Docket Nos. 13-16819 (L), 13-16918, 13-16919, 13-16929, 13-16936, 13-17028

In the

United States Court of Appeals

for the

Ninth Circuit

ANGEL FRALEY, PAUL WANG, JAMES H. DUVAL, a minor, by and through James Duval, as Guardian ad Litem, WILLIAM TAIT, a minor, by and through Russell Tait, as Guardian ad Litem, SUSAN MAINZER, LUCAS FUNES and INSTAGRAM, LLC,

Plaintiffs and Appellees,

C.M.D., T.A.B., H.E.W., B.A.W., A.D.Y. and R.P.Y.,

Intervenors, Plaintiffs and Appellees,

v.

K.D. and C.D., through their father, Michael Depot,

Objectors and Appellants,

v.

FACEBOOK, INC.,

Defendant and Appellee.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 11-cv-01726-RS · Honorable Richard G. Seeborg

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION

As with many class actions, this case is procedurally complicated, as reflected in many objections and objectors (some typically dubious or marginal). It also includes a District Court who did respond to several aspects of objection (*e.g.*, as to several quantitative matters). But, with all due respect, these matters are relatively trivial compared to its central impact – the substantive business practice affecting many millions here submitted for federal court approval. Quite apart from creating a privacy precedent, this case, within the rubric of the decision's direct impact, is significant.

The red flags for this Honorable Court are many: The case settled before class certification; Facebook repeatedly threatened the class with millions of dollars to pay its counsel (due to an unusual California "reverse fee shift" provision), creating an unprecedented "forced collusion" contaminant; the Settlement was rejected by its own lead class representative; it was rejected even by some *cy pres* award recipients; the primary legal contention of Facebook has drawn *amicus* opposition from the FTC and the California Attorney General – most knowledgeable about involved Congressional intent; and the case has drawn *amicus* opposition by America's most highly respected privacy and child rights institutions.

But the central reason the Settlement Agreement is properly rejected involves the actual terms to be approved - the addition of the following two paragraphs to Facebook's lengthy legal (renamed) "Rights and Responsibilities" document, as follows:

> **You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information. If you have selected a specific audience for your content or information, we will respect your choice when we use it.**[1]
>
> **If you are under the age of eighteen (18), or under any other applicable age of majority, you represent that at least one of your parents or legal guardians has also agreed to the terms of this section (and the use of your name, profile picture, content, and information) on your behalf.** (Amended Settlement Agreement and Release ¶ 2.1(a), ER 299.)

I. Application of the "Totality of the Circumstances" Test Properly Required *De Novo* Review by the District Court

When evaluating the approval of a settlement agreement, the court must apply a "reasonableness under the totality of the circumstances" standard.

[1] Note two aspects: (1) it includes all or any "name, profile picture, content, and information." In other words, everything -- including a teen's posted photo of her 11 year old sister who fell on her belly coming out of the bath that she finds hilarious. (2) The limitation on audience is illusory because any particular capture/retransmission will not be revealed in advance, the teen would have to navigate a maze of clicks to get to the limitation, and the default is "public" – no limitation whatever.

Grunin v. Int'l House of Pancakes, et al. 513 F.2d 114, 124 (8th Cir. 1975). To survive appellate review, a district court must show that it has *comprehensively* explored the factors relevant to the determination that a settlement is "fair, adequate and reasonable." *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1026 (9th Cir. 1998) (emphasis added). When reviewing the Settlement Agreement in this case, the District Court stated that his "**only role** in reviewing the **substance** of that settlement is to ensure that it is 'fair, adequate, and free from collusion.'" (Order Granting Motion for Final Approval of Settlement Agreement ("Final Approval Order") at 3, ER 7, emphasis added.) He used this phrase repeatedly in limiting his role in disturbing the substantive terms of an approved contractual arrangement between the parties. *Id.* ("a district court's only role in reviewing the settlement is to ensure that it is "fair, adequate, and free from collusion"); *id.* at 4, ER 8 ("the settlement is entitled to a degree of deference as the private consensual decision of the parties"); and *id.* at 13, ER 17 (finding the settlement must only meet a "minimum threshold of fairness and adequacy"). He focused on payment of amounts of money to the class, fees and related quantitative judgments. (*Id.* at 5-7, ER 9-11.)

