Case No. 13-16819
(Consolidated with Nos. 13-16918, 13-16919, 13-16929, 13-16936, 13-17028, 13-17097)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL FRALEY, ET AL.,
Plaintiffs and Appellees,
C.M.D., ET AL.,
Intervenors, Plaintiffs, and Appellees,
JO BATMAN, ET AL.,
Objectors and Appellants

v.

FACEBOOK, INC.,
Defendant and Appellee.

Appeal from the United States District Court
for the Northern District of California
No. 11-cv-0126, Hon. Richard Seeborg, presiding

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES SUSAN MAINZER, ET AL.

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I. JURISDICTIONAL STATEMENT

Plaintiffs filed this case in the Superior Court of California, Santa Clara County, alleging claims under Cal. Civil Code § 3344 and Business & Professions Code§ 17200 et seq. The case was removed by Defendant Facebook to the Northern District of California pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332 (d) based on the citizenship of former class representative Angel Fraley and the fact that Defendant Facebook is incorporated in the State of Delaware. Notice of Removal, Depot Appellants' ER 553-556. The District Court granted final approval of the Settlement on August 26, 2013. Various objector appellants filed Notices of Appeal beginning on September 9, 2013 with most being filed on September 24, 2013. Dkt 365, Dkt 372, Dkt 373, Dkt 375, Dkt 376, Dkt 389.

Appellate jurisdiction exists under 28 U.S.C. § 1291. introduction

These consolidated six appeals[1] are from the approval of a settlement of a class action involving more than 150 million Facebook.com users in the United States who appeared in advertisements which were displayed to the users' "Friends" on the Facebook website. Three groups of appellants also appealed the attendant attorneys' fee and service awards. The settlement is fair, reasonable and adequate, the attorneys' fee and service awards are well supported, and both

[1] Only six appeals, in a class of 150,000,000, is equal to 0.000004% of the class, which shows that the reaction of the class members to the proposed settlement was overwhelmingly positive. *See* section IV.D.2 infra, "Interests of the Appellants."

Orders were well within the District Court's discretion. The objections are all without merit, and the Orders granting Final Approval of the Settlement and the Fee Award should be affirmed.

This action arose because in January 2011 defendant Facebook, Inc. ("Facebook") instituted a novel advertising service – that Facebook refused to call "advertising" – which plaintiffs contended misappropriated the names and likenesses of Facebook users. Facebook sought no consent to such use, gave users no notice they were being used in the ads, and provided no way to prevent the misappropriation. The Settlement approved by the District Court requires Facebook to get informed consent from users appearing in ads, and gives the more than 150 million Facebook users (as well as future Facebook members) the ability to discontinue such appearances if they so wish. Specific additional notice and controls are to be put in place for parents of minor teens who use Facebook. The Settlement also entails the payment of $20 million by Facebook. Every Class member who filed a valid claim will receive a cash payment that more than fully compensates them for the actual economic harm they suffered. The claims process resulted in over 614,000 claims being made by Class members, who will receive

$15 each. PSER 1. [2] Thus, $9,210,000 will be distributed directly to claiming Class members.

The balance of the $20 million fund after attorneys' fees and costs, incentive awards, and settlement administration and notice costs, expected to be approximately $2 million, will be directed to the *cy pres* recipients the Parties have designated. These entities have been and are engaged in activities that will benefit the entire Class as well as the public at large, as they will advocate for issues such as the right of protection of the Class members' right of privacy on the internet. The *cy pres* recipients also include entities that are dedicated to the protection of the rights and welfare of minor children as they are affected by social media in an online context.

Appellants, most of whom are serial objectors, raise objections in an effort to curtail any commercial interaction whatsoever between companies and minor teenagers from ages 13 through 17. However, Congress has established strict guidelines for the treatment of minors in COPPA, and made 12 years of age the cutoff for such restrictions. Under Facebook's policies, the only minors allowed to use Facebook are 13 through 17 years of age, and COPPA's restrictions do not apply to them.

[2] All references to "PSER" are to Plaintiffs-Respondents' Excerpts of Record. References to the Excerpts of record submitted by the Schachter Appellants are denoted "SHER--"

Plaintiffs contended that Sponsored Stories as currently structured violates California Civil Code § 3344, but not because Facebook is engaging in what would otherwise simply be "data mining" in order to show ads.[3] As pointed out by Facebook in defending this case, the actions which are being displayed to the minor teens' friends are almost exactly the same as those posts which those friends were eligible to see in their "newsfeed" in the first instance. Plaintiffs took the position that it is the implied endorsement, and more specifically, the inclusion of the news feed post which included profile pictures and names of members alongside corporate logos or text without the user's consent that violates Cal. Civil Code § 3344.

If accepted, Appellants' challenge to the method of obtaining consent for the use of minor teens' profile pictures and names would make it difficult for a minor to behave responsibly and honestly by self-identifying as a minor. If prior parental consent were to be required for each ad as Appellants would like, minor teens would frequently lie about their ages in order to be able to continue to use Facebook. This would lead to the unintended consequence of minor teens being exposed to age-inappropriate ads for alcohol and dating, as Facebook would unknowingly treat them as adults and not have the minor teen advertisement

[3] "Data mining" is the practice of tracking a person's history of online usage, which information is employed to tailor ads for specific users. It has been found acceptable by federal law, given proper notice.

screening in place. The argument that minor teens are incapable of providing consent on their own behalf, under the theory that California Family Code § 6701 prohibits minor teens from consenting to contracts generally, was rejected by Judge Seeborg in the case below as well as in the recently dismissed *C.M.D. v. Facebook* case.[4] Since minor teens can consent to be bound by a contract in this instance, they 1) can and are bound by Facebook's Statement of Rights and Responsibilities providing for the application of California law to their claims, which nullifies the call for the application of the laws of other States as contended by Appellants, and 2) can also be bound by a "notice and consent" model for changed terms as to inclusion in Sponsored Stories as provided under the Settlement Agreement.

Further, there is no need for separate representation of the minor teen subclass. If Plaintiff-Respondents took the positions advocated in *C.M.D. v. Facebook* and by the appellant objectors, Plaintiff-Respondents' case would have suffered the same fate as *C.M.D.* Part of negotiating a great settlement is not taking harsh and untenable positions on the law.

[4] Similarly, Judge Murphy of the Southern District of Illinois held in transferring what is now the *C.M.D.* v. *Facebook* case to the Northern District of California, that the SRRs were enforceable as to the venue provision in this putative class of only minor teens. *E.K.D. v. Facebook, Inc.*, 885 F. Supp.2d 894 (N.D. Ill. 2012). In the motion for reconsideration of the transfer order *C.M.D.* class counsel stated that validating the SRRs as applied to minors "could be ruinous" to their claims. PSER, at page 8. As it turns out, counsel's prediction was correct and the case was dismissed.

Appellant objectors Wendy Lally, et al. ("Lally"), Tracy Cox Klinge, et al. ("Cox"), and Jo Batman ("Batman") also take issue with the District Court for not adequately scrutinizing the Settlement and Fee Award. Yet, the court rejected the settlement as first presented. The revised Settlement added direct payments to claiming Class members, and removed the clear sailing provision. The District Court, after performing a lodestar crosscheck, awarded Class Counsel 25% of the net settlement amount remaining after deduction of the settlement administration fees, costs, and incentive awards. Thus, by definition, the fee award is within the 25% benchmark for attorneys' fees in the Ninth Circuit. Smaller-than-requested service awards of $1,500 per class representative were also ordered. The District Court plainly analyzed the Settlement carefully and exercised its discretion in approving the revised Settlement, and ensured that the resulting fee and service awards are reasonable.

All that the Appellants / Objectors have achieved or will achieve through their appeals is to create a stay of judgment and to delay implementation of the additional notice and control features and distribution of the monies as provided in the Settlement. Such ill-conceived objections and appeals also have a chilling effect on attorneys considering taking cases which require thousands of hours of time and a huge payment of expenses, all of which are then tied up for years on appeal.

II. SUMMARY OF THE ARGUMENT

The District Court gave due consideration to the fairness, reasonableness and adequacy of the Settlement in granting final approval. The monetary consideration, in light of the risks of continued litigation, combined with the distribution to cy pres entities and the significant changes to Facebook's practices which provide new notice and controls, support the Settlement. The Fee Award is similarly fully supported and was the subject of close analysis by the District Court, and at 25% of the net settlement fund, well within the District Court's discretion and Ninth Circuit precedent.

Appellants' contention that the injunctive relief does not go far enough because it does not have an "opt-in" feature, is in essence, a claim that the Settlement is "not good enough." This is not a proper objection. Appellants also incorrectly assert that the Settlement "authorizes" violations of the law. The Settlement does no such thing, instead providing for additional notice and controls but only releasing claims for past appearances in Sponsored Stories. Meaningful consent in this context includes "browsewrap" agreements whereby users consent by continuing to use a website.

