Nos. 13-16819, 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,

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-01726, Hon. Richard Seeborg, presiding

ANSWERING BRIEF OF DEFENDANT–APPELLEE FACEBOOK, INC.

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Facebook, Inc. is a publicly traded corporation. It has no parent corporations and no publicly traded corporation owns more than 10% of its stock.

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INTRODUCTION

The appellants in these consolidated appeals object to a class action settlement that Facebook and Plaintiffs reached after over a year of hard-fought litigation and extensive arm's-length negotiations facilitated by a retired federal magistrate judge. The named plaintiffs sought to represent a nationwide class of approximately 150 million adult and teenage users of Facebook's free social networking service. They challenged Facebook's social advertising program, focusing in particular on Facebook's "Sponsored Stories" feature, through which content that Facebook users voluntarily shared with their Facebook "friends"—such as "liking" a product or brand—was republished to those same friends.

Plaintiffs' complaint alleged that Facebook's republication of content that users already had shared with the same audience violated California's right of publicity statute, Cal. Civ. Code § 3344, and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, because it was part of a feature made available to Facebook advertisers. Among other things, Plaintiffs alleged that they had not sufficiently consented to the republication of content to their friends, and that parental consent should be required before teenage users were permitted to "like" content and allow those "likes" to be republished to their friends.

The district court (the Honorable Richard Seeborg) acted well within its broad discretion in approving the settlement. Under the settlement terms—which were revised substantially after the district court raised questions about an initial settlement and sent the parties back to the bargaining table—each class member who filed a claim will collect a $15 cash payment, to be paid from a $20 million settlement fund. Unclaimed settlement funds will go to specified Internet watchdog and advocacy groups that conduct research, educate the public, and advance issues relating to online privacy and security. The settlement also responds directly to the allegations in the underlying action through robust injunctive relief provisions, under which Facebook will (1) provide class members with additional information about Facebook's practices; (2) offer new features to control the republication of users' social actions, including features to allow parents more visibility into, and control over the republication of, the content shared by their teenage children; and (3) revise its terms of use (called the Statement of Rights and Responsibilities or "SRR") to make the consent terms relating to republication of content in sponsored contexts even clearer. These substantial provisions will remove any doubt about the adequacy of Facebook's disclosures and consent terms, and will give Facebook users a level of control over their (and their teenagers') appearance on Facebook that goes well beyond what the law requires or what other online services offer.

The district court approved the amended settlement agreement only after weighing all of the factors that this Court has prescribed for evaluating proposed class action settlements, and only after considering and rejecting the same objections that are raised in this appeal.

As the district court found, Plaintiffs would have faced numerous barriers if this case were to proceed through the litigation process. The terms of Facebook's SRR, to which all Facebook users must agree, expressly include consent to Facebook's republication of content in the very manner that Plaintiffs challenged in this action. And Facebook also offered substantial evidence that users impliedly consented to their appearance in Sponsored Stories and other social ads by choosing to share their social actions (for example, their support for and affiliation with organizations, brands, and causes) with their friends on Facebook, because Facebook made extensive disclosures about its advertising practices, and because Facebook enabled users through privacy controls and other features to prevent their appearance in sponsored content.

The district court also recognized that Plaintiffs would face a substantial burden to show that they were injured in any cognizable way by the mere republication of content to the same audience with which they already had shared that content voluntarily. Without any proof of injury, or that they ever gave any money to Facebook, Plaintiffs would not have been able to meet the injury

elements of § 3344 or the restitution requirement of the UCL, and also would have had difficulty establishing Article III standing. Plaintiffs' claims also were subject to a potential immunity defense under the Communications Decency Act, 47 U.S.C. § 230, which broadly protects Internet services that simply republish content provided by others.

Plaintiffs' claims relating to the republication of "likes" by teenage users faced similar legal obstacles. Under Plaintiffs' theory, teenage users who wanted to "like" a particular product or brand and also wanted to consent to the republication of that "like" to his or her friends would not be allowed to do so without the consent of his or her parents. Such a prohibition would raise serious First Amendment questions, particularly in light of recent caselaw recognizing that a "like" constitutes protected expression under the First Amendment, *see Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), and that a teenager's expressive right cannot be suppressed through government-imposed parental consent requirements, *see Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2735-36 (2011). Further, as the district court found, the assertion that state law could be used to impose parental consent requirements on teenagers who choose to share content on Facebook also faced a significant challenge under the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 *et seq*., in which Congress made a

deliberate choice *not* to impose such a requirement on teenagers' Internet use, and broadly preempted inconsistent state law.

Finally, the district court recognized that Plaintiffs faced a significant risk that they would be unable to obtain and maintain a certified class for purposes of trial.

Given these serious litigation risks, the district court did not abuse its discretion in finding the settlement fair, reasonable, and adequate. The court found that the $20 million monetary award was a reasonable compromise, particularly given that no class member ever paid Facebook money or established any actual injury from Sponsored Stories. And the court found that the injunctive relief in the settlement—which it recognized would have been difficult if not impossible for Plaintiffs to obtain through a trial—will provide meaningful benefits to all class members. The court found no evidence of collusion between Plaintiffs and Facebook, and, in fact, Facebook opposed Plaintiffs' motion for attorneys' fees, resulting in a substantially smaller award than Plaintiffs had requested.

A settlement is by its very nature a compromise, and compromises never please everyone. In this case, a small handful of the approximately 150 million potential class members continue to object to the compromise, but the now-standard presence of objectors does not show that the district court abused its broad discretion in approving this settlement. The premise of many of the objections—

particularly those relating to teenage Facebook users—is that Facebook's defenses would have failed and Plaintiffs would have won. But neither the district court's role in evaluating a settlement nor this Court's role in reviewing the district court's exercise of discretion in a settlement is to adjudicate the merits. And in any event, the arguments raised by the objectors are without merit, as are the other objections raised by these appeals.

In sum, the district court carefully evaluated the settlement as a whole, gave reasoned responses to the objections, and ultimately concluded the settlement was fair, reasonable, and adequate. Because that decision falls well within the court's broad discretion, this Court should affirm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court's final judgment approving the class action settlement was entered on September 19, 2013. Timely notices of appeal were filed in these consolidated appeals on September 9, 2013 (13-16819); September 24, 2013 (13-16918; 13-16919; 13-16929; 13-16936), October 4, 2013 (13-17028), and October 18, 2013 (13-17097). (Schachter ER 171; Lally ER 1; K.D. ER 32; H.L.S. ER 1; Batman ER 353; *see* Fed. R. App. P. 4(a)(1).)

STATEMENT OF ISSUES

Whether the district court abused its discretion in approving the class action settlement between Plaintiffs and Facebook.

STATEMENT OF THE CASE

A. Factual Background

Facebook operates a popular and free social networking service that allows people around the world to connect and share information with their friends, families, and communities. People voluntarily share photos, reflections, links, opinions, and other information with their friends and other Facebook users. Indeed, one of the main reasons people use Facebook is to share with their friends and to see interesting and personalized content that their friends have shared. (Schachter ER 58.) Facebook is available only to people over the age of 13.