His comments and analysis consistently reflected a passive view of his role as to the future practices of Facebook *vis-à-vis* its 1.2 billion subscribers. Appellants understand that finding the optimum arrangement is not the Court's

designed function. However, Appellants suggested one illustrative easy way of accomplishing lawful consent.[2] But no alternative was considered beyond the extreme abrogation of the paragraphs quoted above. Appellants do not seek the optimum, but merely one that complies with the applicable common law, statutes, and California's "privacy rights" Constitutional provision. The Court below here properly plays a more active role than the "degree of deference [provided to the] private consensual decision of the parties" (*id.* at 4, ER 8) as stated by the District Court.

The Court here properly conducts a more probing inquiry as to "advantage" to the class. Where "a class counsel negotiates a settlement agreement before the class is even certified, courts 'must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.' In such a case, settlement approval 'requires a higher standard of fairness' and 'a more probing inquiry than may normally be required under Rule 23(e).' To survive appellate review, the district court must give a 'reasoned response' to all non-frivolous objections." *Dennis v. Kellogg Co.*, 697 F.3d 858,

[2] Facebook need only copy and paste what it intends to send, describe the audience to receive it, and send it to a minor posting it and his parents. If a simple "consent" button is clicked by the teen and one parent, it may be transmitted. Voila.

864 (9th Cir. 2012), citing *In re Bluetooth Headset Prods. Liabl. Litig.*, 654 F.3d 935, 947 (9th Cir 2011) (additional internal citations omitted).

Appellee Plaintiffs argue that the District Court was appropriately "attentive" because he "rejected the first Settlement Agreement" (Plaintiffs' Answering Brief ("PAB") at 21) and reduced the fee award (*id.* at 22). Granted, the District Court insisted on *some* monetary benefit to the larger class (lacking entirely in the initial version). And also as noted, the Court reduced plaintiff attorneys' fees -- but only after the settlement was otherwise approved (including the child/parent blanket waiver here at issue).[3]

There was review of the usual routine matters of incentive awards, appeal bonds, *et al*. But as the oral argument and the written decision below reflect, the Court concededly deferred to the parties and did not address the terms of the order as to Facebook-permitted practices.[4] His decision concedes some influence from the erroneous argument that a federal statute preempts and effectively cancels all

[3] Note that the reduction is from both an initial $10 million fee figure Facebook did not contest, followed by a $7.5 million fee in the revised version. These amounts, that the District Court found excessive, were the ones extant when the plaintiff agreed to the actual injunctive terms here at issue. Appellee Facebook contends "[t]he $10 million figure was simply a 'not to exceed' number in the original Settlement Agreement which never came into play" (PAB at 48, n.27), but that is not the point. The large amounts under cooperative discussion at millions more than the court found proper were necessarily part of class counsel's perceived incentive when his agreement to these terms effectively occurred.

[4] See discussion of District Court's interpretation of his appropriate role when reviewing the substance of the settlement in AOB at 21.

common law and state statutes pertaining to privacy and youth protection. His dismissal of the common law, the statutes of many states, and three California statutes on point was based on a wave-of-the-hand "unavailing" descriptor.[5]

Even more troublesome is the Court's failure to consider or comment upon in any way the application of California's information "privacy initiative" now in Article 1, Section 1 of the state Constitution, and extraordinarily applicable not just to "state action," but, unlike most constitutional measures, also applying directly to private actors such as Facebook.

Finally, even though brought up in detail by counsel for Appellants, the District Court showed no consideration and uttered not a word about the serious antitrust "tie-in" offense here at issue. There is little discussion about California law – even though Facebook concedes that its operations are covered by the laws of California. Nor is there even any discussion about the state Constitution. Nor is there any response by the parties or the Court about the rather momentous issue of

[5] The District Court summarily concluded without explanation that "Objectors' reliance of provisions of the California Family Code is similarly unavailing. While Family Code § 6701(a) prevents minors from entering into enforceable 'delegation[s] of power' and § 6701(c) limits their ability to contract away rights to 'personal property, not in the immediate possession or control of the minor,' neither subsection is implicated by the circumstances here" (Final Approval Order at 13, FN 14, ER 17). The Court proffered no further analysis or explanation as to how § 6701's explicit provisions prohibiting this momentous third-party (non-parental) expropriation complies with its terms. It is apparent from other comments that the Court essentially bought the erroneous categorical foreclosure of all common and state law from the federal COPPA statute, discussed below.

federal and state antitrust prohibitions on tie-ins where there is appreciable market power in the tying (social media service market) (see below).