Other Appellant objectors argue that the minor subclass requires separate representation because of supposed "conflicts" between the overall Class and the subclass. All the objectors fail to explain how the heightened concerns for minor

teen interests, place the minor teens in conflict with the rest of the Class, since the Settlement provides further protections for the minor teens in terms of additional notice and controls, including parental involvement, none of which come at the expense of the overall Class. Nor are the minor teens' interests in any way sacrificed to those of the overall Class.

Appellants also contend that the monetary amount of the Settlement is inadequate, given the potential liability imposed by the law, including the $750 statutory penalty imposed by California Civil Code § 3344. The proper question is whether on the terms of the actual settlement, the amount is fair and reasonable. Given the substantial risks of litigation, including among other items the difficulty of proving actual damages (as required by an Order of the District Court), possible preemption under the Children's Online Privacy Protection Act ("COPPA") 15 U.S.C. §§ 6501-08, the use of pseudonyms (as opposed to the users' real names)[5] and profile pictures which did not show the users' face (leading to defenses that the name or likenesses had not been used), and the amount of money actually derived from the actions by Facebook (estimated at approximately $74 million), the total amount in settlement is well within the range of approval and provides good value to the Class.

[5] Facebook users, especially minors, commonly employ pseudonyms and use profile pictures of objects or persons other than themselves.

The objections to the cy pres component are premised upon an incorrect view of Ninth Circuit jurisprudence. Appellants seek to impose a requirement that cy pres only be used if it is impossible to give the money to any class members whose identity can be determined. Given that an individual Class member's actual damage is estimated to be less than $1, the planned distribution is fair. Increasing the per-member distribution from $15 by a pro rata amount of the $2 million remaining after the fees and costs and initial sums, would as one court put it, be simply cy pres by another name—and would deprive the absent, non-claiming Class members of the benefit of those monies. Appellants have also failed to show that the actual cy pres recipients are inadequate under Ninth Circuit authority.

The District Court has awarded Class Counsel 25% of the net settlement after deduction of costs, which is well within its discretion and fully supported by the work done in the case, the results, the skill employed, the risks of litigation and the contingent nature of the fee. The service awards to the three Class Representatives, Susan Mainzer, and minors James H. Duval and W.T., who each were deposed at length about their personal choices, and endured media exposure and risk of paying Facebook's attorney's fees (per Cal. Civ. Code § 3344's "prevailing party" or "loser pays" provision) were set at $1,500 each—a very modest sum given their involvement.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Background

As of December 2011, social website Facebook had over 161 million monthly active users in the United States.[6] PSER 160. On January 25, 2011, Facebook officially launched a new advertising service called "Sponsored Stories." PSER 144. Facebook created a product it called Sponsored Stories, while specifically avoiding calling it "advertising." Since that time, when a user takes a "social action," i.e. posts, "Likes," "Checks in," uses an application, or plays a game such action triggers an algorithm which creates a "posting" on the user's newsfeed and the users' friends' newsfeed. If the content relates to an ad campaign in some predetermined way, the user's profile image and name may appear along with content created by Facebook as an endorsement in a Sponsored Story which would appear in the right hand column of the users' friends' Facebook page. Plaintiffs contend that Sponsored Stories are paid advertisements shown to some or all of the Facebook "Friends" of that user. Sponsored Stories typically appeared in the right-hand column, known as the ad column. They do not appear on pages seen by the user whose identities are appropriated into the ads. *See* PSER 138; and PSER 115. Advertisers paid to have users' actions turned into Sponsored Stories,

[6] As of August 31, 2012, 123,868,976 Facebook members had appeared in a Sponsored Story. Of that number, 19,761,991 are minor teens. *See* PSER 174.

paying using either a cost-per-click or cost per impression method. Thus, there was a direct connection between Sponsored Stories and revenue to Facebook.

The Sponsored Stories service was already enabled for all users when they sign up, and Plaintiffs contend that users are unable prevent their appearance in such ads, much less completely opt-out. PSER 117; PSER 132:3-6; PSER 157:20-158:02. The most common action that leads to an appearance in a Sponsored Story is clicking on a Facebook "Like" button anywhere on the Internet. Reasons for doing so include being able to thereby take advantage of some offer or see content on a page. At any given time, only a single user agreement was in effect between Facebook and all Class members in the United States. PSER 133:11-135:9; 136:3-1.[7] That agreement applied uniformly to all Class members during the time period in which it was in effect. *Id*. The user agreement has been modified over time, but only one is in effect at a given time. *Id.* The terms of use effective during the Class Period thus far (generally referred to as the Statement of Rights and Responsibilities, or "SRRs").[8]

Plaintiffs contended that none of the operative versions of the SRRs disclosed to users the fact that they may appear in Sponsored Stories or sought

[7] PSER 140

[8] *See* PSER 24-63: all operative versions of the SRRs during the Class Period, and the proposed changes pursuant to the injunctive relief.

their consent as to appearances in Sponsored Stories.[9] Plaintiffs further contended that a problem with the voluminous "Help Center" (hundreds of linked pages) and the Settings arose from Facebook's failures to notify users of the addition of Sponsored Stories, who upon visiting the "Help Center" were told "You can edit your ad privacy settings through the 'Account Settings' link at the top of any page within Facebook or by clicking here." PSER 167. If a Facebook user clicked on that link, they were taken to a page where it appeared that they were given the ability to "opt-out" of appearing in all advertisements, but in fact they were still eligible to appear in Sponsored Stories. Facebook's "Help Center" in some areas stated that Sponsored Stories are "different" than Facebook Ads, thus, Plaintiffs allege, leading to further confusion. PSER 165. Facebook contended in this litigation that Sponsored Stories are not ads. *See* footnote 10, *infra*.

B. Settlement Negotiations

Plaintiffs and Defendant Facebook mediated the case at JAMS in San Francisco before the Hon. Edward A. Infante, retired former Chief Magistrate Judge of the Northern District of California, on March 1, 2012. Plaintiffs' settlement conference statement was 231 pages long and provided a 28-page long executive summary. PSER 64. The case did not settle at that time, but lead counsel

[9] In contrast, the SRRs expressly discuss "Facebook Ads" with social content, and made it clear that a Facebook User could appear in them and thus was giving consent by using the site. *See* PSER 24-63. Facebook took the position that Sponsored Stories are not advertisements, thus Plaintiffs contended that they were not covered by the SRRs.

for both parties continued to negotiate, with the mediator being kept apprised at all times of the status. *Id*. at ¶ 4. Eventually a framework for settlement was developed between Facebook and counsel for Plaintiffs.

C. Terms of the Settlement

The terms of the Settlement are as follows:

1. The Settlement Class

The Court certified the following Settlement Class:

i. **Class:** All persons in the United States who have or have had a Facebook account at any time and had their names, nicknames, pseudonyms, profile pictures, photographs, likenesses, or identities displayed in a Sponsored Story, at any time on or before the date of entry of the Preliminary Approval Order.

ii. **Minor Subclass:** All persons in the Class who additionally have or have had a Facebook account at any time and had their names, nicknames, pseudonyms, profile pictures, photographs, likenesses, or identities displayed in a Sponsored Story, while under eighteen (18) years of age, or under any other applicable age of majority, at any time on or before the date of entry of the Preliminary Approval Order.

Amended Settlement Agreement (hereafter "A.S.A") §§1.6, 1.17. SHER 26.

2. Injunctive Relief

The Parties agreed to a stipulated injunction that will provide the relief described below addressing and clarifying the issues of consent, notice and control of the use of the Class members' names and likenesses. Previously, it was impossible even for a person who carefully pored over Facebook's SRRs and Help

Pages to discern exactly what a "Sponsored Story" was. Rather, Facebook distinguished them from "ads," stating expressly that Sponsored Stories are "different from ads." PSER 165. In fact, Facebook took the legal position that Sponsored Stories are not advertisements at all. [10]

3. Payments to the Class / Claims Process

The Settlement creates a Settlement Fund of $20 million. Class Members were able to submit a claim for payment from the Net Settlement Fund, which will be the amount of the Common Fund after attorneys' fees and costs, service awards, and settlement administration costs are deducted. (A.S.A. §4.1(a).) Class Members who submitted timely and valid Claims Forms ("Authorized Claimants," A.S.A.§1.1) will receive payments of $15, either by check or through an Automated Clearing House transfer. The excess after the claims and costs are paid will be distributed to *cy pres* recipients proposed by the Parties and approved by the Court (the "*Cy Pres* Recipients," A.S.A. § 1.8).

[10] In Facebook's response to Request For Admission, No. 6 [1.6], Set 1 Facebook denied "that Sponsored Stories are advertisements for members.") PSER 144. Jim Squires of Facebook testified: "Yes, Sponsored Stories are not ads. I'm not sure what the distinction is to members, advertisers, or anybody else. Sponsored Stories are not advertisements period." PSER 154.