A common activity in which Facebook users engage is to "like" other Facebook pages and content posted by other users. By "liking" a page or other content, a user makes an expressive connection by indicating his or her enthusiasm or support for, or agreement with, a particular idea, brand, product, news story, political candidate, or other content. Indeed, the Fourth Circuit has recognized the act of "liking" content on Facebook as protected expression under the First Amendment. *See Bland*, 730 F.3d at 386.

Facebook's privacy controls allow users to determine how widely their "likes" are shared on Facebook. (Facebook's Supplemental Excerpts of Record

(SER) 364, ¶¶ 12-13.) Thus, for example, as of April 2012, approximately 5 million Facebook users had set their privacy controls to make a "like" visible to "Only Me." (*Id.* ¶ 13.) In this way, Facebook allows users to express themselves and associate with content and pages on Facebook, while also allowing them to control who can see their activities and social actions.

Each Facebook user's homepage has a "News Feed," which is the primary place where users view and engage with their friends' content on Facebook. The News Feed displays a running selection of personalized content from and about a user's friends and any Facebook pages that the user has "liked" or with which the user otherwise has engaged. The name and profile picture[1] of the user or page that shared the content accompanies each piece of content that appears in the News Feed. Depending on how frequently users check their News Feed and how often their friends and the pages they "like" share content, users typically will see in their News Feed only a subset of the content their friends have shared with them.

Like many other Internet websites, Facebook funds its free service—which, as of Fiscal Year 2013, costs more than $5 billion per year to provide[2]—primarily

[1] Users sometimes upload of picture of themselves, but users can (and often do) upload photos of virtually anything else—landscapes, pets, cars, icons, other people—as their profile picture. (SER 368.)

[2] *See* Facebook, Inc., SEC Form 10-K for Fiscal Year 2013, at 51, *available at* http://www.sec.gov/Archives/edgar/data/1326801/000132680114000007/fb-12312013x10k.htm.

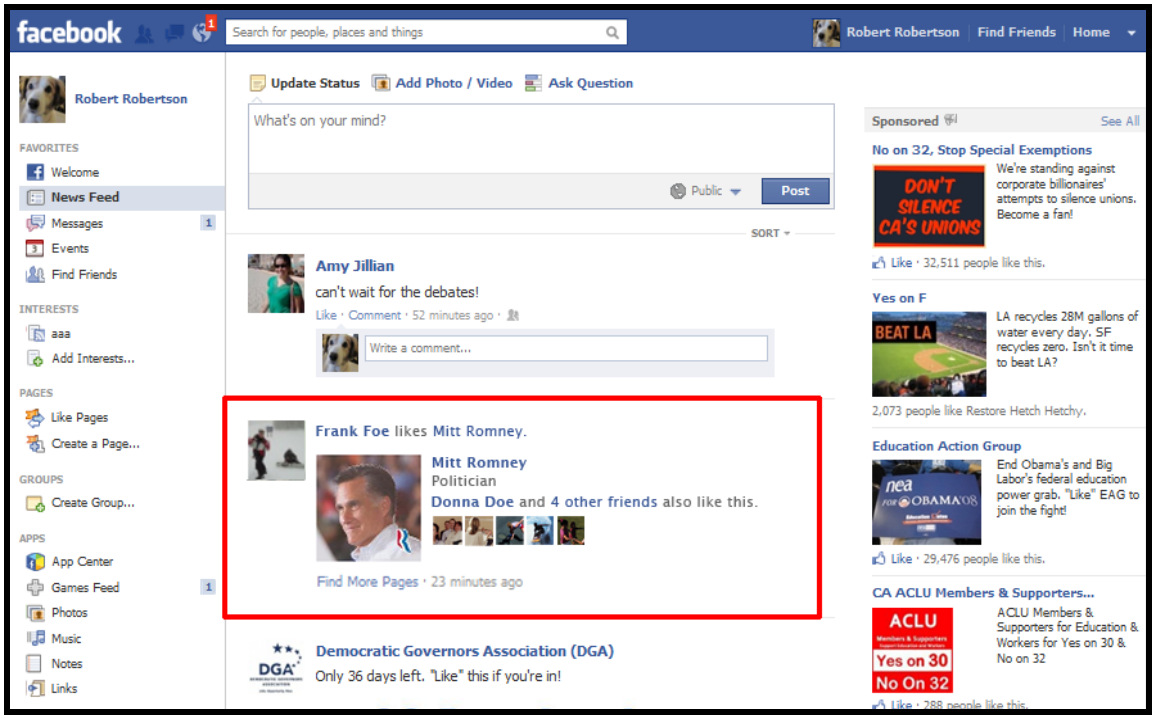
by allowing marketers to display advertisements and sponsored content on the site. Facebook users agree in the SRR, as a condition to joining Facebook, to various uses of their content in connection with such displays of advertising.

Since 2007, Facebook has offered a variety of forms of social advertising, though which a user's "like" or other content may be republished to that user's same group of friends in connection with an advertisement for the "liked" product, service, or other content. In January 2011, Facebook launched a social marketing product called "Sponsored Stories." (SER 373-74, ¶ 15.) As with other social ads, Sponsored Stories enabled businesses, organizations, and individuals to pay Facebook to increase the likelihood that certain types of user-generated content—for example, a user's "likes," "check-ins" at local place, or comments on an organization's Facebook page—would appear on friends' homepages. This meant that, subject to a user's personal privacy settings, a user's "like," "check-in," or comment would be republished to the same (or a smaller) audience and in similar places on Facebook in which the initial content already appeared—most notably on the user's friends' News Feeds. (SER 368-72, ¶¶ 4-10.)[3] Users always have had

[3] Even where the user had adjusted his or her privacy settings to allow "likes" to be viewed by a broad audience—such as everyone on Facebook (public)—the republished "like" would appear only to that person's selected group of "friends." And where the user chose to publish his or her "like" to only a subset of his or her "friends", the republished "like" would be shown only to that smaller audience specified by the user. (SER 440, ¶ 72.)

the ability to prevent their "likes" from appearing in Sponsored Stories and other social ads simply by adjusting their privacy settings so that their "likes" are visible to "Only Me" or by choosing at any time to unlike pages or delete content that would be subject to republication. (SER 373, 375-76, ¶¶ 12, 22-23.)

To give a concrete example: Suppose a Facebook user named Frank Foe chose to "like" a presidential candidate's Facebook page and share that "like" with his friends. A story about the "like" (e.g., "Frank Foe likes Mitt Romney") could appear on his Facebook personal profile page (called a timeline), on the candidate's Facebook page if one of Frank's friends visited the page, and also potentially in his friends' "News Feeds" (among other places). (SER 370-71, ¶¶ 7-9.) This example is illustrated below:



If the political candidate elected to participate in Sponsored Stories, the same story ("Frank Foe likes Mitt Romney") might also be republished to Frank's friends on their homepages denoted as "Sponsored." (SER 439-41, ¶¶ 70-76.)

