTLEMENT AGREEMENT, AS**  
**MODIFIED**

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Date: November 15, 2012  
Time: 1:30 p.m.  
Courtroom: 3  
Judge: Hon. Richard Seeborg

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1 **SUMMARY**

2 The Center for Public Interest Law (CPIL) and the Children’s Advocacy Institute (CAI)  
3 respectfully oppose the Proposed Settlement Agreement—and as modified in October of 2012—  
4 (“Proposed Settlement”) on the basis that it not only lacks beneficial impact, but actually  
5 achieves a negative result. Alarminglly, its terms are contrary to the interests of the subclass of  
6 children involved, and even contrary to basic standards of applicable juvenile law. Nor do the  
7 changes in the “modified” proposal adequately resolve the problems. *Amici* acknowledge that  
8 class action settlements are to be favored—they remove what may be lengthy and complex cases  
9 from the calendar and may accomplish much without delay or protracted proceedings. And we  
10 also are well aware of abuses among a population of reflexive “objectors” to settlements. CPIL  
11 and CAI are not among such objectors and make these comments as officers of the court and with  
12 substantial knowledge and experience in the subject matter here affected.

13 Moreover, and with all due respect, *amici* contend that this case represents many of the  
14 particular concerns we have over class action litigation abuse by purportedly adverse parties—who  
15 may sometimes engage in an arrangement that is not a fully adversary test of the propositions  
16 allegedly in dispute. This scenario involves some class representatives and counsel who have little  
17 expertise in issues involving children or privacy, and allows a major multi-national corporation to  
18 (a) arrange what is clearly envisioned to be a multi-million dollar fee to that counsel (obviously  
19 disparate from market level hours), and then (b) propose a system of largely symbolic payments to  
20 “class members” buttressed by payments to various charities—some of which were apparently  
21 potential objectors. These measures are advanced hoping to (c) lead a federal district court judge to  
22 enter an advantageous court order worth many, many times the amount awarded to class members,  
23 and which would purport to allow the defendant to effectively make use of a child’s information for  
24 commercial use without actual prior approval by that child’s parents.

25 One of the primary reasons for *Amici*’s opposition to the revised Proposed Settlement  
26 Agreement, as discussed below, is the fact that it retains an improper “opt out” structure rather  
27 than the informed “opt in” standard required for lawful parental consent. *Amici* respectfully  
28 contend that any settlement on this issue of commercial third party expropriation of a child’s

1 posted photos and information must involve the simple following element: If Facebook wishes to  
2 use the information posted online by a child, it must secure the ADVANCE permission of the  
3 parent for EACH such capture and republication event, with detailed disclosure of what will be  
4 published to others, and to whom it will be published.

5 *Amici* also oppose the Proposed Settlement Agreement on the basis that counsel for the  
6 parties already had a meeting of the minds with regard to an appropriate attorneys’ fee amount, as  
7 was indicated in the original proposed settlement—and the amount is excessive, especially in light  
8 of the fact that the subclass (and their parents) would continue to have their rights violated. The  
9 revised Proposed Settlement has merely removed the \$10 million dollar figure that was previously  
10 agreed upon, and now allows Facebook to oppose Plaintiffs’ attorneys’ fee request—hollow acts  
11 that *amici* doubt change anything. Facebook agreed to the initial settlement that involved up to \$10  
12 million for counsel “working” a case for about one year. In terms of the collusion danger in class  
13 settlements, that Facebook offer provides this Court with all of the information it needs.

14 CPIL and CAI intend to file a formal objection at any subsequent Fairness Hearing, but  
15 request that this Court consider the points made above and below, reject the proposed settlement  
16 agreement at this stage, and—rather than direct the parties to continue working to resolve the  
17 case—dismiss it in order to allow class representatives and counsel who will “adequately  
18 represent the class” do so in a future filing. The premature entry of this order lacking such  
19 adequate representation violates a seminal requirement of FRCP 23. The federal courts are not a  
20 proper forum for arranged violations of child rights.

21 **I. *AMICI*'S QUALIFICATIONS TO EVALUATE THE PROPOSED SETTLEMENT**  
22 **AND THE ADEQUACY OF CHILD CLASS REPRESENTATION**

23 CAI is an academic and advocacy center based at the University of San Diego (USD)  
24 School of Law. It is part of CPIL, also a USD center that helped to found the currently  
25 independent Privacy Rights Clearinghouse. *Amici* have already submitted comments as *amici*  
26 *curiae* in this matter and its comments have been addressed by the parties and considered by this  
27 Honorable Court. This submission is an update of their previous submission in light of alleged  
28 “modifications” following the Court’s initial rejection of preliminary approval.

1 Both CAI and CPIL were founded by a co-author of this brief, Professor Robert Fellmeth,  
2 Price Professor of Public Interest Law at the University of San Diego School of Law. A graduate  
3 of Stanford University (AB 1967) and Harvard University (JD 1970), Professor Fellmeth has  
4 taught juvenile law courses and directed a clinic representing abused children in juvenile  
5 dependency court for the past 20 years. He is author of the law school text *Child Rights and*  
6 *Remedies* (Clarity, 3<sup>rd</sup> ed., 2011). He has been an officer of the National Association of Counsel  
7 for Children since 2006, and served as its President from 2010–12. He has been counsel to the  
8 Board of Directors of Voices for America’s Children for the last decade, and has chaired the  
9 Board of Public Citizen Foundation in Washington, D.C. for the last 20 years.<sup>1</sup>

10 In addition to the child-protection concerns raised by the proposed settlement, CPIL and  
11 Professor Fellmeth also have an interest in the class action/consumer law and legal ethics issues  
12 raised by this proposed settlement—which are profound. Professor Fellmeth is the co-author of  
13 *California White Collar Crime* (w/ Papageorge, Tower, 3<sup>rd</sup> ed., 2010) and has taught consumer  
14 and class action law for the last 22 years. From 1987 to 1992, he served as the State Bar  
15 Discipline Monitor, a position created by the California legislature to investigate and reform the  
16 State Bar’s attorney discipline system. Professor Fellmeth has served as a legal ethics and  
17 consumer law expert on behalf of the State Bar, the Los Angeles Office of District Attorney, the  
18 San Diego Office of District Attorney, the Attorney General acting for the Judicial Performance  
19 Commission, and the U.S. Attorney for the Southern District of California.