4. Changes to the SRRs and Information on Facebook's Website and Help Pages

The changes to the SRRs and Help Pages seek permission for Facebook to place users' names and likeness in the advertisements, and identify Sponsored Stories as advertisements.

Within a reasonable time, not to exceed six months following the Final Settlement Date (once the Judgment is final, A.S.A. §1.13), Facebook will modify Section 10.1 of the Statement of Rights and Responsibilities ("SRRs") in part to read as follows to clearly seek permission to use names and likenesses:

> **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.
>
> 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.

A.S.A. § 2.1(a) (emphasis added).[11]

[11] See PSER 24 ¶¶ 14 and 15 for a comparison of the old and proposed new SRRs.

5. Notice and Control: New Tool for Limiting Appearances in Sponsored Stories

The Settlement provides notice and controls through the addition of new tools or mechanisms for meaningfully limiting appearances in Sponsored Stories, something that does not currently exist. A.S.A. 2.1(b). First, Facebook will create a tool whereby users can easily see what actions they have taken that have caused them to be in Sponsored Stories, and what those Sponsored Stories are. Next, Facebook will add a new feature to the site that will allow users to control which actions and content they will allow to potentially appear in Sponsored Stories. *Id*. Finally, these settings will allow users to prevent new appearances in ads from that advertiser, or from entire categories of interactions and content from appearing in Sponsored Stories. *Id.*

6. New Information and Tool for Opting Out Minor Teens

Under the terms of the Settlement, parents of minor users will be able to visit a public link on the Facebook website and utilize a tool which will enable the parent to prevent the name and likeness of their minor teen from appearing in Sponsored Stories.[12] A.S.A. § 2.1(c)(iii). Further, if the minor's parent is also a Facebook user, the minor and the parent can use Facebook to indicate that relationship. A.S.A. § 2.1(c)(ii). In fact, Facebook will encourage user to do so. *Id.* Under the terms of the A.S.A., when the parent and minor have confirmed a

[12]PSER 170 is an exemplar of what this tool will potentially look like.

parent-minor teen relationship, the Facebook system will then allow the parent to utilize the opt-out tool through their own Facebook account, without obtaining access to their children's account. A.S.A. § 2.1(c)(ii)-(iii).

The A.S.A. requires Facebook to add clear, easily understandable information about how advertising works on Facebook to the "parents" section of its Family Safety Center. It also provides that Facebook shall create and show advertising to users with a confirmed parental relationship with a minor, directing them to the Family Safety Center, and/or other parent-specific resources on Facebook. A.S.A. § 2.1(c)(iv). Class Counsel shall also have the right to request the Court to order a one-time Injunctive relief compliance audit, for which Facebook will pay. A.S.A. § 2.1(e).

Finally, Facebook will add a control in minor users' profiles that enables each minor user to indicate that his or her parents are not Facebook users.[13] If a minor indicates that his or her parents are not Facebook users, Facebook will make the minor ineligible to appear in Sponsored Stories until he or she reaches the age of 18, until the minor changes the setting to indicate his or her parents are on Facebook, or until a confirmed parental relationship with the minor user is established.

[13] PSER 163 is a draft "mock up" of what this tool will potentially look like.

D. Approval of the Settlement and Objections to the Settlement

1. Approval of the Settlement

The District Court approved the Settlement on August 26, 2013, and granted Class Counsel's request to increase the amount of the cash distribution from $10 to $15 per Class member. The Court also awarded costs and attorney's fees, the attorney's fees being based upon 25% of the remaining Settlement Fund after costs and incentive awards are deducted. The District Court also granted service awards of $1,500 to each of the three Class representatives, Susan Mainzer, and minor teens James H. Duval and W.T.

2. Interests Of The Appellants In This Appeal

Several of the appeals are by "serial" or "professional" class action objectors, or who have other interests beyond simply benefiting the Class. The law firm Korein Tillery is counsel in the *C.M.D. v. Facebook, Inc.*, No. 12-1216-RS action, which was pending before the same District Court as *Fraley* and in which claims were made on behalf of a putative class of minor teens, primarily under Family Code §6701 and for declaratory relief that COPPA did not preempt the class' claims. The *C.M.D.* plaintiffs made a motion to intervene, and posed unsupported objections to the first Motion for Preliminary Approval. Dkt 187. Their Motion to

Intervene was denied and their objections overruled by the court in granting approval of the Revised Settlement.

Korein Tillery here represents objections by Appellant Sheila Shane and others ("Shane Objectors"). Korein Tillery's reason for finding an objector to bring an objection to this Settlement is evident: if the Settlement is put into effect, as Korein Tillery attorney Aaron Zigler has admitted, the *C.M.D.* case would be wiped out because it will not include Sponsored Stories. See PSER 21. On March 26, 2014 Judge Richard Seeborg granted a motion to dismiss with prejudice in *C.M.D. v. Facebook, Inc.*, No. C12-1216RS, 2014 U.S. Dist LEXIS 41371(N.D. Cal. March 26, 2014)("*C.M.D.*"). The decision in *C.M.D.* is directly on point with regard to the same arguments being made by Shane counsel in this appeal, and is addressed *infra*.

Several other appellants / objectors have a checkered history of objecting to class action settlements in conjunction with each other. Objectors Tracey Cox Klinge, and Thomas Cox are often linked as objectors in class action settlements. Thomas Cox represents Tracey Cox Klinge in *In re Netflix Privacy Litigation*, 2013 U.S. Dist LEXIS 37286 (N.D. Cal. Mar 18, 2013); and *In re Online DVD Rental Antitrust Litigation*, 2012 U.S. Dist LEXIS 5591 (N.D. Cal. April 20, 2012). Objector Jo Batman is also a serial objector, having appeared as a non-party litigant in one form or another in numerous cases including *Cassese v.*

Washington Mutual, Inc., 743 F. Supp. 2d 148 (E.D.N.Y. 2010); and *Blessing v. Sirius XM Radio Inc*., 775 F. Supp. 2d 650 (S.D.N.Y. 2011). Her attorney herein, Christopher Bandas, is also a frequent objectors' counsel.

IV. STANDARD OF REVIEW

This Court reviews the approval of this class action settlement and award of attorney's fees for an abuse of discretion. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046 (9th Cir. 2002).

Furthermore,

> The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge. "Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971). We are not to substitute our notions of fairness for those of the district judge and the parties to the agreement.

Officers for Justice v. Civil Service Commission of S.F., 688 F.2d 615, 625-626 (9th Cir. 1982) (some citations omitted).

V. ARGUMENT: THE SETTLEMENT WAS PROPERLY HELD TO BE FAIR, REASONABLE AND ADEQUATE.

The District Court acted within its discretion in determining the Settlement was fair, adequate and reasonable. Those conclusions are supported by the size of the monetary distribution to the Class, the cy pres distribution, and the injunctive

relief notice and controls obtained. On a motion for final approval, the settlement must be found to be "fundamentally fair, adequate and reasonable." Federal Rule of Civil Procedure 23(e).

> Assessing a settlement proposal requires a district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining a class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; … and the reaction of the class members to the proposed settlement.

In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (citation omitted).

While the settlement occurred before class certification, and thus a "'higher standard of fairness'" governed the District Court's evaluation, *Lane v. Facebook*, 696 F.3d 811, 819 (9th Cir. 2012), cert. denied 134 S.Ct. 8 (2013), the District Court applied the proper standard. SHER at 3. This Court's review therefore remains "extremely limited" and reversal is warranted only if the objectors show a "clear abuse of discretion." *Lane*, 696 F.3d at 818-19.

The record and transcript of the hearing also do not support the claims that the District Court failed to employ the proper standards and was inappropriately deferential either as to the Settlement or the requests for attorneys' fees and service awards. Judge Seeborg in fact rejected the first Settlement Agreement, which speaks volumes for his attentiveness. SHER 136. The parties revised the

Settlement Agreement to eliminate the clear sailing agreement, and to include direct distribution to Class Members. Further, Judge Seeborg awarded 25 % of the net recovery (amounting to approximately $4.7 million in fees) rather than the $7.5 million Plaintiffs had requested based upon their $5.39 million lodestar, and granted incentive awards that were a fraction of those requested by Plaintiffs. These actions all confirm that the District Court performed its duty to ensure the fairness of the Settlement.

Appellants' assertion that the Settlement "authorizes" violations of the law, is simply incorrect. The injunctive relief is meaningful and supported by precedent. The same is true of the cy pres distribution. Nor were there any conflicts which required separate representation of the minor subclass.