A Sponsored Story or other social ad is nothing more than republication of the same content that a user already chose to share with a designated audience on Facebook to that same audience (or a subset of that audience, *see supra* note 3), in a similar location, for the purpose of increasing the likelihood that a user's selected audience might see that content.

In June 2013, before final approval of the settlement, Facebook disclosed publicly that it was simplifying its advertising products to eliminate different types

of ads that served the same purpose and to achieve a more consistent appearance for ads on Facebook. In April 2014, while this appeal was pending, Facebook confirmed that marketers would no longer be able to purchase Sponsored Stories, but that users' social actions (likes, etc.) still were eligible to be republished next to ads shown to friends. Facebook, *Platform Roadmap, April 9th, 2014 for Ads API* (Apr. 9, 2014), https://developers.facebook.com/roadmap/completed-changes/.

B. Procedural History

In March 2011, Plaintiffs filed this action in the Superior Court of California, Santa Clara County. Through the complaint, as amended, they sought to represent a class of all Facebook users in the United States, as well as a subclass of Facebook users between the ages of 13 and 17 (the "minor subclass"), whose names, photographs, likenesses, or identities had been used in a Sponsored Story. (Schachter ER 72-73.)

Plaintiffs alleged that Sponsored Stories violated California's right of publicity statute, Cal. Civ. Code § 3344, and the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, and also asserted an unjust enrichment claim. (Schachter ER 75-79.) Plaintiffs alleged, generally, that the republication of their "likes" in Sponsored Stories was improper because it constituted a use of their names and likenesses for advertising purposes without their (or, in the case of teenage users, their parents') consent.

Facebook removed the action to U.S. District Court for the Northern District of California pursuant to the Class Action Fairness Act. *See* 28 U.S.C. §§ 1332(d), 1453(b). Facebook then moved to dismiss Plaintiffs' Second Amended Complaint.

In December 2011, the district court (Koh, J.) granted Facebook's motion in part and denied it in part. (Schachter ER 98-135.) The court held that the complaint adequately alleged that Plaintiffs had Article III standing to bring their claims because Plaintiffs alleged violation of a state statute and claimed injury based on "the additional profit Facebook earns from selling Sponsored Stories" (Schachter ER 111); that, on the facts alleged, § 230 of the federal Communications Decency Act, 47 U.S.C. § 230, did not bar Plaintiffs' claims (Schachter ER 114-16); and that, based on the limited allegations in the complaint, Plaintiffs stated a claim under § 3344 and the UCL. (Schachter ER 116-33). The court dismissed the unjust enrichment claim because "'unjust enrichment is not a cause of action'" under California law. (Schachter ER 133-34 (quoting *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1307 (2011)).)

In holding that Plaintiffs stated claims under § 3344 and the UCL, the district court stated that "at summary judgment or at trial," Plaintiffs could not "rel[y] on a bare allegation that their commercial endorsement" had economic value, but rather would have to "'prove actual damages like any other plaintiff

whose name has commercial value.'" (Schachter ER 126 (quoting *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 1006 (2008)).)

The parties conducted extensive discovery and motion practice, including more than 1,000 discovery requests, document productions spanning more than 200,000 pages of documents, and 21 depositions of expert witnesses, named plaintiffs and their parents, and Facebook employees. (SER 352, ¶ 2.) In March 2012, Plaintiffs moved for class certification, and Facebook opposed the motion. The district court set a hearing for May 31, 2012.

Meanwhile, Facebook and Plaintiffs engaged in extended arm's-length settlement negotiations. They participated in an all-day mediation session overseen by the Honorable Edward A. Infante, retired Chief Magistrate Judge of the Northern District of California. (SER 379, ¶ 4.) On the eve of the hearing date on class certification, following an additional three months of negotiations, the parties agreed on a settlement that included an injunction requiring Facebook to provide users with additional information about, and control over, the use of their names and profile pictures in connection with Sponsored Stories; a $10 million *cy pres* payment to organizations involved in Internet privacy issues; and an agreement by Facebook not to oppose an award of attorneys' fees up to $10 million. (Schachter ER 136.)

In August 2012, the district court (Seeborg, J.)[4] denied without prejudice Plaintiffs' motion for preliminary approval of the settlement. (Schachter ER 136-43.) The court raised a number of questions about the absence of monetary relief to class members; the contemplated injunctive relief; and a "clear sailing" provision under which Facebook would not object to the proposed attorneys' fee award. (Schachter ER 140-41.)

C. The Amended Settlement Agreement

After the district court's ruling, the parties negotiated further, with the continued assistance of Judge Infante. Those discussions led to agreement on a revised settlement that addressed each of the concerns that the court had raised.

First, the new agreement called for direct monetary payments to class members. Facebook agreed to establish a Settlement Fund of $20 million, out of which each class member filing a claim could receive a one-time cash payment of $10—despite the fact that none of the class members ever paid any money to use Facebook's free service. (Schachter ER 30, 33-35, Amended Settlement Agreement and Release (ASAR) §§ 1.27, 2.2, 2.3.) The $10 amount later was increased to $15, based on the number of class members who ultimately filed claims. (Schachter ER 5.) Any money that remained in the Settlement Fund after

[4] On July 11, 2012, Judge Koh recused herself from the case, which was then reassigned to Judge Seeborg.

the distribution of payments to class members, attorneys' fees, costs, taxes, and incentive awards to the named plaintiffs, is to be distributed as a *cy pres* award to a group of 14 organizations that are dedicated to or engaged in Internet privacy issues.[5] (Schachter ER 35-36, ASAR § 2.4.)

Second, the amended settlement set forth with greater precision the injunctive relief the class would receive. Facebook agreed to create an "easily accessible mechanism" allowing users to see which (if any) of their stories and interactions on Facebook had been displayed in Sponsored Stories, and to "control which of [their] interactions and other content are eligible to appear in additional Sponsored Stories." (Schachter ER 31, ASAR § 2.1(b).) This new feature directly responded to Plaintiffs' allegation that users were not adequately notified that content they shared with friends would be, or had been, republished to those same friends through Sponsored Stories. Facebook also agreed to include language in its terms to clarify how Sponsored Stories work and to expand users' control over

[5] The organizations designated as *cy pres* recipients were: the Center for Democracy and Technology; the Electronic Frontier Foundation; the MacArthur Foundation; the Joan Ganz Cooney Center; the Berkman Center for Internet and Society at Harvard Law School; the Information Law Institute at NYU Law School; the Berkeley Center for Law and Technology at UC Berkeley Law School; the Center for Internet and Society at Stanford Law School; the High Tech Law Institute at Santa Clara University Law School; the Campaign for a Commercial Free Childhood; the Consumers Federation of America; the Consumer Privacy Rights Fund; ConnectSafely.org; and WiredSafety.org. (Schachter ER 35–36.)

permissions given to Facebook in relation to sponsored content. (Schachter ER 31, ASAR § 2.1(a).)