20 **I. CONCERNS REGARDING ADEQUACY OF REVISED PROPOSED**  
21 **SETTLEMENT AGREEMENT TO PROTECT MINORS’ NAMES AND**  
22 **VISAGES FROM COMMERCIAL APPROPRIATION**

23 **A. The Proposed Settlement Agreement, as Revised, Retains a (Misleadingly**  
24 **Described) “Opt Out” Structure Rather than the Informed “Opt In” Format**  
25 **Required for Lawful Parental Consent**

26 The modification purports to make an improvement by properly prohibiting “Sponsored  
27 Story” use of a child’s information and postings until he or she reaches 18 years of age—but such  
28 prohibition applies only to a minor who has affirmatively indicated that his/her parents are not

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<sup>1</sup> The comments expressed herein represent only the opinion of CAI and CPIL.

1 Facebook users, an indication that minors are not required to make one way or the other in order  
2 to use Facebook. To recapitulate accurately the often misleading description by the parties:  
3 Under this settlement, Facebook enters a default consent by a child, combined with the child's  
4 representation that a parent has approved the use. This is not consent, but a "terms of use" clause  
5 in Facebook's Statement of Rights and Responsibilities, Section 10.1 as modified, quoted in full  
6 in section II.B. below. Failure to affirmatively contradict it or to object is necessary to stop what  
7 will be automatic license to use. Further, that consent is categorical and hands over to Facebook  
8 effective use of all postings however and wherever and to whomever made—to be selected out  
9 and repackaged and commercially used as Facebook determines.

10 Now the modification adds a wrinkle that to some extent underlines the continuing defect  
11 in the basic "opt out if you can find it" format for this extraordinary commercial-use license.  
12 Here is what Facebook's brief is trying to make the new settlement sound like: "We shall let the  
13 child know he or she can opt out and ask him or her to confirm that a parent has consented. If  
14 she does opt out, we do not do it. Further, we shall ask the child whether the parent is a  
15 Facebook user. If the answer is "no" we shall not use the information. If the answer is "yes" we  
16 shall facilitate a parental objection by notifying them of an easy way to bar use of the information  
17 of the child." But this characterization is sophistry.

18 The reality is as follows:

19 1. The child will not see any of the obscure "notices" that he or she can maintain  
20 privacy and virtually none will affirmatively "opt out." Nor will any child see the "consent"  
21 clause and because of it, go to Dad and say "Dad, there is a 'terms of use' provision in here that  
22 says I automatically have gotten your consent.... well I see that here, and I certainly do not want  
23 to be part of Facebook unless you understand all of the conditions, including your need to  
24 consent. So do you consent to Facebook's unrestricted use of my postings as it chooses for  
25 commercial purposes?" *Amicus* CAI, who has represented children for 22 years, discloses the  
26 unsurprising to this Honorable Court: **This will not happen.** The "safeguard" is disingenuous.  
27 Further, the children subject to this "conditions" disclosure are minors and such contracts, as  
28 discussed below, are fatally flawed without actual, *bona fide*, knowing parental consent.



1           2. Many children will not indicate whether or not their parents are on Facebook. This  
2 will be the vast majority of the children posting. The Proposed Settlement does not address  
3 Facebook’s use of a child’s information if he/she has not indicated that his/her parent is not on  
4 Facebook. Result: Facebook would access and use the child’s data.

5           3. For those children who do identify parents on Facebook, the default remains “now your  
6 parent must find out about what we are doing, without knowing we are about to do it, or seeing  
7 what it looks like or what information we are taking, or to whom it is being sent, and object  
8 through our procedure.”

9           Although a tiny fig leaf has been inserted, the structure as modified has the same defect—  
10 no real or minimally lawful consent by parents. Facebook knows this “you must opt out regime”  
11 assures virtually universal access to child postings. The Proposed Settlement does not require  
12 any action on behalf of the parent to affirmatively consent to Facebook’s use of his/her child’s  
13 name and information in Sponsored Stories, it is improperly the opposite. (See § 2 (2.1) (c)(iii) of  
14 Joint Motion for Preliminary Approval of Revised Settlement at page 11.)

15           To restate: The only exception to what amounts to the entry of this constructive  
16 “consent” occurs when and if a parent somehow knows about Sponsored Story use, understands  
17 the alleged implied parental “consent” to that use unless an objection is lodged, and follows the  
18 obscure warnings and notices in order to intervene to so disallow it. And none of this would  
19 occur in the context of an actual capture and publication of a child’s photos and postings, but as  
20 something that must be done on a theoretical basis in advance.

21           For a self-serving description of the proposed “safeguards,” see Facebook’s Memorandum  
22 of Points and Authorities in Support of Joint Motion for Preliminary Approval of Revised  
23 Settlement at 11–12. Note the key provisions—that Facebook will “begin to encourage new  
24 Users...to designate the Users on Facebook that are its family members,” and the parents of  
25 children who are so identified by them “will be able to utilize the above-described minors’ opt out  
26 tool directly from his or her (adult) Facebook account.” This is an ephemeral “opt out for your child  
27 if you find out about this generic need to do so somehow” provision—retaining the basic flaw that  
28 the settlement has always contained.