Appellants grant that class settlements generally involve a complex package of issues subject to objection, including class and subclass composition, adequacy, proper notice, fluid recovery, compensation calculation, representative incentive payments, fee levels, *cy pres* awards,[6] *et al*. Further, in the normal course, courts understandably assume that counsel make all arguments and invoke provisions of law challenging adverse contentions. And, over the past decade, approval of class settlements is also influenced by the regrettable proliferation of compensation-seeking objectors (*e.g*., payment for the withdrawal of their objections) or from those with narrow ideological *a priori* motivation. But this case presents the other side of the coin: A settlement with binding legal judgment on profound

[6] Although the Court carefully examined most quantitative aspects, he failed to determine that all recipients had an interest relevant to the class. Approved recipient MacArthur Foundation is among those who have thus far withdrawn as a recipient after the court's approval, in its case because it is a "grantmaking institution that does not focus on consumer privacy" (Michael Lotman, "MacArthur Foundation to Decline Facebook Settlement Fund," *Bloomberg BNA*, Sept. 20, 2013, *available at* http://www.bna.com/macarthur-foundation-decline-b17179877204/). This marked example contradicts the self-serving description ofFacebook that these choices "'demonstrated records of addressing issues closely related to the matters raised in the complaint' including 'education regarding online privacy, the safe use of social media, and the protection of minors.'" (Facebook's Answering Brief ("FAB") at 23, quoting *Schacte*r ER at 10, which quotes *Nachsin v. AOL, LLC,* 663 F.3d 1034, 1038.)

commercial practices that will bind millions. It is a legal judgment accomplished by counsel not fully entitled to the assumption of subject matter expertise nor *bona fide* adverse advocacy. Taking all of the elements dominating the proceedings below regarding notice, *cy pres*, fees, and incentive payments, *et al.*, Appellants respectfully suggest that combined they make up a small fraction of its impact on the class, the law as applied, and on society. Arguably, 99% of that impact emanates from the commercial practice that would here be federal-court-approved. This is the element applying to 1.2 billion persons, including over 10 million American teens; one that arguably diminishes their privacy rights and the parental rights of their parents.

The Court's substantive deference on this central aspect includes ignoring absence of argument and legal contentions as to:

1. How and whether the approved practice would comply with California Civil Code § 3344;

2. How and whether it would comply with California Family Code § 6701 *et seq*. – a basic issue argued by Appellants, as well as by Objector Public Citizen, but not by plaintiff subclass below; and

3. How and whether it is consistent with the "Privacy Initiative" in the California Constitution (Article I, Section 1), applicable to Facebook (private parties, not just the state) and directed at "informational privacy."

Beyond these omissions is a larger issue also not argued by class counsel and not considered by the Court, although presented below in some detail by Appellant: The classic antitrust "tie-in" violation.

II. Numerous Factors Here Dictate *De Novo* Review

A. Facebook's Repeated Threats to Seek Millions of Dollars from Minor Subclass Representatives and/or Counsel.

An extraordinary threat of financial losses was faced by the Plaintiffs and their counsel due to the unusual "reverse fee shift" provision found in California Civil Code § 3344, a statute pled and placing the posture of the settling parties in such a position that "a more probing inquiry than may normally be required under Rule 23(e)" (*In re Bluetooth Headset Prods. Liabl. Litig.*, 654 F.3d 935, 947 (9th Cir 2011)) was appropriate. This was the proper standard to here measure adequacy, fairness, and reasonableness. Facebook is correct that the existence of a statutory fee shift does not weigh against most settlements as a general matter. (FAB at 79.) But the problem here is twofold. First, the class attorney has a special duty of vigorous representation to the 10 million teens in the subclass. Second, Plaintiff subclass counsel has substantial fees in prospect for relatively brief legal work, combined with the repeated threat of millions of dollars in reverse fee claims to bankrupt the class representatives and perhaps counsel. Is that not part of the "totality of the circumstances" in measuring collusion? *Grunin v. Int'l House of Pancakes* 513 F.2d 114, 124 (8th Cir. 1975).

Plaintiffs point to a lack of specific evidence regarding the impact of the fee-shifting provision on the decision to settle. However, it is clear that the weight of the fee-shifting provision weighed heavily on plaintiff counsel Arns. As noted in Appellant's Opening Brief, at the hearing on the motion regarding settlement approval, Mr. Arns asked the court if Mr. Fellmeth or Mr. Frank would "be willing to take on this case, going back to 3344? Do they want to put $20 million in trust?...Do they want to be subject to the 3344 fee and cost shifting, and take over the case?" (Reporter's Transcript at 98, ER 50.) That is rather direct admissive evidence of the forced collusive effect of millions of dollars in threatened liability – albeit the circumstances are obvious enough not to require it.