E. The Relief Obtained Supports the Fairness of the Settlement

1. The Cash Component is Substantial in Light of the Risks of Continued Litigation and In Comparison with the Actual Damages Suffered by the Class Member

The claiming Class members will benefit from a Settlement Fund of $20 million, and will each receive $15, for a total estimated distribution of approximately $9.2 million. Objections to the size of the recovery are without merit. A settlement need not be a rout, and there is not and could not be enough money to pay everyone in the entire class a meaningful amount. That a party may have achieved a "better result" in settlement is thus simply not a supportable

argument. *Linney v. Cellular Alaska P'ship.*, 151 F.3d 1234, 1242 (9th Cir. 1998). A proposed settlement "is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625. Furthermore, courts must not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Id*.

There were substantial risks of litigation if the case were to continue to trial. The Hon. Lucy Koh held on the Motion to Dismiss that Plaintiffs must prove actual damages first before being entitled to seek the statutory damages under Cal. Civil Code § 3344, and that plaintiffs do not have a vested interest in receiving the statutory penalties. *Fraley v. Facebook*, 830 F. Supp. 2d 785, 809-811, 812 (N.D. Cal. 2011). The difficulty in proving such damages bears directly on Plaintiffs' ability to secure the statutory penalties under § 3344. The District Court in its Order on Final Approval found the monetary relief adequate after reviewing the various hurdles faced by Plaintiffs. SER 5-6. Using the revenue of approximately $73 million generated from Sponsored Stories, being settled for $20 million is certainly fair. SER 6.

Simply noting the $750 statutory damages in Cal. Civil Code. § 3344 and comparing them with the amount made available to the claiming class members,

(see Lally brief at 11), is not a useful metric for whether "enough" money has been achieved or distributed. Recovery of all possible damages is not realistic in a settlement context, regardless of which laws are sued under. The Lally Appellants admit that "[t]he settlement would have to be at least $150 million in order to provide just $1 per class member." Lally brief at 11. This makes the point that such a distribution would not make for a realistic and worthwhile settlement, whereas the current settlement provides $15 for claiming class members, *cy pres* and injunctive relief.

Furthermore, the potentially enormous statutory damages lead to a due process problem, which would be a great risk of continued litigation. Decl. of Edward Infante, PSER 100 at ¶18; PSER 64; *see also BMW of N. America v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589 (1996) (holding that courts must consider the proportionality of punitive damages awards to the harm suffered).

The offhand criticism of the Seventh Circuit of a settlement based on theoretical maximum damages is thus not a useful guideline for deciding whether a good result has been achieved, simply because the risk of recovery is a factor leading to a discount. *See Murray v. GMAC Corp*, 434 F.3d 948, 952 (7th Cir. 2006). Class members who do not receive a cash payment are still receiving the benefit of the injunctive relief, and the *cy pres* award. Persons who believed that

they had viable claims for more were free to exclude themselves and bring a separate suit, as the Ninth Circuit noted in *Lane*.

There were also contested issues associated with determining what "profits" and "damages" are for purposes of asserting claims under either Civil Code § 3344 or under the Unfair Competition Law, Business & Professions Code § 17200 et seq., which also allows for restitutionary disgorgement of profits. Such issues also exist as to any "profits" sought to be disgorged or "damages" on which treble damages could be based under any other laws. Section 3344 allows additional damages from "any profits from the unauthorized use that are attributable **to the use** and are not taken into account in computing the actual damages." (emphasis added). Whether Facebook can include its costs of creating the ad platform itself in its costs to determine profits is just one issue presented.

Like the overall Class, the minor teen subclass has significant risks of litigation including the use of pseudonyms, profile pictures not depicting their likenesses, implied consent by continuing to use Facebook after learning of sponsored stories which they would view frequently,[14] and potentially COPPA preemption.[15]

[14] The minor teen subclass like the overall class was subject to the defense of "implied consent" because at some point they became aware they could be in Sponsored Stories through reading the posts of friends and seeing the Sponsored Stories generated from those posts. Facebook took the position that Sponsored Stories were never a mystery to a frequent user of Facebook.

[15] In *Cohen v. Facebook, Inc.*, No. BC444482 (Cal. Sup. Ct. Los Angeles County), the Superior Court of California ruled that COPPA preemption applied against the claims of the minor class. SHER 167.

2. The Injunctive Relief Remedies The Problems Identified And Supports the Adequacy of the Settlement

The A.S.A. Sections 2.1 (b) and (c) contain extensive new mechanisms of notice and control. Users will be able to prevent all appearances in any future advertisements by that same advertiser based on the selected interactions. See A.S.A. § 2.1(c).[16] Furthermore, the A.S.A. provides that "these settings will include the ability to enable users to prevent individual interactions and other content (or categories of interactions and other content) from appearing in additional Sponsored Stories." *Id.* The injunctive relief thus addresses and remedies the harm that was at the core of Plaintiffs' claims – that Class members were never given notice and had no meaningful way to control their appearances in Sponsored Stories. The District Court held that the injunctive provisions provide benefits "that would be difficult, if not impossible, ever to obtain through a contested judgment, even if plaintiffs were to eventually prevail upon the merits." SHER 8.

3. The Settlement Does Not Authorize any Violations of Law

Appellants John Schachter, et al. ("Schachter") and K.D. and C.D. through their father, Michael Depot ("Depot") wrongly contend that the Settlement Agreement is

[16] For example, a user who at one point "Liked" Wal-Mart to get a coupon would see on the new notification page that she is now appearing in a Sponsored Stories ad to her friends, caused by that "Like" action. She will be able to "control which of these interactions and other content are eligible to appear in additional Sponsored Stories." A.S.A. § 2.1(b).

in "violation the laws of seven states" because it does not require prior parental consent for the use of minor teens in Sponsored Story ads. The trial court noted that the objectors below had failed to establish that differences in the laws of any other states were material or could be applied under choice of law principles. SHER 12-13. In any case, the laws as quoted are similar to California's as to the proposition for which they are cited—that prior consent is necessary. The Settlement provides for consent under a notice and control method, and for consent as to minor teens involving parental consent.

a. California Law Applies

California law was properly applied and the trial court correctly certified a nationwide class for settlement purposes. Because Facebook is an Internet company and all of its dealings with its Members are through its website, all of the Class Members are similarly situated and exposed to the same policies, practices and procedures. This applies to the SRRs, Terms of Use, and Privacy Policy, as well as the means by which Sponsored Stories ads are generated. PSER 117 (types of actions leading to SS ads).

California law is specifically made applicable to all claims against Facebook under the user agreement. PSER 47, 55, 59. The claims in this case are based upon violation of a pair of California laws, the Unfair Competition Law, Business and Professions Code §17200, et seq. and the Consumer Legal Remedies Act Civil

Code § 1750, et seq. In *Washington Mutual Bank, FA v. Super. Court*, 24 Cal. 4th 906, 921 (2001), the California Supreme Court held courts must enforce a California choice of law as to a nationwide class so long as "the chosen state has a substantial relationship to the parties or their transactions." California has a substantial relationship to the parties through the presence of Facebook's headquarters, and one-eighth of the nation's population, many of whom are Facebook users. California has an interest in preventing unlawful, unfair, or fraudulent behavior from originating in California. *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal. 4th 1036 (1999). "Where the defendant is a California corporation and some or all of the challenged conduct emanates from California," it is proper to apply California statutes to non-California members of a nationwide class. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 243 (2001). Accordingly, nationwide certification was proper and California law was properly applied.

Thus, arguments that non-California Class members are giving up "slam dunk" claims are spurious. Given that the SRRs' venue provision is enforceable, a plaintiff from another State would have to try to assert their State statutory or common law claims in California. Thus, she would likely not be able to take advantage of her home State's contract law because it is likely that the choice of California law in the SRRs would also be enforced. Those claims are subject to

the same defenses of implied consent, use of pseudonyms, and others that were raised by Facebook.

b. The Release Does not authorize violation of Any laws

Shachter Appellants' assertion, unsupported by citation or any evidence, that "choice of law principles are irrelevant" and the Court has an obligation to ensure the laws of other states are not violated cannot withstand scrutiny. To say the Settlement "authorizes conduct" that other States' laws prohibit is incorrect. If any Class members have a future claim he or they wish to bring, this Settlement does not prevent them from filing it. The Settlement does not "bless" or immunize or authorize the actions of Facebook, it only releases claims for past behavior. The Second Circuit Court of Appeals in *Robertson v. National Basketball Assn'*, 556 f.2d 682 (2d Cir. 1977) held that:

> It is true that a settlement that authorizes the continuation of **clearly illegal** conduct cannot be approved, but a court in approving a settlement should not in effect try the case by deciding unsettled legal questions. *West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1086* (2d Cir.), *cert. denied, 404 U.S. 871, 92 S. Ct. 81, 30 L. Ed. 2d 115 (1971)*. Here, as in *Grunin v. International House of Pancakes, 513 F.2d 114, 124* (8th Cir.), *cert. denied, 423 U.S. 864, 46 L. Ed. 2d 93, 96 S. Ct. 124 (1975)*, "the alleged illegality of the settlement agreement is not a legal certainty." **The challenged practices have not been held to be illegal per se in any previously decided case.**