1           The regime in the modified settlement is neither lawful nor in the interests of the youth  
2 and families involved. *Amici* respectfully contend that any settlement on this issue of  
3 commercial third party expropriation of a child’s posted photos and information must involve the  
4 simple following element: If Facebook wishes to use the information of a child posted online by  
5 a child, it must secure the ADVANCE permission of the parent for EACH such capture and  
6 republication event, with detailed disclosure of what will be published to others, and to whom it  
7 will be published. That permission is not just an aspirational concept— it is a legal condition  
8 precedent to any valid contract that its terms and scope be understood by both parties. And this  
9 Proposed Settlement represents a regrettable attempt to recruit a federal district court to sanction  
10 its violation by allowing Facebook to continue using a minor’s image and information for  
11 commercial purposes without prior affirmative and knowing parental consent.

12           Here is the baffling disappointment in the modified settlement: The modification appears  
13 to make compliance with that minimum, required standard not only feasible, but possible through  
14 a trivial adjustment. Facebook now will encourage—but not require—its new members  
15 (including children ages 13 to 18) to include information about their family, including their  
16 parents. Why can that query not require the child to identify the Facebook identity of his/her  
17 parent(s) and then require the parent(s) to confirm their relationship? Then Facebook could  
18 simply copy and paste what it intends to include in a proposed “Sponsored Story” (as it will be  
19 transmitted) with a note as to whom will receive it, and then transmit that electronic message to  
20 that parent through his/her Facebook account, with a request to check a box indicating whether  
21 the parent consents to that use. Period. That is all that *amici* ask.

22           Perhaps Facebook would want to follow a different procedure—and the FTC regulations  
23 under the federal Children’s Online Privacy Protection Act (COPPA) (15 U.S.C. §§ 6501–08)  
24 outline alternative ways to obtain parental consent where relevant to children under 13 years of  
25 age would could also be used for children aged 13 and older. Such methods should apply  
26 because although COPPA for political reasons protects only children under 13 years of age, a 15-  
27 year-old child has the same capacity to contract under state law as does a 13-year-old. Further,  
28 although it does not apply to the case at hand, COPPA presents numerous alternatives that could

1 be used to secure consent beyond the *amici* suggestion above. It is unclear why the consent  
2 process suggested by *amici*, or some other method, could not be accomplished by a software  
3 adjustment well within Facebook's capacity.

4 To repeat and emphasize, before it uses a child's postings and photos, Facebook must be  
5 required to first transmit the proposed message to the minor's parent(s)—a transmission that  
6 seemingly can be accomplished within Facebook on a system-wide virtually costless basis—and  
7 then it may use the child's information if and only if the parent so consents.<sup>2</sup> If Facebook resists  
8 this obvious additional element to its own modified proposal, this Court properly questions its  
9 good faith. If Facebook wants to respect child privacy, parental prerogative, and applicable law,  
10 it will agree to this simple, but essential change to the modified settlement. This Honorable  
11 Court should know that *amici* are not reflexively objecting to the settlement at all, we merely  
12 want children protected responsibly, parental authority respected, and the law followed.

13 **B. Under Longstanding California Law, Minors Cannot Consent to the**  
14 **Contract Proposed in the Statement of Rights and Responsibilities**

15 The Proposed Settlement Agreement purports to stipulate, on behalf of all minors, to a  
16 violation of the California Family Code, which prohibits minors from contracting for the use of  
17 their names and likenesses in the manner proposed, contrary to the points and authorities just  
18 submitted to this Honorable Court from Facebook as discussed below.

19 Under the revised proposed agreement, section 10.1 of Facebook's Statement of Rights  
20 and Responsibilities would include the following statement:

21 You give us permission to use your name, profile picture, content, and information in  
22 connection with commercial, sponsored, or related content (such as a brand you like)  
23 served or enhanced by us. This means, for example, that you permit a business or other  
24 entity to pay us to display your name and/or profile picture with your content or  
25 information. If you have selected a specific audience for your content or information, we  
26 will respect your choice when we use it.

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26 <sup>2</sup> If a child indicates that his/her parents are not Facebook users, or if a child makes no  
27 indication as to whether his/her parents are Facebook users, Facebook would properly have two  
28 options: (1) do not use that child's content or information in its Sponsored Stories, or (2) request  
parental consent prior to using that child's content or information in its Sponsored Stories.

1 If you are under the age of eighteen (18), or under any other applicable age of majority,  
2 you represent that at least one of your parents or legal guardians has also agreed to the  
3 terms of this section (and the use of your name, profile picture, content, and information)  
4 on your behalf.

5 Although the second paragraph is limited to users under the age of majority, the first  
6 paragraph applies to *all* Facebook users. Thus, in addition to requiring minors to “represent” that  
7 whatever Facebook wants to do with the minor’s name, image, content, and information is ok  
8 with the minor’s parent, Facebook’s Statement of Rights and Responsibilities continues to  
9 implicitly assume that minors grant Facebook those permissions on a personal basis as well.

10 That minors lack capacity to consent to many types of contracts underlies much of our  
11 system to protect them. Some of that protection is, to be sure, safeguarding them from their own  
12 immature improvidence; we have age minimums behind everything from voting to tobacco,  
13 liquor to tattoos, even sex. The inability of the adolescent brain to regulate emotional responses,  
14 resist peer influences, and calculate the harmful future consequences of present actions is the  
15 basis for the recent U.S. Supreme Court rulings abolishing the death penalty for minors and  
16 prohibiting the mandatory imposition of a sentence of life without parole, even for homicide  
17 offenses. *See Roper v. Simmons*, 543 U. S. 551, 560 (2005), *Graham v. Florida*, 560 U. S. \_\_\_\_,  
18 130 S.Ct. 2011 (2010) and *Miller v. Alabama/Johnson v. Hobbs*, Nos. 10-9646 and 10-9647,  
19 decided June 25, 2012. “It is the policy of the law to protect a minor against himself and his  
20 indiscretions and immaturity as well as against the machinations of other people and to  
21 discourage adults from contracting with an infant. Any loss occasioned by the disaffirmance of a  
22 minor’s contract might have been avoided by declining to enter into the contract.” (*Niemann v.*  
23 *Deverich* (1950) 98 C.A.2d 787, 793, 221 P.2d 178.) It in no way protects the privacy and  
24 property rights of children (or their parents) to create a system for releasing the names and faces  
25 of children into the worldwide stream of e-commerce based on a provision in “terms of service”  
26 contract to which minors lack the capacity to consent.