The amended settlement also contained more robust injunctive relief specifically tailored to the proposed minor subclass. Facebook agreed to: (1) create and make easily accessible a tool that enables parents (whether or not they are Facebook users) to prevent their teenage child's name or profile picture from appearing alongside Facebook ads or in Sponsored Stories (Schachter ER 32, ASAR § 2.1(c)(iii)); (2) augment disclosures and tools in its online Family Safety Center about how advertising works on Facebook, including creating a link to the new tool described above (*id.*); (3) display ads about the Family Safety Center to parents on Facebook (*id.*, ASAR § 2.1(c)(iv)); (4) encourage parents and teenage Facebook users to confirm their family relationships on their profiles, thus giving parents greater visibility into their teenage children's Facebook activities (*id.*, ASAR § 2.1(c)(iii)); (5) revise its SRR to require users under age 18 to make representations confirming they had discussed the use of their names and profile pictures in connection with ads with a parent or legal guardian (*id.*, ASAR § 2.1(c)(i)); and (6) prevent users under age 18 from appearing in Sponsored Stories if they indicate that their parents are not on Facebook (*id.*).

Third, the amended settlement eliminated the "clear sailing" provision that, under the original settlement, would have barred Facebook from objecting to a

request for attorneys' fees (and Facebook ultimately did object to the fee request). (Schachter ER 36, ASAR § 2.5.) The parties also agreed that the amended settlement would become effective, upon approval by the court, whether or not the court approved any attorneys' fee award. (Schachter ER 37, ASAR § 2.7.)

In December 2012, the district court granted preliminary approval of the settlement and certified Plaintiffs' proposed class for settlement purposes. (Schachter ER 147-48.) The court found that the settlement appeared to be "the product of serious, informed, non-collusive negotiations" and noted that it "falls within the range of possible approval as fair, reasonable and adequate." (Schachter ER 146.)

D. The Objections

The parties provided notice of the proposed settlement by establishing a website describing the settlement, sending a short-form notice by email to class members, and publishing the notice several times in national news outlets. (Schachter ER 148; Schachter ER 38-39, ASAR § 3.3.) Neither the form nor the method of the notice is challenged in any of the present appeals.

The settlement also established a procedure and time period for objections. (Schachter ER 148-150; Schachter ER 39-41, ASAR § 3.7.) Out of a class of approximately 150 million members, only 17 proper objections were submitted. In addition, as the district court explained, 87 other statements "purporting to be

objections" were submitted, over a third of which "actually assert[ed] opinions that Facebook's conduct was not improper and/or that the lawsuit is otherwise without merit or abusive." (Schachter ER 11.)

The objectors advanced a variety of arguments, only some of which are pressed on appeal. These include assertions that the injunctive relief is insufficient because it does not contain a blanket prohibition on teenagers' participating in social ads such as Sponsored Stories without their parents' consent, District Court Docket No. ("Dkt.") 305 (Depot Objection) at 10; Dkt. 308 (Schachter Objection) at 9; Dkt. 314 (Shane Objection) at 3; that the settlement provides only *de minimis* monetary relief to class members, Dkt. 328 (Batman Objection) at 2; Dkt. 308 (Schachter Objection) at 15; that the *cy pres* component of the settlement is suspect, Dkt. 328 (Batman Objection) at 3; Dkt. 298 (Cox Objection) at 2; and that the attorneys' fee award is excessive, Dkt. 328 (Batman Objection) at 3; Dkt. 298 (Cox Objection) at 2.

E. The District Court's Final Approval of the Settlement

The district court granted final approval of the amended settlement in August 2013, after reviewing extensive written submissions and hearing argument from the parties and several objectors.

The court found that "[t]he record leaves no doubt that this settlement was the product of arms-length negotiations and compromise." (Schachter ER 2.) It

observed that the settlement was reached through negotiations mediated by "a renowned retired federal magistrate judge" after "months of active, adversarial, litigation," including motion practice and substantial discovery. (*Id.* at 3.) These negotiations reflected "a good faith, arms-length attempt by experienced and informed counsel to resolve this matter through compromise." (*Id.* at 2-3.)

In evaluating the fairness of the settlement, the district court emphasized that, if the case were to proceed to trial, Plaintiffs would face "a substantial burden in showing they were injured by the Sponsored Stories." (Schachter ER 4.) They also would face "a substantial hurdle in proving a lack of consent, either express or implied" to the challenged use of their names and profile pictures. (*Id.*) Individualized issues surrounding consent, and other differences among the experiences of the tens of millions of class members, also raised a "significant risk" that class certification would prove unwarranted at some point during the litigation. (*Id.* at 4-5.)

With respect to the minor subclass, the court observed that that COPPA "stands as a potential preemption hurdle" to Plaintiffs' recovery. (Schachter ER 5.) The court concluded that, even assuming Plaintiffs might ultimately prevail on their claims, "it likely would only be after a protracted and very expensive journey." (*Id.*)

The district court also found that the monetary component of the settlement was "on balance … fair, reasonable, and adequate." (Schachter ER 6.) The court recognized the significant challenge the parties faced in crafting this aspect of the settlement, given that with a proposed class of approximately 150 million members, "even a modest per-class member payment could easily require a total settlement fund in the billions of dollars." (*Id.* at 5.) In light of this reality, as well as the "slim indicia [that] class members suffered *any* pecuniary harm as the result of appearing in Sponsored Stories," the court found that the proposed settlement payment of $15 to each class member who filed a claim was reasonable. (*Id.* at 6 (emphasis in original).) The court also noted that, even if Plaintiffs could establish that the appropriate measure of damages was the monetary benefit to Facebook of the Sponsored Stories feature—a proposition that Facebook vigorously disputed—their best case scenario based on Facebook's alleged profits would yield a number in the range of only $73 million (approximately 60 cents per class member). (*Id.*) In that context, a $20 million settlement was a "reasonable compromise." (*Id.*)

"The only factor pulling in the opposite direction," the district court noted, was "the theoretical availability of statutory damages of $750 per violation" of § 3344. (Schachter ER 6.) The court found that factor an insufficient ground to reject the settlement, which the court concluded "should not be evaluated against some theoretically available judgment, but against what plaintiffs could reasonably

expect to recover." (*Id.*) Any judgment even approaching the statutory maximum, the court noted, would raise due process issues "and threaten Facebook's existence." (*Id.* at 6-7.)