B. Other Extraordinary Factors Commend a "Totality" and "*De Novo*" Review

The District Court showed no comprehensive exploration of the posture of the parties that adequately considered the "totality of the circumstances" – including a number of germane factors. Appellants concede that the District Court took an approach appropriate for most settlement negotiations – an approach in line with this Court's strong policy favoring settlements (*In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008)). But a combination of factors are here at play:

(a) The millions going to plaintiff counsel (not atypical), but here combined with the extraordinary and repeated threat of millions possibly to be assessed

against plaintiff representatives and perhaps counsel (some incentivized collusion combined with perhaps unique "forced" collusion);

(b) The size of the settlement in its direct impact (involving more people and more intrusion in its application than occurs as to even the precedential impact of most U.S. Supreme Court decisions);

(c) The status of the case as pre-certification, where few of the millions to be bound by it even know it is happening;

(d) Facebook's contention that all state law is preempted by a federal statute that does not even apply to the age-group of the subclass of children, an erroneous contention concededly influencing the Court;

(e) The failure of plaintiff counsel to make many arguments or cite relevant statutory/constitutional provisions transgressed by Facebook previously, or violated under the settlement;

(f) The resulting failure of the Court to consider fully the California statutes violated;

(g) The failure of the Court to even consider the applicable provision of the California Constitution (the "Privacy Initiative" now in Article I, Section 1, whose intent centers on "informational privacy" and which extraordinarily does not just apply to "state action" but to private actors such as Facebook); and

(h) The failure of the plaintiff to argue, or the Court to consider, the antitrust implications of a "tie-in" by a social networking service market dominated by Facebook to the tied separate market of commercial endorsements – different markets with different participants, with an obvious anticompetitive effect central to that prohibition (see Section IV below).

III. The Settlement is Not "Fair, Adequate and Reasonable" for the Subclass of 10 Million American Children, For Whom No Settlement is Preferable

The Settlement Agreement places children in a position with less protection than they currently have. In fact, it purports to recruit the federal courts to enter an order that would effectively exempt Facebook from numerous statutes protecting privacy and children.

A. The Settlement Imposes an Unenforceable Contract -- Even if All Involved Teens Were Somehow to Have Legal Capacity.

Under the Settlement Agreement, the consent of more than ten million teen Facebook users will be effective simply via a notice from Facebook that the "Rights and Responsibilities" terms have been altered. This notice does not quote or show how this legal document has been altered nor does it explain what changes have occurred. Note that the original document "checked off" by teens and other subscribers was called "Terms and Conditions" and was routinely clicked-on without scrutiny and was rarely if ever reviewed again. Those 10 million teens are now to receive a note that a "Rights and Responsibilities" document has been

altered in some unspecified way (and even changing its name from its previous iteration).

Apart from the issues of privacy and child status, we all remember from our first year contracts class the essence of an enforceable agreement: offer, acceptance, consideration. (*See, e.g.*, *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1019 (9th Cir. Wash. 1997) "offer, acceptance, and consideration are requisites to contract formation under Washington law"), *citing Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081, 1087 (Wash. 1984), and *Ramanathan v. Saxon Mortg. Servs.*, 2011 U.S. Dist. LEXIS 68297, 5 (D. Nev. June 24, 2011), finding that "[t]he essential elements of a valid contract include offer, acceptance, and bargained for consideration," *citing D'Angelo v. Gardner*, 107 Nev. 704, (Nev. 1991).) Beneath it all is a required "meeting of the minds."

Can a contract term never communicated to 10 million teens (even assuming capacity) meet that threshold test? Two brief paragraphs within 5 on-screen pages of legalese are changed in a document now with a different name. The notice could at least quote the two new paragraphs. As quoted in bold in the Introduction, alone they are somewhat incomprehensible, take up little space, and add no cost for Facebook. There is a reason it is absent, because there is no *bona fide* intent to have a legitimate agreement. This change is a significant and categorical waiver of rights to information control of teen postings to a commercial third party. How

does it comply with the basic condition precedent that there be a meeting of the minds?

Plaintiffs and Facebook claim the Settlement Agreement provides "meaningful new controls for both parents and teens." (PAB at 16; "The Settlement provides notice and controls through the addition of new tools or mechanisms meaningfully limiting appearances in Sponsored Stories," and FAB at 60, arguing the settlement provides "meaningful new controls for both parents and teens.") But they are transparent fig leaves. First, as documented in Appellants' Opening Brief, the limitation on the audience of the retransmission requires affirmative acts by the child without real notice of actual postings expropriated. (AOB at 11–13.) Second, as to the limit on to whom they may be sent, the default is "public" or up to 1.2 billion persons. Contradicting that default may involve sophisticated searching in Facebook's system. We don't know. It is still to be created and has yet to be seen. Finally, the third fig leaf, the allowance for parental excision of his child from blank-check Facebook privacy incursion, requires the parent to: (a) know about the content of the provision with no more warning than is described above, (b) somehow understand that it will apply to his children and that the child has warranted there is "parental consent," and (c) know how to navigate Facebook to remove that child from the presumptive blanket consent.