27 Current California Family Code provisions echo common law prohibitions against  
28 enforcing contracts against minors, providing that certain types of contracts made by minors are

1 void as a matter of law.<sup>3</sup> Family Code section 6701 provides the following explicit restrictions  
2 on a minor’s authority to contract:

3 A minor cannot do any of the following:

- 4 (a) Give a delegation of power.
- 5 (b) Make a contract relating to real property or any interest therein.
- 6 (c) Make a contract relating to any personal property not in the immediate  
7 possession or control of the minor.

8 The proposed settlement agreement operates on the violation of both subsections (a) and  
9 (c), and each of them separately. Facebook claims that Family Code section 6701(a) is  
10 inapplicable to this case because “no power of agency” is created pursuant to Facebook’s terms  
11 or the revised settlement under (a) above. But the categorical prohibition against a delegation of  
12 power is here violated *in extremis*. The settlement purports to delegate to Facebook the  
13 extremely broad power to take information posted by a child—for his or her purposes and very  
14 possibly under parental supervision—package it, and transmit in any form and to any recipients  
15 and for any commercial purpose, as Facebook determines. The lone check on such a self-serving  
16 delegation would come from affirmative parental objection—after somehow finding out that they  
17 are expected to do so and that Sponsored Story use is in prospect. Facebook here argues that this  
18 kind of discretion over the child’s postings that it presumes unto itself is not a “delegation of  
19 power”? *Amici* respectfully suggest *contra*, that it is a grant of extraordinary power to Facebook.

20 The existence of an agency relationship is mainly a question of fact<sup>4</sup> (3 Witkin Sum. Cal.  
21 Law Agency § 93), with the distinguishing features of an agency being its representative  
22 character and its derivative authority (*see, e.g., Gipson v. Davis Realty Co.* (1963) 215

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23 <sup>3</sup> In addition, the Family Code provides that many other contracts made by a minor are  
24 voidable by disaffirmance (Family Code section 6710).

25 <sup>4</sup> Under some circumstances, even the parent/child relationship can be viewed as an  
26 agency: “Although we normally do not view the relationship between minor children and their  
27 parents as a principal-agent relationship, under many circumstances parents, in fact, act on behalf of  
28 their children in a capacity difficult to distinguish from that of an agent...[The parent/child]  
relationship bears a significant similarity to that of principal and agent.” (*Cruz v. Superior Court*  
(2004) 121 Cal.App.4<sup>th</sup> 646, 651–52 [17 Cal.Rptr.3d 3].) Note that as a default matter, Facebook  
may here seek to operate as the fundamental agent of the child in making detailed decisions on his  
or her behalf (albeit without any supervision or detailed notice), but while presuming agent powers,  
Facebook is neither the child’s properly authorized agent, nor principal, nor parent or guardian.

1 Cal.App.2d 190, 207 [30 Cal. Rptr. 253]). Here, Facebook claims that it has the power, delegated  
2 to it by the minor directly and through the minor’s representation that a parent so consents, to  
3 take, use and promote (represent) the minor’s information and images to third parties. Assuming  
4 for the moment that Facebook users (principals) really do retain “immediate possession and  
5 control” of their information and images (as Facebook contends), this relationship has all of the  
6 telltale signs of an agency relationship—which makes the arrangement void as to minors who  
7 lack capacity to so delegate such power in the first place.<sup>5</sup>

8 In arguing that Family Code section 6701(c) is inapplicable to this case, Facebook points  
9 to the illusory statement it provides to its users—which *amici* no longer assume is true—that  
10 users own all of the content and information they upload to Facebook. If this is how Facebook  
11 actually works, we all would be working on something else right now. How does Facebook not  
12 take “possession or control” of the user’s content and information when it creates and publishes  
13 its Sponsored Stories? Clearly users give up some sort of possession or control when they upload  
14 images or information to Facebook—at least enough for Facebook to take and transform users’  
15 images into a different format for its own commercial gain without the assurance of a user’s (or  
16 his or her parents’) knowing and valid consent. Section 6701(c) explicitly prohibits the making  
17 of “a contract relating to any personal property not in the immediate possession or control of the  
18 minor.” By definition, Facebook must take control of the minor’s personal property in order to  
19 do what it is doing with it.<sup>6</sup>

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21 <sup>5</sup> As to Family Code section 6701(a), the facts of this case relating to the existence of an  
22 agency relationship are distinguishable from *I.B. v. Facebook, Inc.* (2012) 2012 U.S. Dist. LEXIS  
23 154327. There, the court properly declined to find an agency relationship between Facebook and  
24 minor Facebook users who charged items to their parent’s credit or debit cards possibly without  
25 the parent’s knowledge or consent. As Facebook argued in *I.B.*, that case involved the users’  
26 “simple act of making a purchase,” which did not amount to a delegation of power to Facebook.  
27 *I.B.* involved an arms-length transaction involving offer, acceptance and consideration;  
28 understandably, the court was unsympathetic to minor plaintiffs who received the benefit of a  
bargain they knowingly and affirmatively sought out. None of those elements are present in the  
instant case, where Facebook is attempting to presume a delegation of authority from its users to  
represent the users’ information and images to third parties — and here, the only entity receiving  
any compensation or benefit is Facebook itself.