The district court also found that the provisions for injunctive relief provide meaningful benefits to the class members because Facebook has agreed "to provide [both] greater disclosure and transparency" regarding Sponsored Stories, as well as enhanced user controls over the appearance of their names and profile pictures. (Schachter ER 7.) Indeed, the court viewed many of the proposed injunctive terms as *preferable* to a victory at trial, because they "would be difficult, if not impossible, ever to obtain through a contested judgment, even if plaintiffs were eventually to prevail on the merits." (*Id.* at 8.) These included, among other things, Facebook's agreement to implement tools and procedures that "address plaintiffs' concerns in a more nuanced manner than would likely emerge from any victory at trial." (*Id.* at 8-9.) The court also took note of the additional injunctive provisions that were tailored to address the minor subclass and the related parental consent and control concerns, including provisions giving teenagers and parents further opt-out options that allow parents to prevent their teenage children's names and profile pictures from appearing in Sponsored Stories. (*Id.* at 7, 9.)

The district court found that the *cy pres* component of the settlement was an acceptable approach to providing relief to the class. (Schachter ER 9.) The court

reasoned that, absent such an option, and given the number of class members, "it simply might not have been feasible to settle this action"—a result that "plainly would conflict with the strong policy favoring settlements." (*Id.*) The court noted that the *cy pres* organizations would receive only funds that were not claimed by class members, and that "*cy pres* is a well-accepted method for distributing unclaimed settlement funds." (*Id.* (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011).) The court also found that the *cy pres* recipient organizations satisfied this Court's requirement that there be "'a driving nexus between the plaintiff class and the *cy pres* beneficiaries'" because the beneficiaries were "not merely worthy recipients with noble goals, but organizations and institutions with 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." (*Id.* at 10 (quoting *Nachshin*, 663 F.3d at 1038).)

The district court also reviewed the release of claims to ensure that it was not overbroad (Schachter ER 10-11), and surveyed the responses of class members to the settlement. The court noted that only a "miniscule" percentage of class members opted out, and that a significant number of those opt-outs apparently believed that the litigation was frivolous and "faulted the suit rather than the settlement." (*Id.* at 11.)

Finally, the district court fulfilled its obligation to "give a reasoned response to all non-frivolous objections." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012). The court recognized that many objectors would have preferred a larger monetary award for each class member, in light of the statutory damages provision of § 3344. But it concluded that this view "fail[ed] to give sufficient weight to the reality that it would be virtually impossible for plaintiffs to be awarded, and to collect, the full amount of the statutory damages on a class-wide basis." (Schachter ER 11-12.) Noting that many of the objections were more akin to "suggestions as to how the settlement might be made *better*," the court recognized that its role was to evaluate whether the settlement was "'fair, adequate and free from collusion,'" not to consider, in this Court's words, "'whether the final product could be prettier, smarter or snazzier.'" (Schachter ER 13 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)).) The court then concluded that, even considering all the objections cumulatively, they did not support a conclusion that the settlement was collusive, unfair, or inadequate. (*Id.*)

With respect to the objections challenging the parties' treatment of the minor subclass, the court concluded that "these objections would have the Court decide—in plaintiffs' favor—the *merits* of the dispute." (Schachter ER 12 (emphasis in original).) The court noted that, "to the extent some preliminary analysis of the merits may be appropriate," the objectors had "not persuasively shown the

settlement to be improper." (*Id.*) In particular, the court noted that COPPA "may well" preempt claims based on a failure to obtain parental consent of minors. (*Id.* at 12-13.) The court also concluded that the objectors' reliance on provisions of the California Family Code was unavailing because the cited provisions were not implicated by the circumstances of the case. (*Id.* at 13 n.14.)

In a separate order, the district court awarded attorneys' fees of 25% of the settlement fund, net of costs, administrative expenses, and incentive awards. (Schachter ER 21.) Although the award was greater than what Facebook had advocated, it was substantially less than the $7.5 million award that plaintiffs initially sought and to which many commenters objected. (*Id.* at 12, 16.)

Seven Objectors appealed from the court's approval order. The timely filed appeals were consolidated and are now before this Court.

SUMMARY OF ARGUMENT

Plaintiffs faced serious obstacles to obtaining any relief on their claims that Sponsored Stories violated § 3344 or the UCL. Among other barriers was the reality that Facebook users (including the named Plaintiffs) expressly and impliedly agreed to the republication of their names and profile pictures in Sponsored Stories, as well as the absence of any cognizable injury suffered by class members. Plaintiffs' claim alleging a lack of parental consent for minors was preempted by federal law, and Facebook had numerous other significant defenses,

including a First Amendment defense, the newsworthiness exception to the § 3344 claim, the fact that many Facebook users do not even upload their own photo into their profile, and immunity under the Communications Decency Act. It was also far from clear Plaintiffs would have succeeded in obtaining class certification for liability purposes. Indeed, courts repeatedly have found that individualized issues regarding consent preclude certification. And even if a class had been certified, Plaintiffs faced a long and uncertain course of litigation.

In light of all of these risks, the settlement reached by the parties, after arm's-length negotiations, provided significant benefits to the class, in the form of monetary relief, *cy pres* payments to groups with a commitment to the concerns at stake in the lawsuit, and injunctive provisions requiring Facebook both to create new and innovative tools providing users with additional transparency and control and to enhance its disclosures regarding how advertising works on Facebook. The district court played an active role in ensuring the fairness of the settlement, the negotiations were facilitated by an experienced and well-regarded mediator, and the parties amended their initial agreement to address concerns raised by the court.

The district court did not abuse its considerable discretion in approving the resulting revised settlement. The court considered each of the factors that this Court has established for evaluating proposed class action settlements, and correctly applied the "higher standard of fairness" required for settlements reached

before a class has been certified. *See Hanlon*, 150 F.3d at 1026. There is no basis to set aside the court's considered judgment that the settlement was fair, reasonable, and adequate.

The arguments advanced by Objectors do not establish any abuse of discretion in the district court's approval of the settlement. Two of the Objectors' briefs argue that the settlement allows Facebook to continue to violate statutory provisions relating to the use of minors' names and likenesses for advertising purposes. But these were among the very highly contested issues that the parties sought to resolve by settling the case. The central purpose of a settlement would be lost if district courts were required to resolve all such contested issues before approving a proposed settlement or required to reject any settlement that did not adopt one party's view. As a consequence, this Court and other circuits have emphasized that only if a proposed settlement *clearly* violates *well established law* should a district court reject it on that basis.

The settlement here does not come close to violating that rule. As the district court found, there was substantial doubt as to whether Plaintiffs would be able to show that Sponsored Stories violated any law. Objectors' arguments that Sponsored Stories violated § 3344 and the UCL assumes away the flaws in Plaintiffs' theories of recovery and Facebook's strong defenses—including consent, federal preemption, the lack of any injury to minors (or anyone else), the

First Amendment, newsworthiness, and Facebook's immunity under the Communications Decency Act. And Objectors' assertion that Facebook's practices implicate certain Family Code limits on minors' rights to enter contracts fundamentally misinterprets those provisions and has been squarely rejected by the only case on point—namely, Judge Seeborg's ruling dismissing the claims of plaintiffs who opted out of the present action. *See C.M.D. v. Facebook, Inc.*, No. 12-CV-1216-RS, 2014 WL 1266291, at *3-*4 (N.D. Cal. Mar. 26, 2014).