Robertson, 556 F.2d at 686 (emphasis added). Here, Appellants have not shown

that the "challenged practices," are illegal per se.[17] In other words, the District Court in this action was correct that it was being asked to decide the merits.

c. Consent for Minor Teens is Provided for in the Settlement

Nor do Facebook's SRRs as revised under the Settlement authorize any violations of the law. Under the Settlement, the new SRRs will require minor teen users to represent that their parent or legal guardian consents to the user of their names and likenesses in Sponsored Stories. A.S.A. Section 2.1(c)(i). Second, Facebook will encourage new users to include in their profile information parent and minor teen relationships. A.S.A. § 2.1 (c) (ii) Where those relationships are confirmed, Facebook will give the parent easy-to-use controls to prevent the minor teen from appearing in any Sponsored Stories, all without having to log into the child's account. A.S.A. § 2.1 (c)(iii). Such controls are unprecedented, and are likely to set the bar for all social networks. The proposed changes to the SRRs are sufficient to bring Facebook into compliance with Cal. Civil Code § 3344, in that they expressly seek consent to appearance in Sponsored Stories. What the Plaintiffs have secured here, and what the Court itself could not have ordered, is a reasonable solution to the issue of whether parents have given their consent implicitly. Now, parents will have notice and parental controls that did not exist prior to the Settlement.

[17] Nor does the Settlement violate the FTC's guidelines or any Orders as to Facebook. Plaintiffs adopt the arguments made in this regard by Facebook in its brief.

Amicus EPIC attacks the procedure for obtaining user consent under the settlement, because the default position is for there to be deemed consent. Registration on Facebook (as on almost all other websites) works on the honor system as far as users self-identifying as minor teens. The courts should recognize that those same persons will be likely to also follow the procedures for acknowledging the parent-minor teen relationship, or state that their parents are not on Facebook and thus removing them from being in Sponsored Stories. Anyone who continues to use Facebook in the light of the new SRRs once they are implemented, is on notice that such consent has been sought and is deemed granted through further use and actions taken which can trigger Sponsored Stories. This "browsewrap" method of obtaining consent has been widely accepted.[18] Many courts have held that consent to at least some of the terms of use can arise from continued use of a website. Again, Judge Murphy in the *C.M.D.* matter enforced the venue provision in Facebook's SRRs, as to a class of minor teens. *E.K.D. v. Facebook, Inc., supra,* 885 F. Supp 894 at 901-902.

Facebook currently has in place controls which explicitly protect minor teens based on the age indicated when they register. Unknown adults are unable to contact minor teens. Inappropriate ads such as alcohol ads and dating service or

[18] *Ticketmaster v. Tickets.com,* CV99-7654-HLH(VBKx) 2003 U.S. Dist. LEXIS 6483 9 (C.D. Cal Mar. 7, 2003); *see Craigslist, Inc. v. Naturemarket, Inc.*, 694F. Supp. 2d 1039, 1052 (N.D. Cal. 2010).

sexually-relevant ads are not shown to minor teens. If minor teens are forced to lie about their age in order to continue using Facebook, this would end up subverting these safety controls. This settlement allows teenagers to do the right thing and state their age correctly.

d. There are No "Antitrust," Constitutional or Other Violations at Issue Implicated by the Release or SRRs.

Depot Appellants' contentions that Facebook's actions amounted to an antitrust violation, and/or that claims for one should have been brought for that or for Constitutional or "right to parent" claims, are each without merit.[19] As to the antitrust claim, Depot Appellants have failed to identify any products or services being purchased by the users of Facebook, let alone any second product that they are being forced to purchase. Facebook is free to use. To the extent that there is a market for commercial ads on Facebook, it is the advertisers who are using them. Facebook users are not "participating" in either "market" identified by Depot Appellants, because they are not purchasing—and hence not paying more for—any product or service. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) ("the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the

[19] These arguments were not made below and thus waived (Depot counsel at best mentioned antitrust law in a passing analogy at final approval, Depot ER at 49), *Trigueros v. Adams*, 658 F.3d 983, 988 (9th Cir. 2011), and further are "merely adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation" and therefore waived. *United States v. Alonso*, 48 F.3d 1536, 1544 (9th Cir. 1995).

purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."(emphasis added)); *Bhan v. NME Hosps Inc.*, 929 F.2d 1404 (9th Cir. 1991) ("Tying exists when a seller refuses to sell one product unless the buyer also purchases another."). Each of the cases cited by Depot involves situations where a party is being forced to buy in two markets. *See County of Tuolumne v. Sonora Community Hospital*, 236 F.3d 1148 (9th Cir. 2001); *Blough v. Holland Realty, Inc*., 574 F.3d 1084 (9th Cir. 2009); *Datagate, Inc. v. Hewlett Packard Co.*, 60 F.3d 1421(9th Cir. 1995). In *People v. National Ass'n of Realtors,* 155 Cal.App.3d 578 (1984), the court held that there was an illegal tying arrangement. However, nowhere does the opinion state that either membership in the trade associations or use of the MLS were free of cost.

EPIC argues that the Settlement is overbroad, asserting that the release insulates Facebook from all other misappropriation claims arising from the Sponsored Stories program prior to the conclusion of this case. EPIC brief at page 24. This argument simply repeats the mantra that affirmative parental consent is required in some states, which is dealt with above.

The assertions by Depot Appellants that claims for nebulous "Constitutional" violations should have been asserted, or that the Settlement somehow takes away the "right to parent" are similarly without any support in the law. Any Class members who believed that they had such claims and that they would be precluded

from bringing them under the Settlement, were free to opt out and bring them. The "right to parent" "liberty interest" does not amount to a cause of action being given up in the Release. Depot Appellants' half-formed arguments on this and under the California Constitution that Facebook is somehow taking on a "parental function," are not claims which had to be raised by Class Counsel.

As the Court of Appeal for the Seventh Circuit held in considering a similar objection, nationwide class actions are routinely brought notwithstanding differences in proof under similar statutes in other States:

> Nonetheless, the objectors imply, these class representatives are inadequate because they failed to investigate and deploy every potential state-law theory. Why they should have an obligation to find some way to defeat class treatment is a mystery. It is best to bypass marginal theories if their presence would spoil the use of an aggregation device that on the whole is favorable to holders of small claims. Instead of requiring the plaintiffs to conduct what may be a snipe hunt, district judges should do what the court did here: Invite objectors to identify an available state-law theory that the representatives should have raised, and that if presented would have either increased the recovery or demonstrated the inappropriateness of class treatment.

In re Mexico Money Transfer Litigation, 267 F.3d 743, 747 (7th Cir. 2001)(emphasis added). Appellants have failed to present available state law theories that would have either increased the recovery or which demonstrate the inappropriateness of class treatment.

F. The Cy Pres Distribution is Appropriate Under Ninth Circuit Law

Objectors contend that the amount to go to *cy pres* is minimal and not appropriate when there are identifiable Class members. At $15 per claim, distribution of the entire residual Settlement Fund amount after fees, costs and the Class Member cash distribution, the amount to go to *cy pres* will be approximately $2 million. The District Court was given the power to augment as to the claiming Class members under A.S.A. 2.3(b). But *cy pres* distributions are appropriate in cases such as this without a need for first exhausting the funds which could theoretically be distributed to claiming class members.

This Court has recognized that the use of *cy pres* to further the interest of a class is warranted in appropriate circumstances – even where that is the *only* relief:

> "[W]hen a class action involves a large number of class members but only a small individual recovery, the cost of separately proving and distributing each class member's damages may so outweigh the potential recovery that the class action becomes infeasible … *cy pres* distribution avoids these difficulties … federal courts have frequently approved this remedy in the settlement of class actions where the proof of individual claims would be burdensome or distribution of damages costly."

Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990).

This Court in *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), cert. denied 134 S.Ct. 8 (2013) again held that a distribution to only *cy pres* recipients was appropriate. *Lane* was followed in *In Re Netflix Privacy Litigation*, No. 5:11-CV-

00379, 2013 U.S. Dist. LEXIS 37286 (N.D. Cal. March 18, 2013), where the overall settlement was for $9 million, with the "cash" component of the settlement consisting entirely of *cy pres* distribution to twenty "not-for-profit organizations, institutions, and programs for the purpose of educating 'users, regulators, and enterprises regarding issues relating to protection of privacy, identity, and personal information through user control, and to protect users from online threats.'" 2013 U.S. Dist. LEXIS 37286 at *5-6. The District Court in *Netflix* also noted that given the size of the class, 62 million persons, "each class member would receive a *de minimus* payment in the event of a direct class cash payout." *Id*. at *20. Thus the Court held that the distribution to the *cy pres* recipients" was appropriate.[20] Tellingly, the Court also held "the settlement amount—**which includes the size of the cash distribution, the *cy pres* method of distribution, and the injunctive relief**—to be a factor that weighed in favor of approval." *Id*. at *21 (emphasis added). *See also Catala v. Resurgent Capital Services L.P.*, No. 08CV2401 2010 U.S. Dist. LEXIS 63501 (S.D. Cal. June 22, 2010) (*cy pres* only settlement approved where the amounts available to the Class would have been trivial when divided among the class members).