<sup>6</sup> In *I.B. v. Facebook, Inc.* (2012) 2012 U.S. Dist. LEXIS 154327, plaintiffs also argued  
that Family Code section 6701(c) rendered the sales contracts void, in that the minors were not in  
the immediate possession or control of their parents’ credit cards or bank accounts when the

1 In yet another attempt to avoid the roadblock that is Family Code section 6701, Facebook  
2 contends that Family Code sections 6750 and 6751 “expressly contemplate contracts ‘pursuant to  
3 which a minor...agrees to...license ...use of a person’s likeness’ specifying that certain such  
4 contracts may *not* be disaffirmed if approved by a court.” (Facebook Memorandum at 46.) It  
5 then adds that “this would be nonsensical if Section 6701 operated as an absolute prohibition....”  
6 (*Id.*) In a disappointing example of citation abuse, Facebook omits key information about the  
7 statute cited. Family Code sections 6750–51 are part of a Family Code Chapter consisting of  
8 sections 6750–6753, relating only to “contracts in art, entertainment, and professional sports”—  
9 *i.e.*, contracts pertaining to minors who are entertainment figures, have guardians or trustees  
10 protecting them, and are paid. Remarkably, Facebook appears to argue that the mere presence of  
11 sections 6750–51 somehow makes the broad prohibitions set forth in section 6701 inapplicable to  
12 the case at bar because what it is doing falls within the rubric of (some) of these sections. The  
13 statute cited by Facebook addresses a very narrow situation and requires all sorts of safeguards  
14 set forth in the very next section of the Family Code—section 6752—that Facebook fails to  
15 mention. Where are section 6752’s many conditions and safeguards—including supervision of a  
16 parent or guardian, required compensation for the child actor, and the many other provisions—in  
17 the Proposed Settlement? Where is the requirement for court review or any of the many required  
18 elements to narrow this exception to section 6701 manifested in this settlement?

19 To capture the pernicious nature of the matter before this Honorable Court, review just  
20 the beginning provisions of the very next uncited section:

21 **6752. Placement of percentage of minor's gross earnings in trust; Duties of trustee,**  
22 **parent or guardian, minor's employer, and Actors' Fund of America; Notice to**  
23 **beneficiary; Fiduciary relationship between parent or guardian and minor**

24 (a) A parent or guardian entitled to the physical custody, care, and control of a minor who

25 \_\_\_\_\_  
26 purchases were made. Contrary to Facebook’s theory here, the court agreed that plaintiffs have  
27 alleged a plausible claim that the transactions at issue are void contracts “relating to any personal  
28 property not in the immediate possession or control of [a] minor” and denied Facebook’s motion  
to dismiss the claim for declaratory relief under section 6701(c). These facts are substantially *a*  
*fortiori* to the issue of simple credit card use by a child to pay for something legitimately  
received.

1 enters into a contract of a type described in Section 6750 shall provide a certified copy of  
2 the minor's birth certificate indicating the minor's minority to the other party or parties to  
3 the contract and in addition, in the case of a guardian, a certified copy of the court  
4 document appointing the person as the minor's legal guardian.

5 (b) (1) Notwithstanding any other statute, in an order approving a minor's contract of a  
6 type described in Section 6750, the court shall require that 15 percent of the minor's gross  
7 earnings pursuant to the contract be set aside by the minor's employer in trust, in an  
8 account or other savings plan, and preserved for the benefit of the minor in accordance  
9 with Section 6753.

10 (2) The court shall require that at least one parent or legal guardian, as the case may be,  
11 entitled to the physical custody, care, and control of the minor at the time the order is issued  
12 be appointed as trustee of the funds ordered to be set aside in trust for the benefit of the minor,  
13 unless the court shall determine that appointment of a different individual, individuals, entity,  
14 or entities as trustee or trustees is required in the best interest of the minor.

15 \* \* \*

16 (4) The minor's employer shall deposit or disburse the 15 percent of the minor's gross  
17 earnings pursuant to the contract within 15 business days after receiving a true and  
18 accurate copy of the trustee's statement pursuant to subdivision (c) of Section 6753, a  
19 certified copy of the minor's birth certificate, and, in the case of a guardian, a certified  
20 copy of the court document appointing the person as the minor's guardian.

21 Notwithstanding any other provision of law, pending receipt of these documents, the  
22 minor's employer shall hold, for the benefit of the minor, the 15 percent of the minor's  
23 gross earnings pursuant to the contract.

24 \* \* \*

25 (7) The court shall have continuing jurisdiction over the trust established pursuant to the  
26 order and may at any time, upon petition of the parent or legal guardian, the minor,  
27 through his or her guardian ad litem, or the trustee or trustees, on good cause shown,  
28 order that the trust be amended or terminated, notwithstanding the provisions of the  
declaration of trust. An order amending or terminating a trust may be made only after  
reasonable notice to the beneficiary and, if the beneficiary is then a minor, to the parent or  
guardian, if any, and to the trustee or trustees of the funds with opportunity for all parties  
to appear and be heard.

\* \* \*

20 Following the above are more than twenty additional paragraphs spelling out all the  
21 safeguards required for an entertainment-related contract of a child. *Amici* invites this Honorable  
22 Court to review all of sections 6750–6753 which are properly taken together in evaluating  
23 applicable state law on the subject. But the gist of the many detailed provisions includes the  
24 following elements: the contract must be controlled front to back by “at least one parent or legal  
25 guardian, as the case may be, entitled to the physical custody, care, and control of the minor at  
26 the time.” That is not Facebook. And the statute provides for court review contract by contract.  
27 And it even requires minimum compensation for the child. And it specifies how the employment  
28



1 will proceed, reinforces both parental authority and the role of the court as a check — all of it  
2 intended to limit the possible exploitation of a child by private parties seeking to profit from  
3 commercial/entertainment use of the child.