All of (a), (b), and (c) above is in the context of no actual advance notice of content seizure when it occurs, nor even assured knowledge that it happened after it has occurred. It involves no knowledge of how the posts and photos are arranged, nor to whom they will be sent.

B. The Federal COPPA Statute Does Not Preempt State Laws Pertaining to the Privacy of Children Explicitly Excluded from its Coverage.

Contrary to the assertions of both Appellees, the federal Children's Online Privacy Protection Act (COPPA) 15 U.S.C. §§ 6501-08), does not bar (or even address) teen privacy rights. Appellees make their arguments based on their interpretation of legislative intent coupled with the COPPA provision of 15 U.S.C. § 6502(d) which provides that "no state or local government may impose any liability for commercial activities or actions by operators ...in connection with an activity or action described in this title that is inconsistent with the treatment of those activities or actions under this section." But Congress explicitly removed a provision of the original bill that would have required parental consent for children up to the age of 17 (FAB at 39). Appellants seriously doubt that a single member of Congress from either party intended that this pro-privacy bill should overturn all of the relatively more permissive laws of the sovereign states that protect teens. Attorneys are paid to make ridiculous arguments sound plausible, but this example does not succeed.

For purposes of COPPA, "[t]he term 'child' means an individual under the age of 13." (15 U.S.C. § 6501 (1).) "Where the plain language of a statute clearly expresses Congress' intent, there is no need to resort to legislative history." (*Tehama-Colusa Canal Auth. v. United States*, 809 F.Supp. 2d 956, 976 (E.D. Cal. 2011), *citing Abrahim & Sons Enterprises v. Equilon Enterprises ORC*, 292 F.3d 958, 963 (9th Cir. 2002). By the express terms of the statute, COPPA (and the preemption clause contained therein) applies only to children under the age of 13.

Appellees' dismissal of the *amicus curiae* briefs filed by the Federal Trade Commission ("FTC") and the State of California arguing that COPPA does not preempt state privacy laws is baffling. These are the two entities most intimately familiar and involved with the appropriate application of COPPA and California law, respectively. Appellees have no rebuttal to the detailed Congressional intent recitation of these public authorities who enforce and themselves interpret relevant statutory law. Appellees lack Congressional intent evidence, ignore the applicable common law and cite no published authority.[7]

[7] The one exception to lack of citation is the problematic reliance on an ambiguous unpublished superior court dismissal of a class action. (*Cohen v. Facebook, Inc.*, No. BC444482 (Cal. Sup. Ct. Los Angeles County.) That case was dismissed prior to certification, and the pleading was not amended or refiled for unrelated reasons. (*See* discussion in AOB at 47, n.11.)

C. The Settlement Terms Approved Below Impermissibly Violate Applicable California Law that Prohibits Children from Entering Into These Types of Contracts Without Clear Parental Consent.

The Settlement Agreement purportedly gains the permission of children to use their names and photos for commercial purposes (or presumably, as written, for any purpose) through a contract to which children lack the capacity to consent under explicit California law. A leading case explains that California law "shields minors from their lack of judgment and experience and confers upon them the right to avoid their contracts in order that they may be protected against their own improvidence and the designs and machinations of other people, thus discouraging adults from contracting with them." *Sparks v. Sparks*, 101 Cal.App.2d 129, 137 (1950), (citing *Niemann v. Deverich*, 98 Cal.App.2d 787). California Family Code § 6701 echoes and adds to such common law prohibitions, which themselves make this Settlement unlawful by providing that contracts made by minors are void as a matter of law if they do any of the following:

(a) Give a delegation of power;

(b) Make a contract relating to real property or any interest therein; or

(c) Make a contract relating to any personal property not in the immediate possession or control of the child.

We currently have a vast cyberspace where adults and children have created value in what exists virtually -- but not tangibly. Contracts pertaining to these

virtual goods are precisely the sorts of contracts that are too abstract for a child to adequately understand due to his diminished capacity. Facebook argues that it is not acting as "agents" for teens. (FAB at 62-63.) Appellees might be asked: "How is categorical conferral of this extraordinary discretion to a non-parent commercial third party not an effective grant of agency?" The only distinction is that this agent is taking not 10% of the compensation received, but 100%. But that overreach hardly affects the degree of discretion ceded to Facebook, nor any element of an agency relationship – which here exists as to every germane aspect of the agency concept.