Thus, Appellant Batman's assertion that "cy pres distributions are always disfavored in comparison to settlements that distribute benefits directly to members

[20]*See also In re Google Buzz Privacy Litigation*, No. C10-00672 JW (N.D. Cal. June 7, 2011).

of the Settlement Class," is unsupported by the authority cited, *Rodriguez v. West Publ'g Corp*., 563 F.3d 948, 966 (9th Cir. 2009). This Court in *Rodriguez* held only that the issue of the propriety of the cy pres distribution "becomes ripe only if the entire settlement fund is not distributed to class members," and declined to reach the issue on the ground it was not ripe since no such distribution was imminent. *Id*.

Furthermore, the claiming Class members will have been "made whole." The average additional revenue that Facebook is calculated to have earned per class member was only between approximately $0.94 to $1.45.[21] Thus, the $15 payment is not disproportionate to the damage suffered by the vast majority of Class members. The *cy pres* award of the remaining funds, which will be over 2 million, provides the next best relief to benefit the Class. An additional distribution above the $15 would be unfair to the Class members who had purposely not asserted claims for monetary relief on the ground that they wanted the monies to go to cy pres. In *Torres v. Bank of Am. (In re Checking Account)*, 830 F. Supp. 2d 1330, 1356 (S.D. Fla. 2011), the court rejected the idea that cy pres funds could only be drawn from unclaimed funds in part for that reason, as such a redistribution "would simply be *cy pres* directed to different recipients."

[21] The determination of damages is complex, and Plaintiffs refer the Court to their Memorandum in Support of their Joint Motion for Preliminary Approval (Dkt 280), particularly pages 17-23.

Contrary to Appellants' citation, *Klier v. Elf Atochem,* 658 F.3d 468 (5th Cir. 2011) does not support their position. The court in *Klier* held that "the district court abused its discretion by ordering a *cy pres* distribution in the teeth of the bargained-for terms of the settlement agreement, which required residual funds to be distributed within the class." *Id*. at 471. Thus, the statement that "a cy pres distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members" because the settlement fund proceeds belong to the class, 658 F.3d at 475, was not the actual basis for the holding that the attempted cy pres distribution of funds was improper. Instead, the cy pres distribution would have violated the settlement agreement.

Amicus EPIC tries to sensationalize the decision of certain proposed cy pres recipients to withdraw from consideration and the Plaintiffs' "failure" to include EPIC. Ironically, Plaintiffs had asked EPIC if it were interested in assisting early on, but EPIC declined. Then EPIC reversed course and filed an objection with the District Court requesting that it be considered as a recipient. Dkt 219. Similarly, the Campaign for A Commercial Free Childhood submitted a declaration stating it supported the Settlement and believed it would benefit the minor Class. Dkt. 194. The MacArthur Foundation, initially selected as a cy pres recipient (but not under the current Settlement) declined eligibility for *cy pres* funds only because it is a "grantmaking institution that does not focus on consumer privacy." Michael

Loatman, "MacArthur Foundation to Decline Facebook Settlement Funds," *Bloomberg BNA*, Sept. 20, 2013, *available at* http://www.bna.com/macarthur-foundation-decline-b17179877204/. In any case, it is not up to the District Court to ensure that potential cy pres recipients are themselves satisfied with the settlement, only that their goals are congruent with the needs of the Class.[22] This Court has noted that:

> We do not require as part of that doctrine that settling parties select a *cy pres* recipient that the court or class members would find ideal. On the contrary, such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process.

Lane, 696 F.3d at 820-21 (Citation omitted and emphasis added). The District Court found the cy pres recipients were appropriate, and neither EPIC nor the other appellants specify why any of the extant proposed cy pres recipients are supposedly inadequate.

EPIC's reference to the dissent in the *Lane* case in the denial of the request for a hearing en banc before the Ninth Circuit is unavailing; first because it is the majority opinion which is the law, and second because unlike in *Lane*, there is no "Facebook controlled" cy pres entity. EPIC brief at 28, citing *Marek v. Lane*, 703 F.3d 791, 793-794 (9th Cir. 2013).

[22] "C*y pres* distributions must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity." *Nachshin v. A.O.L., LLC*, 663 F.3d 1034, 1036 (9th Cir.2011)(citing *Six Mexican Workers v. Ariz. Citrus Growers*, *supra*, 904 F.2d at 1307-8). *See* Facebook's brief discussing the cy pres recipients in more detail.

G. Objections Regarding the Need for Separate Representation of the Minor Subclass are Without Merit

There is no conflict of interest between the minor Subclass and the overall Class which requires separate representation, as contended by Appellants Shane and Depot. Depot cites case law holding that Fed. R. Civ. P. 23(c)(5) requires separate counsel where there are conflicts among subclasses. Depot Brief at 27 n.2 citing *In re Literary Works Inc. Elec. Databases Copyright Litig*, 654 F.3d 242 (2nd Cir. 2011) and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999). In *In re Literary Works*, 654 F.3d 242, the court found that there was a conflict between holders of different types of claims of varying worth. Here, there is no similar conflict here as all minor teens were as equally eligible for the $15 as were the adults. Even under Shane Objectors' reasoning, the supposed "strength" of the minor claims would only mean they were less likely to have their claims defeated – there were no enhanced penalties associated with being a minor.[23] The specific needs of the minor Subclass are reflected in additional protections and information as part of the injunctive relief, including the ability to be opted-out by one's parent. This

[23] The decision in *I.B. ex rel. Fife v. Facebook, Inc.*, No. 12-1894 CW (N.D. Cal. Oct. 25, 2012), where disaffirming of a contract without returning benefits was allowed, is distinguishable because the minor plaintiff there had purchased Facebook Credits with his parent's credit card without authorization. The "contract" that was sought to be disaffirmed was the contract to purchase the Facebook credits, not to use Facebook, and thus the claim sought to disaffirm the entire contract, not just parts of it. Few minor Class members would likely want to disaffirm the entire contract with Facebook if that meant they could no longer use the service, and they could not selectively choose to only disaffirm as to potential consent to appearing in Sponsored Stories.

does not come at a cost to the adult class, and there is no need for separate representation of the minor sub-class.

Critically, the cases relied upon by Shane Appellants involved "limited fund," F.R.C.P. 23(b)(1) class actions, where there was no opportunity to opt out, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Cor.*, 527 U.S. 815 (1999). In *Ortiz v. Fibreboard* the U.S. Supreme Court noted that "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class." 527 U.S. at 846. This is a Rule 23(b)(3) action, and Class members had the opportunity to opt out.

Amchem and *Ortiz* are further inapposite as there was in those cases a distinction between the class members between persons who had actually suffered injuries and those who had not yet become sick, and between those who had different types of illnesses. The distinction between "future" claimants, class members who had not suffered an injury yet was the primary basis for the Supreme Court's holdings that there was a need for separate counsel in each case. *Amchem*, 521 U.S. at 627; *Ortiz*, 527 U.S. at 856. There are no such differences here; there are no additional penalties available to the minor teens, and no greater amount of money available to anyone based on age. Here, the violation suffered by each of

the Class members—minor teens or adults—was the same, and so are the potential damages which can be recovered.

Central State Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC, 504 F.3d 229 (2d Cir. 2007), is also inapposite because there the "Class members had different relationships with [the insurance company] Medco that affected the extent to which they were damaged." *Id*. at 248. The Second Circuit noted that "[t]he Self-Funded Plans dispute any recovery to the insured or capitated Plans, yet none of the class representatives is part of an exclusively self-funded plan that could adequately advance this position." *Id*. at 246. Here, two of the three class representatives are members of a sub-class. The Second Circuit in *Central State* did not instruct the District Court to require separate counsel, only the creation of a sub-class and further findings as to the basis for a discount applied to the claims for plans not directly affected by the policy. *Id*. at 249.

Shane Appellants assert that the minor sub-class claim is "substantially stronger" than that of the class as a whole, but that since they were not represented by separate counsel, this means that they were not adequately represented. This argument fails for several reasons: First, the requirement of separate representation only arises if there is an actual conflict between the named class members and the Class they are seeking to represent. There is no evidence of any conflict between

the class representatives, when two out of three are also members of the Minor Subclass.