4 Note that the cases can be confusing because they often confront collateral issues. For  
5 example, many cases address the “disaffirmance” of a contract by a minor—here not at issue.  
6 The issue here is the legitimate *formation* of an enforceable contract involving contributions by  
7 and takings from the child and the delegation of broad authority to a commercial third party in  
8 their capture and dispersion—largely to be effectively concealed in practice from parents, and  
9 certainly concealed as to its details. Nor are cases germane that involve a child taking advantage  
10 of a contract’s benefits without paying (can a child’s use of a credit card be acknowledged for the  
11 payment of an acknowledged benefit received still at issue in the *I.B.* case discussed in notes 4  
12 and 5 *supra*). *Amici* understand and agree that one exception to the lack of capacity bar to  
13 enforcing contracts against children (without parental consent) is the situation in equity where  
14 benefits have been received by the child. Here, of course, equitable doctrine carves an exception  
15 to sometimes allow recompense of those who have provided benefits to a child—regardless of the  
16 original contract and its defects. Indeed, where there has been reliance, principles of estoppel  
17 may well allow a child to enforce a contract for his or her benefit that he or she in theory lacks  
18 capacity to agree to it. These are not issues here. This settlement provision rather proposes a  
19 radical prospective regime of binding contracts applicable against children (and without  
20 compensation) and separate and apart from parental consent or assured knowledge. That is not  
21 the law in the United States, and explicitly not the law in California.

22  
23  
24  
25 **C. COPPA Does Not Apply to or Preempt State Law as to Children 13 and Older**  
26 **Nor Does It Apply to the Issues Raised in this Case**

27 The citation of the federal Children’s Online Privacy Protection Act (COPPA) (15 U.S.C.  
28 §§ 6501–08) does not assist Facebook. While that Act does to some extent preempt some state

1 law relevant to internet communications, as noted above, this statute is very narrow and pertains  
2 exclusively to the *privacy rights* of children under the age of 13—and to its credit Facebook does  
3 not make its pages available to those children. In fact, the statute defines “child” for its purposes  
4 as only those under 13 years of age, as the FTC rulemaking proceeding during 2000 emphasizes  
5 (see FTC, Notice of Proposed Rule, 16 CFR Part 312, Fed. Reg. Vol. 76, No. 187, at 59805,  
6 middle column, on Congressional intent to confine the statute to only those children (available at  
7 <http://www.ftc.gov/os/2011/09/110915coppa.pdf>)). COPPA does not deal with *any* child’s  
8 ability to contract and thus is irrelevant to the issues raised here. The body of privacy protection  
9 it does provide hardly supplants state contract law relevant to children over the age of 13 here at  
10 issue. *I.e.*, the federal protection of a group of very young children in one area hardly creates a  
11 wholesale prohibition on state protection of somewhat older children in another area.

13 **III. THIS COURT PREVIOUSLY DECLINED TO ACCEPT FACEBOOK’S**  
14 **ARGUMENT THAT ITS NOTICES CONSTITUTE CONSENT**

15 It is ironic that Facebook has enjoyed categorical immunity from libel because it  
16 describes itself as nothing more than a “passive receptacle” of postings of others—with which it  
17 does nothing. In fact, Facebook initially moved to dismiss *Fralely* based in part on the claim that  
18 a federal immunity statute—47 U.S.C. § 230(c)(1)—precludes defamation claims against  
19 providers of an “interactive computer service” (such as Facebook). It contended that this statute  
20 afforded it immunity because “plaintiffs seek to hold Facebook liable for information provided  
21 by another party—namely, Plaintiffs themselves.” Facebook claimed that its actions turning this  
22 information into “sponsored stories” didn’t change anything, as those actions were “well within  
23 the editorial functions for which websites receive immunity.” Judge Koh rejected this argument,  
24 finding that Facebook “meets the statutory definition of an information content provider” in light  
25 of Plaintiffs’ claims that Facebook had transformed the character of Plaintiffs’ words,  
26 photographs, and actions into a commercial endorsement to which they did not consent. (See  
27  
28

1 Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss (Dec. 16, 2011) at  
2 18.) The court found Facebook’s assertion that its actions were well within the editorial function  
3 for which websites receive immunity to be “unpersuasive” and that Facebook’s actions were  
4 distinguishable from the types of editorial actions taken by other web providers granted CDA  
5 immunity in other cases. (*Id.* at 19.) This ruling is devastating to the rest of Facebook’s argument  
6 that “consent” is not necessary because it is not taking anything from anyone, nor making  
7 commercial use of entries by children, *et al.*  
8

9 Judge Koh’s order also rejected other arguments of Facebook, including the continuing  
10 argument (in its points and authorities supporting this settlement) that its adhesive and obscure  
11 “notices” allowing affirmative disapproval are somehow *de jure* “consent.” (*Id.* at 23: “whether  
12 Facebook’s Statement of Rights and Responsibilities, Privacy Policy, or Help Center pages  
13 unambiguously give Defendant the right to use Plaintiffs’ names, images, and likenesses in the  
14 form of Sponsored Story advertisements for Facebook’s commercial gain remains a disputed  
15 question of fact and is not proper grounds for dismissal at this time.”) This 38-page order stands  
16 as the “law of the case”—applicable to these parties on these issues. It is not appropriate for a  
17 plaintiff, having received this and other rulings in its favor, to surrender on the seminal point in  
18 dispute—that such consent may be secured by a “notice” followed simply by the failure of an  
19 affirmative act of a parent to stop a “sponsored story” commercial use. Nor does the fig leaf help  
20 that children must “represent” that they have their parents’ permission to do something. Nor does  
21 the fact that it will only apply to millions of parents who also happen to have Facebook pages  
22 justify the unconscionable: “You all opt in” to our commercial use of your child’s entries when,  
23 how, and where we choose unless you somehow (a) find out we are doing it, (b) learn that you  
24 can stop it, (c) figure out how to stop it, and (d) do so before it’s too late.  
25  
26  
27  
28

1           **IV. THE PROPOSED SETTLEMENT CREATES NO BENEFIT TO THE**  
2           **SUBCLASS—IT IS, RATHER, A DETRIMENT *VIS-À-VIS* NO SETTLEMENT**  
3           **AND REFLECTS THE LACK OF EXPERTISE REGARDING THE**  
4           **PROTECTION OF CHILDREN**

5           The proposed settlement creates no benefit to the class, and actually amounts to a  
6           dangerous detriment as it scales back the protections currently afforded under state law. The  
7           specific, current abuse addressed by this settlement is of special concern. It involves the  
8           irreparable harm that comes from the necessarily final publication into a forum that can reach  
9           millions and from which the images and information are then irretrievably subject to retransmittal  
10           into the internet world—an entry portal that makes practical withdrawal problematic. It is a bell  
11           that cannot be unring. It involves potential irreparable harm.