Beyond the Civil Code and Family Code sections noted above are Family Code §§ 6750-53, which Facebook mischaracterizes in its Answering Brief (FAB at 65). These sections were actually cited by Facebook before the District Court to purportedly argue that Appellants' argument above regarding Family Code § 6701(c) was untenable because it conflicts with Family Code § 6751. (Facebook's Memorandum of Points and Authorities in Support of Motion for Final Approval at 78, ER 144.) However, what Facebook failed to mention below is that Family Code §§ 6750 *et seq.* includes more than 20 sections of requirements applicable to a situation where any third party uses any likeness or intellectual property relating to any child who has previously received funds for theatrical or athletic enterprise. The long list includes everything from specific parental sign-

off to each contract element, to specified minimum compensation that must be paid, and even required trust accounts for the children involved. Those sections hardly signal legislative intent that children who have not received such prior compensation are "open season," nor is there any indication that the sections discussed above that do generally apply (Civil Code § 3344 or Family Code § 6701) have been voided. Far from it. The legislature is going farther for a specific group, recognizing the importance of the generally applicable safeguards, and enhancing them even more for some children. Facebook's contention that § 6750 does not apply to the instant case is also misleading. California has more than its share of theatre or athletic compensated teens – many of whom are Facebook subscribers and are all purportedly in the minor subclass. California teens work in Hollywood and are skateboard champions and receive compensation in signficant numbers. *Query*, how does this settlement allow statutory compliance for them? Are they separated out or given real notice? Why did minor's subclass counsel not even raise the issue?

Courts have long recognized that "a settlement that authorizes the continuation of clearly illegal conduct cannot be approved." *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2nd Cir. 1977); s*ee also Isby v. Bayh*, 75 F.3d 1191, 1197 (7th Cir. 1996); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123-24 (8th Cir. 1975). Because the proposed settlement here would "authorize the

continuation of clearly illegal conduct" (*Robertson*, 556 F.2d at 686) which is not preempted by any federal law, it is not appropriately affirmed.

IV. Appellants' Arguments Should be Considered by This Honorable Court

Depot Appellants have proffered statutes, citations, and arguments not presented by Plaintiffs at the District Court level. Each of these arguments may be considered by this Honorable Court regardless of the extent or detail of presentations below, particularly where, as here, they involve a constitutional issue (*see, e.g., ReadyLink Healthcare v. Jones*, 210 Cal.App. 4th 1166, 1175 (2012) (finding "a party may raise a constitutional issue, like preemption, for the first time on appeal")), and when the issue presented involves an issue of law that does not turn on the facts of the case (*see, e.g., Sheller v. Superior Court*, 158 Cal.App. 4th 1697 (2008) and *Cedars-Sinai Med. Center v. Superior Court* 18 Cal.4th 1, 6 (1998) (finding that while the court ordinarily exercises its power of decision only with respect to issues raised below, the court may decide an issue not presented below when it is an issue "that did not turn on the facts of [the] case, it was a significant issue of widespread importance, and it was in the public interest to decide the issue at this time")). Appellants' constitutional arguments are issues of law that do not involve any analysis of contested facts. In fact, there has been no witness testimony or other factual proceedings below. They were raised by some objectors as Appellant cited, but the fact that the record is bereft of their analysis

commends remand, not appellate error in approving an unconstitutional provision here applicable to millions.

Contrary to the disingenuous contention of Facebook, the antitrust "tie-in" issue was not simply raised below by instant Appellants, but was argued at some length. Objectors are not allowed the multiple written submissions of the parties; accordingly, instant counsel focused much of his oral argument on the elements of the tie-in offense, and described how each of them were violated by the Settlement terms. (Reporter's Transcript of Proceedings in U.S. District Court, Northern District of California, before the Honorable Richard G. Seeborg on June 28, 2013 at 64, line 21 through 65, line 22, ER 48-49.)