Second, as this Court has held, "Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact, for it is the very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice, supra*, 655 F.2d at 625. Thus, it is not appropriate to decide these claims in a settlement or to use them to leverage a different sort of settlement.

Third, even if this Court were to delve into the merits, the minor subclass' claims are plainly not "stronger." The follow-on action to this matter brought by Shane counsel Korein Tillery, *C.M.D. v. Facebook, Inc.*, No. 3:12-cv-01216RS, sought to represent a class of minor teens only, based upon minor teens' appearances in Sponsored Stories as well as other Facebook ads. But Judge Murphy of the Southern District of Illinois transferred the *C.M.D.* case to the Northern District of California, holding that the venue provision in the SRRs was enforceable against the minor class.[24] *E.K.D.. v. Facebook, Inc.* 885 F. Supp. 2d 894 (N.D. Ill. 2012). Even more tellingly, as noted above, the Hon. Richard Seeborg, presiding over *C.M.D.* in the transferee District Court, and the same judge

[24] In *C.M.D.*, Shane counsel Korein Tillery's motion for reconsideration as to the transfer order was denied. In that motion, C.M.D. contended that the decision to enforce the venue provision could prove "ruinous to their claims." PSER 8).

in this matter, dismissed *C.M.D.*, holding that Family Code § 6701 did not apply. *C.M.D. v. Facebook, Inc.*, No. C12-1216RS, 2014 U.S. Dist LEXIS 41371(N.D. Cal. March 26, 2014) Judge Seeborg emphasized that Family Code § 6701 does not disable minor teens from contracting, which meant the SRRs and their choice of law provision were enforceable. The contention that minor teens cannot consent at all to anything in the SRRs has thus been rejected twice. Therefore, not only are the minors' claims not "stronger" under that section, they are essentially non-existent.

The District Court in *C.M.D.* found that there was no basis for a claim in declaratory relief that California Family Code § 6701 renders Facebook's SRRs void as against minor teens on the theory that minor teens are generally not free to contract. *C.M.D.*, 2014 U.S. Dist LEXIS 41371. Specifically, it noted that a) minors' consent to the SRRs was not void, since the default position under Family Code § 6700 is that minor teens do have the right to enter into contracts, subject only to a few narrow exceptions, and b) conditioning the use of Facebook on a user's consent to the display of his/her name and profile pictures does not qualify for the exception under §6701(a) as it merely grants a "garden-variety" contractual right, not a "delegation of power" within the meaning of the statute. *Id*. at *9-11. Furthermore, the court noted that §6701(c)'s exception for making contracts as to "personal property not in the immediate possession or control of the minor" is

intended primarily to address tangible property and that plaintiffs offered no valid reasoning for their contention that it extends to intangible property. The court concluded that, under either label, the right held by the minors in their name and profile picture "cannot be fairly characterized as 'personal property not in immediate possession or control.'" *Id*. at *12. As to Family Code § 6710, the District Court found in *C.M.D.* that "[a]lthough this section almost certainly would allow a minor to disaffirm the SRRs, the [*C.M.D.*] plaintiffs "have never plainly expressed an intent to do so, and they do not dispute that they continued to use Facebook long after this action was filed." *Id*. at 13.[25]

The District Court's suggestion that a risk of litigation was that the laws of other states requiring parental consent might be preempted by COPPA, 15 U.S.C. §§6501-6508, was a risk of litigation, does not require reversal as contended by Schachter Appellants. Given that a court so held in *Cohen v. Facebook*, *supra*, No. BC 44482, this simply constituted a risk that Plaintiffs had to weigh in settling the case. But while Plaintiffs have contended that COPPA does not preempt other laws, that does not mean that all other possible claims—such as the California Family Code § 6710 claim or the claim for minor teens under Civil Code § 3344(a) are necessarily being improperly waived. Again, the conduct at issue is not

[25] Family Code § 6750 *et seq*. is inapplicable on its face, applying only to contracts "pursuant to which" a minor is paid as an entertainer or athlete. Family Code §6750(a)(1)-(3). The SRRs do not qualify as such a contract.

"clearly illegal," and as noted, minor teens can enter into contracts and the Family Code claim has been rejected by the very same District Court on principled grounds. Class Members wishing to try to bring such claims in the face of the choice of law provision in the SRRs, had the chance to do so by opting out. Furthermore, the laws of the other states cited by Appellants were not shown to be materially different from Cal. Family Code § 6701 as far as rendering the SRRs unenforceable, as noted above.

Whether or not Depot Appellants' counsel has more experience in the area of privacy than Class Counsel is irrelevant to the issue of whether adequate representation was provided in this matter. It clearly was, and Depot Appellants' quotations from the transcript do not show inadequate representation. In fact, their statement that "Commercial endorsements are not what Facebook sold or sells, it rather offers a social networking site," betrays a fundamental misunderstanding of Facebook's business model, which is in fact based upon advertising.

Depot Appellants' criticisms of the experience of Class Counsel as to representation of minors are unfounded. Robert Arns has been representing plaintiffs, including minor teens and children, in significant injury and death actions for 38 years and now in class actions for the last ten years. PSER 185 ¶¶ 18, 19, 24. Jonathan M. Jaffe is uniquely qualified due to his thirteen years of deep technical background as a security consultant, to address the issues raised in this

case as to privacy issues and computer security. *See* PSER 180 ¶¶3-6. Merely because Class Counsel recognizes that minor teens such as the Class Representatives are intelligent, does not reveal a bias. The point class counsel was making was that this is a group that gets many of their class assignments, sports schedules and other scholastic communication on Facebook and that minor teens (age 13 through 17) usually know more about Facebook than their parents.

Depot counsel also fails to acknowledge that the injunctive relief allows minor teen users to see what Sponsored Stories they have appeared in and to make choices. That our laws do not allow minors to marry, vote, get tattoos or receive the death penalty is hardly analogous to saying that minors should not be allowed to consent to a standard user agreement on a social media site like Facebook. Given adequate protections and disclosures, minor consent to Facebook's SRRs is unquestionably valid and enforceable, as noted above.[26] Had Class Counsel adopted the theories suggested by Appellants, such as the ill-fated Family Code § 6701 claim which was rejected in *C.M.D.*, this class action would have likely had them dismissed also. Class Counsels' prudence in this action only reflects positively on counsels' ability to pursue claims which create a positive result for the Class.

[26] Depot Appellants and their counsel CAI/CPIL represent in the brief that they offered to intervene and offer subclass representation and that said offer was ignored. Depot Brief at 27 and n.2. Class Counsel was never approached by these Appellants or their counsel as to intervention.

H. Objections Regarding the Attorneys' Fees are Without Merit

1. The District Court Awarded Attorneys' Fees in Accordance With the Law

Class Counsel The Arns Law Firm and Jonathan Jaffe Law requested a total fee of $7.5 million (not including costs of $282,566.39).[27] That number was based on a lodestar of $5,391,030, with the requested multiplier being 1.391. This fee request was premised upon the excellent results in the case, and the projected cash distributions of over $9,210,000, *cy pres* of approximately $2 million and the injunctive relief.

The District Court awarded fees to Class counsel of 25% of the net settlement amount remaining after deduction of the settlement administration fees, costs, and incentive awards.[28] SHER 21. Class counsel will thus stand to receive $4,703,977 in fees.[29] The District Court thus awarded fees based upon a percentage theory, rather than a lodestar plus multiplier. [30] The District Court found lodestar to be "not less than" $4.5 million, but held that it did not have to calculate the lodestar

[27] Depot Appellants incorrectly imply that Class Counsel "lowered" its fee request to $7.5 million after objections were made. Depot brief at 32. Class Counsel never made a request for that amount. The $10 million figure was simply a "not to exceed" number in the original Settlement Agreement which never came into play.

[28] The Ninth Circuit has found "the choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable. [The] case law teaches that the reasonableness of attorneys' fees is not measured by the choice of the denominator." *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000).

[29] The outstanding Razorfish claim for subpoena costs referenced in the Order was settled for $3,000. Dkt. 357

[30] The "multiplier" was thus not 1.11, as asserted by Appellants Batman and Lally, nor was a fee award of $5 million awarded.

"with precision." Using that number for the crosscheck only, the 25% fee award resulted in a reducing "multiplier" of .87 as compared to Class Counsel's actual lodestar of $5.39 million.[31] Under the Court's formula, the fee award is thus by definition within the 25 % benchmark.

"When assessing whether the percentage requested is reasonable, courts look to factors such as: (a) the results achieved; (b) the risk of litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the financial burden; and (f) the awards made in similar cases." *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010) *citing Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The District Court reviewed the Settlement under these standards and found a 25% award reasonable. Appellants ignore all but the "results achieved" factor in making their unfounded criticisms.