12           The cases of adolescence improvidence in posting photos and comments are of special  
13           concern to *amicus* Children’s Advocacy Institute. The problems of bullying and adolescent  
14           embarrassment and their consequences are easy for adults to minimize. But for teens, the  
15           retransmittal of what they post to persons and in forms they do not control can cause a kind of angst  
16           most of us have forgotten about. We used to be able to avoid bullying when in the sanctuary of our  
17           own homes, but such bullying now invades our home—often on the pages of Facebook. It is no  
18           accident that correlations between internet embarrassment and teen suicides is not trivial. Parental  
19           concern is understandably high over the possible trauma from the mistakes their teens make in their  
20           own volitional postings and many parents do indeed put the computer in the living room and  
21           monitor what their children are entering and to whom messages are sent. That parental relationship  
22           and role is here confronted with a third party claim to use of the postings of one’s child.

23           *Amici* respectfully ask this Honorable Court the underlying ethical question: Would you  
24           grant advance, general permission to Facebook to decide how and to whom your child’s image  
25           and information will be distributed? Would you not want to know exactly what Facebook  
26           intends to do and reasonably expect the right to approve any such intrusive use of your child’s  
27           entries in advance—and as to each such prospective third party retransmission, knowing exactly  
28           what it will include, how it will look and to whom it will be sent?

          Under the Proposed Settlement, via the Statement of Rights and Responsibilities, the

1 control of this irremediable publication—likely into the homes of friends, but perhaps to others—  
2 is vested with the commercial sensibilities of a corporation. That delegation is unconscionable.  
3 It violates the rationale behind limitations on the power of juveniles to contract and to suffer the  
4 enforcement and consequences of those contracts.

5 CAI and CPIL share the concerns raised in the letter submitted to this Court by the Center  
6 for Digital Democracy (CDD), dated July 10, 2012. CDD presents compelling arguments made  
7 by the Federal Trade Commission and computer science scholars: the “notice-and-choice” model  
8 of privacy policies rarely provide actual notice and most frequently effectuate the service  
9 provider’s preference rather than the consumer’s choice. Nor is any settlement provision that  
10 effectively kicks in *after* an initial publication conscionable.

11 The proposed settlement would require Facebook, for a limited time, to provide a highly-  
12 unlikely-to-be-read notice that a user “give[s] [Facebook] permission to use [his or her] name,  
13 profile picture, content and information in connection with commercial, sponsored, or related  
14 content (such as a brand [the user] like[s]) served or enhanced by [Facebook].” (Sec. 2.1(a), page  
15 6.) Indeed, under the modified proposal, the “compliance audit” covers only the first two years  
16 after order entry. It is apparent that after that—we do not know what checks might exist, if any.

17 An adolescent between 13 and 18 years old cannot be expected to understand the  
18 significance or consequences of giving “permission to use [his or her] name, profile picture,  
19 content, and information in connection with commercial, sponsored, or related content (such as a  
20 brand you like) served or enhanced by us.” The same adolescent can, similarly, not be expected  
21 to understand the significance or consequences of representing “that at least one of [their] parents  
22 or legal guardians has also agreed to the terms of [a given] section (and the use of [their] name,  
23 profile picture, content, and information) on [their] behalf.” And the default setting is to allow  
24 the uncompensated use of a user’s name and likeness for commercial purposes. While the  
25 alteration to limit use to children who identify a parent also on Facebook is a positive change, it  
26 exists in the context of a chasm then allowing effective blank-check use unless a parent somehow  
27 knows to object. There is a legally required condition precedent that any contract, including one  
28 between a parent and a third party for use of a child’s information or image, must have a meeting

1 of the minds as to exactly what is being contracted for. That consent is not properly a “we shall  
2 do what we will unless you discover you can stop us and act to do so.” It is rather “tell the  
3 parent(s) what you intend to do, before you do it, and proceed if you receive affirmative  
4 permission.”

5 How can these class representatives and their counsel possibly be “adequate class  
6 representatives” as required to warrant class certification when they are agreeable to not only the  
7 abuse as modified, but the original scheme of close to “blank check” use in virtually every case?  
8 The modification here did not come from any argument or objection of the class—but from the  
9 *sue sponte* and admirable intervention of this Honorable Court. Someone in this process needs to  
10 represent the interests of the children who will be much affected by the resolution—the  
11 immediate parties and their counsel are regrettably not interested in such a task.