Appellees dismiss the tie-in issue by simply asserting that there is no anticompetitive impact and that tie-ins are not a "*per se*" offense, (mis)citing *Brantley v. NBC,* 675 F.3d 1192 (9th Cir. 2012). *Brantley* involved the packaging of multi-channel cable packages and was alleged as a kind of vertical tying case, but it did not satisfy applicable threshold elements. It was actually more of what is called a "bundling" case, hence "[t]he parties do not dispute that the rule of reason applies in this case" (*id.* at 1197), rather than *per se* tie-in law – mooting the *per se* classification of tie-ins. *Brantley* actually repeats the definitions as described by Appellants in oral argument and in the Opening Brief herewith. *Brantley* notes that the competitive injury from tying is one that will either "harm existing

competitors or create barriers to entry of new competitors in the market for the tied product (extensive citations omitted)." (*Id.* at 1199.) The commercial service market tie-in to the tying service of social networking effectuates such a restraint. What chance does Linkedin or Myspace, or other social networking sites have to compete for commercial endorsements of Facebook subscribers when Facebook has already tied each and every one of them into its commercial endorsement tied enterprise? What about third parties who might wish to offer compensation to Facebook subscribers to make such arrangements? They are effectively locked out by this tie-in. Indeed, the fact that Facebook is able to operate on a massive scale with utterly no payment to the endorsers is starkly indicative of the anticompetitive impact of the restraint.

Facebook's answer is to claim competitive *benefit* because – to quote its full defense in its Response -- "advertising on Facebook . . . enables billions of people around the world to connect and share content" (FAB at 82). But subscribers are not connecting to participate in the commercial endorsement market. In that latter tied market, no subscriber is doing any connecting; it is Facebook expropriating postings and deciding unilaterally what is to be connected to whom. It is Facebook – itself a third party, contracting with fourth parties (commercial entities paying). The subscribers are hardly connecting from their own volition. Given this reality,

the justification of "billions connect and share content" has a hollow if not ironic ring.

A tie-in does not require that the consumer be "forced" into buying the tied product. In this case, the purchase of the tied product is assumed and the consumer must extricate herself by somehow knowing of the paragraph providing for the automatic tie,[8] and she will not necessarily know to revoke nor even know when postings are actually expropriated to use as part of the commercial endorsement market. Indeed, tied markets may have possible revocation or restitution possible remedies post purchase.

The tie-in issue here is: Are those seeking commercial endorsements from Facebook subscribers (or others) put at a competitive disadvantage through this particular tying arrangement? Does it confer an advantage based not on performance in the tied service, but on economic domination of the tying service? The gravamen of this offense is to prevent the domination in one market from conferring advantage in another.[9] Appellants agree that the "tie-in" prohibition

[8] Note that many tie-ins may still allow the extrication from purchase of the tied product or service through rescission, refund or restitution at some point. The problem is the capture of customers in a way that disadvantages those wishing to compete in the tied market.

[9] For a discussion of the competitive harm from the instant type of tie-in restraint, see the analysis of similar practices by Google of Professor Benjamin Edelman, *Leveraging Market Power Through Tying and Bundling: Does Google Behave Anticompetitively*?, Harvard Business School Working Paper Series 5-28-14, at: http://www.benedelman.org/publications/google-tying-2014-05-12.pdf

has exceptions (all discussed with citations in AOB at 53). But none of them apply here. Rather, the rationale behind the prohibition in its *per se* posture does apply.

V. Separate Counsel Should Have Been Appointed for the Subclass of Children.

Children lack maturity which may lead to ill-considered decisions. That acknowledgement has led many states, including California, to invoke their role as *parens patriae* and to craft statutes (discussed *supra)* to protect children from their own improvidence. Instead of recognizing the disparate legal status of children in the settlement terms, counsel for the subclass of children actually argued *contra*. For example, he contended that continued use of Facebook as a social media service provides "implied consent" to the blanket expropriation of their posts. Ignoring the fact that children lack capacity to so consent, he argued: "We have the implied consent situation as well as the actual consent." (Reporter's Transcript at 23, ER 43.)

Continued use of a social networking service by a child does not constitute "implied consent" to participate in a separate commercial endorsement market. Additionally, a simple notice to a child that the "Rights and Responsibilities" terms have changed in some unspecified manner does not constitute actual consent for that child who, under the law, already has a degree of diminished capacity to so consent and contract. Unfortunately, the unique statutory protections afforded the subclass of children were not a factor in the Settlement Agreement. To the

contrary, and as discussed and documented in Appellants' Opening Brief, both minor subclass's own counsel and the Court, publicly questioned any difference between a teen and an adult in terms of Facebook's policy (s*ee* AOB at 30-31).

The inability of the Settlement Agreement to protect children – nor even to leave them as protected as they are under current law – is underscored by the actions of proposed *cy pres* recipient Campaign for a Commercial-Free Childhood ("CCFC"). Appellees regrettably characterize *Amicus* EPIC's discussion of CCFC's decision to withdraw as an attempt "to sensationalize" (PAB at 38). Rather, it was a courageous act by a "non-profit organization devoted to helping parents raise healthy families by limiting . . . exploitive practices in child-targeted marketing" (Letter from CCFC dated February 12, 2014, filed in companion case #13-16918, Docket Number 31, at 2). While, as both Appellees point out, CCFC did support the settlement at one point (FAB at 78 and PAB at 38), when faced with knowledge of its detailed terms, it backed away from approximately $290,000 – more than 90% of CCFC's annual budget. After reflection, CCFC buttressed its sacrifice and both disavowed and opposed the settlement. (Letter from CCFC at 2.)