The settlement also addresses the principal concerns alleged in the Complaint. Among other things, Facebook's compliance with the injunctive relief provisions will ensure that both adult and teenage users will have more information about how advertising on Facebook works and will have access to innovative features and controls to prevent their appearance in Sponsored Stories, if they (or in the case of teenage users, their parents) prefer. Objectors essentially complain that Plaintiffs should have negotiated a better deal and seek to dictate the model for Facebook's service—for example, requiring that Facebook adopt an opt-in model for Sponsored Stories—but they ignore the substantial barriers Plaintiffs faced and mischaracterize the district court's role in evaluating class settlements.

The other arguments Objectors advance are no more persuasive. The district court reasonably determined that separate counsel was not required for the subclass of minors because there was no fundamental conflict between minor and adult

class members; in fact, two of the named Plaintiffs were minors. Nor did the court abuse its discretion in concluding that the settlement achieved a fair result for Plaintiffs in light of their uncertain odds of success in litigation. And neither the *cy pres* relief nor the district court's attorneys' fee award provides a basis for rejecting the settlement.

ARGUMENT

The District Court Did Not Abuse Its Discretion in Approving the Settlement

I. Abuse of Discretion Is the Correct Standard of Review

The district court's determination that the settlement is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), is entitled to deference and can be reversed only for an abuse of discretion. Appellate review of such a determination is "'extremely limited,'" and this Court "will set aside that determination only upon a 'strong showing that the district court's decision was a clear abuse of discretion.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1026-27), *cert. denied*, 134 S. Ct. 8 (2013). "We have repeatedly stated that the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because [the judge] is 'exposed to the litigants, and their strategies, positions and proof.'" *Hanlon*, 150 F.3d at 1026 (quoting *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 626 (9th Cir. 1982)).

Some Objectors incorrectly suggest that a less deferential standard of review should apply here because the settlement occurred before class certification. (*See*,

e.g., K.D. Br. 19-33.) Although it is true that a "'higher standard of fairness'" governs the district court's evaluation of such a settlement, *Lane*, 696 F.3d at 819 (quoting *Hanlon*, 150 F.3d at 1026), the district court applied that "higher standard of fairness" and found it satisfied. (Schachter ER 3.) But the "higher standard" governing district court review does *not* alter the abuse of discretion standard in this Court. So long as the district court applied the proper standard, this Court's review remains "extremely limited" and reversal is warranted only if the objectors show a "clear abuse of discretion." *Lane*, 696 F.3d at 818-19; *accord Dennis*, 697 F.3d at 864; *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011).

II. The District Court Correctly Found the Settlement a Reasonable, Arm's-Length Compromise that Avoided Litigation Risk, Provided Important Benefits to Class Members, and Showed No Hint of Collusion

A district court evaluating a proposed settlement should consider a variety of factors, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining 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; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026; *accord Churchill Village, LLC v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004). This analysis

must take into account the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *see also Officers for Justice*, 688 F.2d at 625 ("[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . . .").

Here, the district court identified the appropriate legal standard, including the requirement of "more exacting review" because the settlement had been reached on the eve of the hearing on Plaintiffs' class certification motion. (Schachter ER 3.) The court appropriately weighed the strengths and weaknesses of Plaintiffs' case, analyzed whether the settlement appeared to be the product of collusion, and explained why the settlement as a whole was fair and reasonable. In doing so, the court made a number of specific factual findings, discussed in detail below, that are entitled to deference on appeal and were not clearly erroneous. *Lane*, 696 F.3d at 825; *Churchill Village*, 361 F.3d at 577.

A. Plaintiffs Had Low Odds of Ever Recovering

The district court acted well within its discretion in recognizing that Plaintiffs' case on the merits was problematic and that Facebook's defenses "st[ood] as potentially significant impediments to recovery." (Schachter ER 8.) The court specifically found that Plaintiffs "faced a substantial burden" both in

showing that they had been injured and in proving a lack of consent, either express or implied, to the use of their names and profile pictures in the manner complained of in this case. (*Id.* at 4.) The court also noted that plaintiffs faced a risk that their claims relating to minors may be preempted by federal law. (*Id.* at 5.) Because Plaintiffs' prospects for recovering were questionable, this factor weighed heavily in favor of accepting the settlement. *In re Pacific Enterprises Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) (settlement was fair, adequate, and reasonable where Plaintiffs' "odds of winning [were] extremely small" and defenses "may have adversely terminated the litigation before trial").

1. Plaintiffs Expressly Consented to Sponsored Stories

The district court correctly recognized the challenge Plaintiffs faced in proving lack of consent. *E.g.*, *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (plaintiffs' burden to show lack of consent); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 680 (2010) (same).

The use of Facebook always has been contingent on users' willingness to abide by Facebook's SRR—to which all users agree. *See Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1075 (S.D. Cal. 2012) ("Facebook has a right to control its own product, and to establish the terms with which its users, application developers, and advertisers must comply in order to utilize this product."). Since well before Sponsored Stories launched, users have given

Facebook their express consent, through the SRR, to use their names and profile pictures in the manner used in Sponsored Stories and other social ads.

In 2007, three years before Sponsored Stories, Facebook's SRR authorized Facebook to "use" users' "photos [and] profiles (including your name, image, and likeness)" for "any purpose, commercial, advertising, or otherwise." (SER 400.) By 2009, the SRR authorized Facebook to "use your name, likeness and image for any purpose, including commercial or advertising." (SER 391.) When Sponsored Stories launched in 2011, the SRR stated: "You can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place." (SER 414, ¶¶ 21-22.) By agreeing to these terms, Facebook users expressly consented to their appearance in social ads, including Sponsored Stories. *See C.M.D. v. Facebook*, 2014 WL 1266291, at *3-*4 (rejecting challenges to Facebook's SRR and relying on SRR to dismiss claims of minors who opted out of the present action).

2. Plaintiffs Impliedly Consented to Sponsored Stories

Implied consent—*i.e.*, the consent an individual "manifest[s] by his or her conduct"— also is a valid form of consent under California law. *Hill v. NCAA*, 7 Cal. 4th 1, 26 (1994); *see also, e.g., Traxler v. Varady*, 12 Cal. App. 4th 1321,

1334 (1993); *Newton v. Thomason*, 22 F.3d 1455, 1461 (9th Cir. 1994). The district court was correct that Facebook's implied consent defense created a "substantial hurdle" for Plaintiffs' claims. (Schachter ER 4.)