12 To be fair, Facebook likely does not intend many of the inevitable consequences of its  
13 site’s abuses. But embarrassment and youthful indiscretion on the one end of the spectrum, and  
14 bullying and suicides on the other end, are not part of the formulae in calculating commercial  
15 return on image and information dissemination. The proposed settlement’s warnings and notices  
16 are textbook adhesive fig leaves. They do nothing for the thirteen-year-old who is striving to  
17 assert her independence yet is still simply too young to grasp the reach of her digital citizenship  
18 —a reach that could tarnish her reputation for years to come through a few thoughtless clicks of a  
19 mouse. The current settlement still creates not a world of statutory compliance, but one of rigged  
20 evasion. That is hardly to the benefit of the children involved.<sup>7</sup>

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21  
22 <sup>7</sup> Although the FTC rule implementing COPPA emphasizes its limitation to those under 13 years  
23 of age, as discussed above, note 19 of the proposed FTC rule cited above includes an illuminating  
24 list of the citations relevant to teens not covered by COPPA, as follows: For example, research  
25 shows that teens tend to be more impulsive than adults and that they may not think as clearly as  
26 adults about the consequences of what they do. *See, e.g.*, Transcript of Exploring Privacy, A  
27 Roundtable Series (Mar. 17, 2010), Panel 3: Addressing Sensitive Information, available at  
28 [http://htc-01.media.globix.net/OMP008760MOD1/ftc\\_web/transcripts/031710\\_sess3.pdf](http://htc-01.media.globix.net/OMP008760MOD1/ftc_web/transcripts/031710_sess3.pdf); Chris  
Hoofnagle, Jennifer King, Su Li, and Joseph Turow, *How Different Are Young Adults from Older  
Adults When It Comes to Information Privacy Attitudes & Policies?* (April 14, 2010), available at  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1589864](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1589864). As a result, they may voluntarily  
disclose more information online than they should. On social networking sites, young people may  
share personal details that leave them vulnerable to identity theft. *See* Javelin Strategy and

1           **V. CONCERNS REGARDING MASSIVE COMPENSATION FOR ATTORNEYS**

2           In the original proposed settlement, the parties agreed that plaintiffs’ counsel will seek,  
3 and Facebook will not oppose, fees up to \$10 million. This is apparently based on the “more than  
4 one year of vigorous litigation” cited by Facebook in its previous Memorandum. No information  
5 suggests that \$10 million in fees, or any amount approaching it, is appropriate in this case (no  
6 lodestar billing amount—actual hours times market value—has been provided) and comparison  
7 to other cases suggests this amount is not just excessive, but will likely not be appreciated by this  
8 Honorable Court.

9           The mere fact that the revised Proposed Settlement has deleted the reference to the \$10  
10 million figure gives *amici* no reason to believe that this previously-agreed upon sum is not still the  
11 approximate amount of fees plaintiffs’ counsel will seek, and the fact that the parties have deleted  
12 what they refer to as the “clear sailing” provision contained in the original proposed settlement  
13 gives *amici* no reason to believe the matter will be contested. “One of the main criticisms of clear  
14 sailing provisions is that they represent prima facie evidence of simultaneous negotiations of merit  
15 relief and fees, which is a practice fraught with serious ethical concerns for lawyers representing  
16 the class. Both courts and commentators have expressed apprehension that a plaintiff’s counsel may  
17 be accepting a lower settlement for the class in exchange for a generous and nonadversarial  
18 treatment of fees.” William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion*  
19 *in Class Action Settlements*, 77 TUL. L. REV. 813 (March 2003) at 815. Speaking of bells that  
20 cannot be unrung, the removal of the specific dollar amount previously agreed to and the clear  
21 sailing provision does nothing to lead *amici* to believe that the deal has been undone.

22           Regarding the amount of fees previously agreed to—up to \$10 million—note that in  
23 *Kenny A. v. Perdue* (a federal court class action case challenging the Georgia child protection  
24

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25           Research, 2010 *Identity Fraud Survey Report* (Feb.2010), available at [https://www.javelinstrategy.com/uploads/files/1004.R\\_2010IdentityFraudSurveyConsumer.pdf](https://www.javelinstrategy.com/uploads/files/1004.R_2010IdentityFraudSurveyConsumer.pdf). They may also share  
26 details that could adversely affect their potential employment or college admissions. *See e.g.*,  
27 Commonsense Media, *Is Social Networking Changing Childhood? A National Poll* (Aug. 10,  
28 2009), available at <http://www.common sense media.org/teen-social-media> (indicating that 28% of  
teens have shared personal information online that they would not normally share publicly).

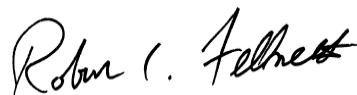
1 system's failure to provide minimally sufficient services to abused and neglected children in  
2 foster care), plaintiffs' counsel received a lodestar fee of just over \$6 million (454 F.Supp.2d  
3 1260, 1286-1287 (2006), rev'd on other grounds, *Perdue v. Kenny A. ex rel Winn*, \_\_ U.S. \_\_,  
4 130 S.Ct. 1662 (2010)). In *Kenny A., Children's Rights* (a law firm with decades of experience in  
5 class action litigation pursuing children's rights and protection) recorded (after a 15% across-the-  
6 board reduction by the trial court) 25,423 hours litigating the case before the state was willing to  
7 begin settlement discussions; after being removed to federal court, the case involved a motion  
8 and full evidentiary hearing for a preliminary injunction, an unsuccessful state motion to dismiss,  
9 a motion for class certification, an unsuccessful state motion for summary judgment, discovery of  
10 nearly half a million pages of documents, and 60 depositions.

11 It seems doubtful that plaintiffs' counsel in this case, in one year, worked this case to  
12 point of earning seven figures, much less eight figures—to procure a settlement. The basic  
13 posture is problematic when the settlement provides no injunctive relief beyond an agreement by  
14 Facebook that it will do *less* than the law requires.

15 **CONCLUSION**

16 Although CPIL and CAI may ultimately file an objection at any future Fairness Hearing  
17 setting forth in further detail the legal and ethical concerns with the proposed settlement, CPIL  
18 and CAI respectfully request that this Court deny preliminary approval of the unfair and  
19 inadequate proposed settlement to prevent undue reliance, during a permanent approval process,  
20 on structure that is seemingly flawed at its outset.

21  
22 Date: November 7, 2012



Robert C. Fellmeth

23  
24  
25 Date: November 7, 2012



Christina Riehl