Appellants' counsel (the Children's Advocacy Institute) offered in its brief below, and at oral argument, to be substituted in as counsel for the minor subclass given the obvious conflicts counsel had vis-à-vis the larger adult class, and

otherwise. The Children's Advocacy Institute (CAI) (with its sister entity the Center for Public Interest Law) founded the Privacy Rights Clearinghouse and CAI has represented the interests of children for 24 years in court, before agencies, in state legislatures and in Congress. It has long been a part of the governance of the National Association of Counsel for Children. Those offers were not considered.

CONCLUSION

Appellants request that this Honorable Court reject this Settlement Agreement and remand this case back to the District Court. However, it would be unfortunate to do so without guidance as to applicable law. Appellants concede that as to the antitrust tie-in aspect of the case below, this Honorable Court may be constrained to do more than remand with instructions to allow evidence and full argument.

But the other omissions are questions of law which are not fact-steeped and are ascertainable at this stage of the proceedings. The terms of the proposed order are known. The nature of minors and the laws that apply to their privacy rights are issues of law. Accordingly, Appellants respectfully request that this Honorable Court specify that (a) COPPA does not preempt or void ANY common law or state privacy provision as to teens who are not a part of that federal statute; (b) the blanket waiver is not a valid "meeting of the minds" to effectuate an enforceable contract; (c) such a categorical waiver here violates the common law and

provisions of the Civil and Family Code as noted above pertaining to the protection, capacity, and privacy of minors; and (d) the blanket waiver violates California Constitution Article I, Section 1 assuring informational privacy.[10]

Two special considerations apply to the momentous decision here to be made. First, this is a case where the lead class representative (Fraley) has withdrawn and publicly condemned the settlement (*see* Objections to Brief re Order on Administrative Motion to File Under Seal, and to Preliminary Approval of Class Settlement and Provisional Class Certification Order, ER 152-154). Two of the *cy pres* recipients have withdrawn – rejecting six figures for their own benefit. The FTC and Attorney General of California dispute the foundational legal assumption of both parties and the Court. And *amici* representing interests entitled to some respect, ranging from the highly regarded Center for Digital Democracy to the American Academy of Pediatrics, have contributed evidence and legal analysis that supports and arguments made by Appellants.

Second, it is important for the judiciary to apply the broad constitutional principles and legislative intent in enactments to rapidly changing technology.

[10] The waiver also raises serious issues pertaining to the federally guaranteed Constitutional "right to parent," a germane consideration not briefed below, see *Lassiter v. DSS* 452 U.S. 18 (1981) and the role of the state here in sanctioning the private usurpation of parental rights as to the control over a child's information and property. While the lack of advocacy on point may inhibit the judgment more easily made *vis-à-vis* specific applicable provisions, it does warrant serious trial litigation and consideration upon remand, along with the antitrust issues noted above.

Perhaps no example illustrates this need more than the case at hand. Privacy rights are now subject to threat beyond comprehension thirty years ago. This settlement for blanket expropriation occurs in the context of an Internet that goes into personal instruments inches from the faces of a child's friends and classmates, and possibly to millions. Any one of those receiving that post/photo can copy and paste and retransmit to large numbers (sometimes called "going viral"). The victim is unlikely to know who has seen it, and has no opportunity to rescind or correct or even comment on it. And it is all without any time limit – Google-ranked items can remain at the top for many years without meaningful recourse or opportunity to defend or deny. The cyber-bullying and teen suicide problems elucidated in *amicus* briefs before this Honorable Court are not merely theoretical dangers. They are real and documented. (*See* Brief of *Amicus Curiae* Center for Digital Democracy, *et al.*, filed February 20, 2014 at 30.)

Finally, Appellants understand that thousands of pages of argument and citations can easily distract any case from its center. And to bring home what is at stake in the instant case, we have recited above the two new paragraphs to be added in the renamed "Rights and Responsibilities" multi-page legalese document. It is to be added in the context of an Internet world of teens and families, friends and classmates and millions of outsiders, as noted above. The new paragraphs here

are quoted at the end of the Introduction in bold above. We respectfully ask that they be front and center in your deliberations.

Dated: July 15, 2014

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,951 words.

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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