To begin, many users engaged in social actions specifically to distribute that information to their friends—for example, by "liking" a particular brand or social cause or "checking in" to a particular location. Facebook also showed that users reviewed and/or had access to several different disclosures on Facebook's site that described how Sponsored Stories work (SER 376, ¶¶ 24-25; SER 363-64, ¶ 10), and that users knew how to prevent their appearance in social ads, including Sponsored Stories, by changing the audience with whom they shared content, by unliking pages, and in other ways. (SER 364, ¶¶ 12-14.) These factors weigh heavily in favor of a finding that individuals who continued to share content with friends knowing that those stories might appear in Sponsored Stories or other social ads and knowing they had the power to control or prevent such appearances impliedly consented to such appearances. *See, e.g., Anderson v. Wagnon*, 110 Cal. App. 2d 362, 368 (1952) (implied consent results from "a sufferance of use or a passive permission deduced from a failure to object to a known past, present or intended future use under circumstances where the use should be anticipated"). Indeed, the record showed that users continued to like and share content on Facebook despite after having seen their friends' social actions (such as "liking" a

product) in what collectively number millions of Sponsored Stories each day. (SER 373, ¶ 13; SER 365, ¶ 15.) Hundreds of thousands of users, in fact, clicked the "like" button *within* Sponsored Stories each day. (SER 365, ¶ 15.)

Likewise, parents who knew that their children "liked" content and appeared in Sponsored Stories impliedly consented as well. (*See* Schachter Br. 11 ("The objector-appellant parents know that their children use the 'Like' function on Facebook and will continue to do so.").) Indeed, there is evidence in the record that many children and their parents (including named plaintiff W.T.) signed up for Facebook together and were "friends," an indication that parents understood what their children were doing and, by continuing to allow them to use the service, impliedly consented to Sponsored Stories. (SER 314-16, 323-24.)

3. COPPA Presented Significant Obstacles for Plaintiffs' Claim That Parental Consent Was Required Before Teenagers Could Elect to "Like" Content on Facebook

The district court also was correct that COPPA—the federal statute that governs requirements for parental consent in connection with the use of minors' personal information—would have presented an obstacle to the claims of the minor subclass under § 3344 due to its broad preemption provision, found at 15 U.S.C. § 6502(d). (Schachter ER 5, 12.)

COPPA requires an "operator of a website or online service" to obtain parental consent before it "collect[s]" or "use[s]" the "personal information" of a

"child," but only where the child is "under the age of 13." 15 U.S.C. §§ 6501(1), 6502(a), 6502(b)(1)(A)(ii); 16 C.F.R. § 312.5(a)(1). It also expressly preempts state efforts to "impose any liability … in connection with an activity or action described in this chapter that is inconsistent with the treatment of those activities or actions under this section." 15 U.S.C. § 6502(d). Insofar as teenagers are concerned, COPPA's "treatment" of a parental consent requirement was that Congress opted *not* to include one. This reflects Congress's "authoritative … determination that the area is best left *un*regulated"— a decision with "as much pre-emptive force as a decision *to* regulate." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (emphases in original). Any state law that purports to impose such a requirement is "inconsistent" with that treatment and therefore expressly preempted.

The legislative history of COPPA confirms what is evident from the text—namely that Congress made an affirmative decision that the online activities of teenagers should not be subject to a blanket parental-consent requirement, under either federal or state law. As initially proposed, COPPA would have governed the collection or use of personal information from minor teenagers, in addition to children under 13. (SER 252.) Although the groups would have been treated differently, both would have been subject to various forms of parental control or consent requirements. The inclusion of teenagers in this parental consent regime

sparked a barrage of criticism from individuals and groups who argued that such a requirement would infringe the First Amendment rights of teenagers to express themselves and share and receive information online. (SER 219-20, 229.) As one witness testified before Congress, "if a 15-year-old visits a site, whether a bookstore or a women's health clinic[, and] merely inquires about books on a particular subject (abuse, religion) using their email address the teenager's parent would be notified. This may chill older minors in pursuit of information." (SER 219-20.)

In order to address these concerns, lawmakers removed the provisions of the bill that would have required parental notification and consent for the use of information from teenagers. *See* 144 Cong. Rec. S12787 (daily ed. Oct. 21, 1998) (statement of Sen. Bryan) (noting that revisions eliminating consent requirement for teenagers had been "worked out carefully" with, among other groups, "First Amendment organizations").

Where Congress includes "'language in an earlier version of a bill but deletes it prior to enactment, it may be presumed'" that Congress made the omission intentionally. *Plata v. Schwarzenegger*, 603 F.3d 1088, 1096 (9th Cir. 2010) (quoting *Russello v. United States*, 464 U.S. 16, 23-24 (1983)). In this way—by requiring parental consent for children under age 13 but affirmatively choosing *not* to require it for teenagers—Congress sought to balance COPPA's

goals of "protect[ing] children's privacy" on the Internet with the goal of preserving teenagers' "access to information in this rich and valuable medium." 144 Cong. Rec. at S12787 (Sen. Bryan).

Because Congress made a considered judgment that the online activities of teenagers should *not* be subject to any blanket parental consent requirement, any state law that treats this issue in a manner inconsistent with this "purpose[ ]" and "objective[ ]" must yield. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1136 (2011) (state law invalid under "ordinary conflict pre-emption principles" when it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives,'" of Congress) (quoting *Hines*, 312 U.S. at 67). Indeed, at least one court has held that COPPA preempts any effort under § 3344 to impose a parental consent requirement on Facebook's social ad practices with respect to teens. *See Cohen v. Facebook, Inc.*, No. BC444482 (Cal. Super. Ct., L.A. County, Sept. 22, 2011) (SER 162 (complaint) and 160 (order)) (COPPA preempted claims that § 3344 required Facebook to "obtain the parental consent of users aged 13 to 17 to the commercial use of their name and likeness").

In separate *amicus curiae* briefs, the Federal Trade Commission ("FTC") and the State of California argue that COPPA does not preempt state privacy laws such as § 3344 when these laws are invoked to regulate the use of the Internet by

teenagers. (FTC Br. 6-13; Cal. Br. 9-23.) But, as the FTC and the State acknowledge, in evaluating whether the district court abused its discretion in approving the settlement, it does not matter whether the district court or this Court necessarily would find preemption if the issue was litigated to judgment. *See generally Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009) (court should not adjudicate the merits of the parties' claims or defenses in determining whether settlement was appropriate). The fact that neither brief cites any case adopting their view of COPPA also confirms that this is a substantial and contested issue, and one on which neither the State of California nor the FTC is entitled to deference. And the fact that both briefs are in support of "neither party" is also significant, because neither the FTC nor the State suggests that the district court would have been required to reject the settlement if their view of the law were correct.

In any event, both briefs argue against COPPA preemption based on the fact that COPPA imposes parental consent obligations only for minors under the age of 13. But this argument overlooks the strong evidence that Congress made a conscious decision *not* to impose parental consent requirements on teens by removing the provision of the original bill that would have required consent for minors up to age 17—a deletion that plainly was motivated by First Amendment and other concerns. It also ignores the plain, broad language of the express

preemption provision, which extends beyond ordinary "conflict" principles to prohibit any state regulation of "activities" that is "inconsistent" with the regulation of those same "activities" that is effected through COPPA. 15 U.S.C. § 6502(d). The "activity" consisting of the use of a person's information to allow them to access and create Internet content would be regulated inconsistently if the state were permitted to impose parental consent requirements on the very group—users aged 13-17—that Congress deliberately excluded from regulation.