Plaintiffs' fees are fully supported by their lodestar and the results achieved in the case. The full $20 million Settlement fund (plus the value of the injunctive relief) should be considered when benchmarking the lodestar against the total complete value of the Settlement. The $5.391 million lodestar which was presented to the Court was the result of reduced billing in that it does not account for paralegal time, and the attorney hours have been scrutinized and reduced by

[31] Furthermore, while the District Court did not place a value on the injunctive relief, it did find that it supported the fairness, reasonableness and adequacy of the Settlement. SHER 9.

Counsel before submission. PSER 185 ¶62. Plaintiffs' counsel has also continued to provide benefit to the class through their post-fee application efforts, with over 275 hours preparing the motion for final approval and addressing the objectors in the matter. Id. ¶2. Plaintiffs' counsel will also continue to provide benefits to the class in the form of working with Facebook to determine the necessary changes to the Facebook.com website, as well as the ongoing monitoring of the website for compliance over the next two years, and potentially future motions and an audit if Facebook does not comply with terms of the settlement. *See* A.S.A. §§ 2.1(d)-(e).

Plaintiffs' attorneys conducted substantial discovery, prepared numerous briefs, and amassed a file including over 1,300 pages of deposition transcripts and extracts. PSER 185 ¶ 42. Written discovery was also substantial, with 11 sets of Requests for Production, for a total of 214 combined categories propounded, and over 200,000 documents being delivered. *Id.* ¶ 43. These had to be received, sorted, organized, and analyzed by Plaintiffs' counsel. *Id.* at ¶¶ 44-47. Plaintiffs' counsel marked 725 exhibits which were used in the depositions and other filings. *Id.* at ¶ 48. Plaintiffs' attorneys prepared and presented five expert witnesses for depositions and deposed two of defendant's experts. Arns Decl. re Fees and Costs, ¶¶40,41, PSER 185

Appellants Batman, Cox, and Lally claim that the attorney fees requested were excessive and no multiplier should be granted. Lally simply compares the $20

million fund to the 150 million Class members to state that the Settlement is "13 cents per class member." Lally also oddly charges that Class Counsel did not fight vigorously to "prevent" monies from going to cy pres. Neither argument has merit, because no multiplier was awarded and the size of the cy pres award was due to the claims rate and a desire to benefit the Class through means other than direct payment, in the form of the work done by the recipients. Appellant Batman expressly acknowledges that she simply uses the same argument as the Lally Appellants, so the same arguments pertain equally to Batman's appeal. Batman brief at page 3.

Cox Appellants' collection of authorities is devoid of any specific arguments as to why the relief is inadequate to support the fees, simply stating that "millions of class members will receive zero benefits." Cox Brief at 12. Cox therefore argues that the fees be reduced to the lodestar, when as noted above, the Court only employed the lodestar as a crosscheck.

Notwithstanding that the Fee Order provides expressly for a 25% recovery out of the net settlement, and is thus by definition within the benchmark, Appellants imply that the award is greater than that 25%. Not only is that not true, courts in other cases have awarded higher fees and higher multipliers to reward superior representation. *See In re Pacific Enters. Sec. Litig.*, 47 F.3d 373,379 (9th Cir. 1995) (awarding 33% of $12 million common settlement fund); *In re Mego Fin.*

Corp. Sec. Litig., 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of fees equal to one-third of total recovery); *In re Omnivision Techs., Inc.*, No. C-04-2297 SC, 2007 WL 4293467, at *10 (N.D. Cal. Dec. 6, 2007) ("in most common fund cases, the award exceeds that [25%] benchmark").

Appellants' cases are not to the contrary. *Perdue v. Kenny A*, 130 S.Ct. 1662, 1669 (2010), for example, involved a suit under 42 U.S.C. § 1988 for inadequate care in a foster children system in Georgia. The fees of the attorneys were thus calculated only on the lodestar method, with no monetary damages, the relief being only injunctive and declaratory relief, and the enhancement granted by the District Court was 75% greater than the lodestar, or a 1.75 multiplier – after the District Court had reduced the lodestar considerably. The very conservative fee award in the case at bench was well within the lower Court's discretion.

Regardless of the method for awarding fees employed, the inclusion of the *cy pres* payments in the calculation of the total recovery for the Class is proper. In *Six Mexican Workers, supra*, this Court held that the district court did not abuse its discretion in using the total fund, including the *cy pres*, amount as its benchmark. 904 F.2d at 1311. Indeed, the *cy pres* awarded in *Lane v. Facebook* was considered so beneficial to the class the Court awarded a multiplier of 2.0 to the fees for Plaintiffs' counsel. *Lane v. Facebook, Inc.*, No. C 08-3845 RS, 2010 U.S. Dist. LEXIS 57765 (N.D. Cal. May 24, 2010).

Contrary to Depot Appellants' characterization, former class representative Angel Fraley Fraley's quoted statements do support the settlement—whether she realizes it or not. Fraley says she would like Facebook to "explain clearly to its users about Sponsored Stories"—the Settlement terms make that happen. She wants Facebook to "give a clear option to back out" from appearing in Sponsored Stories—the Settlement allows users to do that. An option to be "paid for" the use was also made available in the form of the claims process. While Fraley also would have preferred to have won the case instead of settling, she had resigned as class representative for personal reasons (though Facebook still took a seven hour deposition of her) and thus she was not involved in evaluating the risks of continued litigation. CAI/CPIL also vaguely refer to other class members who have objected to the Settlement, but the overwhelming majority of the 150 million class members did not object, and 614,000 even filed claims for monetary distribution.

As noted above, the decisions to withdraw from eligibility by the putative cy pres recipients, were made based upon those entities' individual circumstances and their determination that they were not well suited to provide benefits to the Class in this instance. Their refusal to participate is of obviously extremely limited value as evidence.

2. Objections Regarding Claims of Conflicts are Without Merit

It is contended that the "disproportionate" attorneys' fees show a conflict of interest for class counsel. Considering the injunctive relief, the potential for over $11 million to go to the Class (including cy pres), the requested fees are reasonable and are in line with precedent. The absence of a clear sailing agreement weighs against there being any conflict of interest between Counsel and the Class. Plaintiffs here were free to object to portions, or all, of the settlement, and would still receive their incentive award if they settlement is ultimately approved by the court. *See* A.S.A. § 2.6.

The cases cited as to disproportionate recoveries are distinguishable in that the classes therein were getting less or nothing; here real value is going to the Class. In *Murray v. GMAC Corp*, 434 F.3d 948, 952 (7th Cir. 2006), the "disproportion" between class representatives' award and what the Class members would receive was significant. Claiming Class members here are actually getting $15, whereas the *Murray* class members effectively got nothing because each claim would not be worth their while. Class counsel fees and service awards need to be measured in part against the monies actually being distributed and the injunctive relief.

Nor was there "forced collusion" owing to the fact of the attorneys' fee provision of Civil Code § 3344. It is true that such a provision exists and that Facebook had alluded to it in discovery to the Class representatives. But there is

no evidence that the threat of having to pay Facebook's fees unduly influenced the Settlement. Further, the Class representatives' knowledge of the fee-shifting provision, combined with their willingness to nevertheless pursue the case with full knowledge that counsel were expending significant time on the case which would be met by fees being increased in defense of the suit, if anything supports their adequacy as zealous advocates. No cases have been cited where the simple fact of fee-shifting provision has been held to call a plaintiffs' judgment into question, and for good reason. And while Facebook might seek its millions of dollars of attorneys' fees in defending the case, those fees would have to be seen as "reasonable" in any proceeding to collect them.

3. The Record Supports the Size of the Service Awards

Class representatives "are eligible for reasonable incentive payments," after consideration of relevant factors, including the actions the representative has taken to protect the interests of the class and the degree to which the class has benefited from those actions. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). The Ninth Circuit has approved incentive awards to class representatives that far exceed the modest award received by Plaintiffs herein, $1,500 each. *Id*. at 976-977 (citing cases). This amounts to only .03% of the Settlement Fund. The incentive awards in this case are justified by the significant burdens born by the named plaintiffs in this action. The named Plaintiffs for whom service awards are sought

have expended an estimated 150 hours related to their duties in this matter. PSER 185 ¶ 74. Each had his or her deposition taken at length, which included examination of private and potentially embarrassing communications.

VI. CONCLUSION

For all the foregoing reasons, the Order on Final Approval and Order Granting in Part Motion for Attorney Fees, Costs and Incentive Awards should be affirmed.

Dated: May 30, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

The only related cases pending before this Court known to counsel are those that have been consolidated with this one, as indicated on the cover of this brief.

/s/ Steven R. Weinmann

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 13,966 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

/s/ Steven R. Weinmann

CERTIFICATE OF SERVICE

I certify that on May 30, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Cricuit 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.

/s/ Steven R. Weinmann