In short, the district court acted well within its considerable discretion in considering Facebook's COPPA preemption arguments as one factor that supported a compromise settlement.

4. Plaintiffs Could Not Prove Injury or Entitlement to Restitution

The district court correctly questioned whether Plaintiffs could prove that they were injured by Facebook's conduct. (Schachter ER 4.) Injury is a required element for claims under both § 3344 and the UCL. *See id.*; Cal. Civ. Code § 3344 (discussing "liab[ility] to the injured party"); *Downing*, 265 F.3d at 1001 (citing *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 416 (1983)) ("resulting injury" to the plaintiff is an element of a § 3344 claim); Cal. Bus. & Prof. Code § 17204 (UCL plaintiff must have "suffered injury in fact" and have "lost money or property as a result" of defendant's action); *Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 145 (2008) (applying this requirement in rejecting a UCL

claim for inadequate allegations of injury). In addition, under the UCL, any claim for monetary recovery is limited to restitution—that is, in this case, money given by individual Facebook users to Facebook. *See Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 172 (2000).

Here, the content displayed to Facebook users was nothing more than the content Plaintiffs and class members previously (and voluntarily) chose to share with their friends, and their only theory of wrongdoing was that the same voluntarily shared content was redisplayed to the same friends. Plaintiffs offered no evidence that any Sponsored Story diminished the value of any Facebook users' names or likenesses, or deprived anyone of compensation they could have otherwise earned. (SER 326, 334, 346-47.) Facebook's service is free, and class members plainly did not lose any money or property by virtue of the republication of their actions to their friends. Nor was there any prospect of restitution under the UCL, given that class members never gave any money to use Facebook's service. Under these circumstances, Plaintiffs would have substantial difficulty establishing any prospect of a monetary recovery, or even "the irreducible constitutional minimum" of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs' principal theory was that they were injured because *Facebook* derived revenue from Sponsored Stories. But that alleged gain does not prove

cognizable legal injury to *Plaintiffs*, a required element of § 3344 and UCL claims, nor does it establish the prerequisites to a claim for restitution under the UCL. *See* Cal. Civ. Code § 3344; Cal. Bus. & Prof. Code § 17204. *Cf., e.g.*, *Macken v. Martinez*, 214 Cal. App. 2d 784, 789 (1963) (proper measure of damages "is the value … lost to plaintiff[s], not the gain of defendant, which may be more or less than plaintiff's loss"); *United States v. Haddock*, 12 F.3d 950, 961 (10th Cir. 1993) ("If gain to the defendant does not correspond to any actual, intended, or probable loss, the defendant's gain is not a reasonable estimate of loss.").

5. Plaintiffs Faced Other Barriers to Recovery

Plaintiffs would have faced other formidable barriers in any effort to litigate their claim to final judgment. Although the district court found that some of these issues did not require dismissal at the pleading stage, plaintiffs would have had to overcome all of these issues at the summary judgment, trial, and appellate phases.

Newsworthiness Exemption. Civil Code § 3344 exempts from liability the use of a person's name or likeness "in connection with any news, public affairs, or sports broadcast or account, or any political campaign." This exemption applies to content that is newsworthy even if the name or likeness is used in connection with advertising and generates revenue. *See Baugh v. CBS, Inc.*, 828 F. Supp. 745, 753 (N.D. Cal. 1993) ("the fact that [the challenged use] generates advertising revenue does not prevent [a defendant] from claiming … immunity" under § 3344(d)).

Facebook was prepared to show that content posted by Facebook users to their friends—including stories that the user "likes" certain content—is newsworthy to the audience to which it is directed, namely, that user's group of Facebook friends. Moreover, all class member claims involving the millions of Sponsored Stories that related to more traditional news, political, and public interest categories would have failed based on the "newsworthiness" exception alone. (*See* SER 372-73, 375, ¶¶ 11, 20.)

First Amendment. As noted above, the expressive information republished through Sponsored Stories also is protected by the First Amendment. As the Fourth Circuit recently held, the act of "liking" a Facebook page "constitute[s] pure speech" that is fully protected by the First Amendment, because it "communicates the user's approval" of the page in question. *Bland*, 730 F.3d at 386. More broadly, a Facebook user's voluntary decision to "like" or comment on a given cause, organization, product, event, or service, and to share that statement with his or her network of Facebook friends in a variety of contexts, including alongside ads or commercial content, is protected expression under the First Amendment. Because a social ad like a Sponsored Story consists of merely republishing the user's expressive content, and because Facebook users consent to the republication of that content, the protected speech is "inextricably intertwined" with any "commercial aspects" of a social ad program, and Facebook's redisplay

of the user's social content thus should be treated as "fully protected expression." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

These First Amendment concerns extend equally to teenage Facebook users. Indeed, the Internet has become a critical mode of expression and identity for teenagers, and is one of the primary means by which teens communicate—including by expressing support for, or commenting on, political causes, local businesses, musical bands, social change organizations, and the like.[6]

Given this expressive context, restricting the dissemination of expressive content created by teenagers or requiring parental consent would inappropriately curtail their First Amendment rights of expression and association. In a related context, the Supreme Court recently held that the First Amendment rights of minors to engage in expressive conduct on the Internet cannot be limited through government-imposed parental consent requirements. *See Brown*, 131 S. Ct. 2735-36. As the Court explained, there is no "free-floating power" in the government "to restrict the ideas to which children may be exposed," and "'only in relatively narrow and well-defined circumstances may government bar public dissemination

[6] *See generally* M. Madden, et al., *Teens, Social Media, and Privacy*, Pew Research Center (2013), *available at* http://www.pewinternet.org/Reports/2013/Teens-Social-Media-And-Privacy.aspx; H. Rheingold, *Using Participatory Media and Public Voice to Encourage Civic Engagement*, found in *Civic Life Online: Learning How Digital Media Can Engage Youth* (W.L. Bennett, ed., 2008).

of protected materials to them.'" *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 (1975)); *see also Maine Independent Colleges Ass'n v. Baldacci*, No. 09-CV-396-JAW (D. Me. Sept. 9, 2009) (Dkt. 19) (finding that challengers to a Maine statute that imposed parental consent requirements on the online activities and communications of all minors, had "met their burden of establishing a likelihood of success on the merits" of their First Amendment claims).

Communications Decency Act. Section 230 of the Communications Decency Act, 47 U.S.C. § 230, grants "broad immunity [to websites that] publish[ ] content provided primarily by third parties." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). Because Plaintiffs' claims arise exclusively from Facebook's republication of *content generated by users*—namely, users' "likes" and other actions they decided to share on Facebook—Sponsored Stories are immune from liability under § 230. Plaintiffs survived a motion to dismiss on this ground based on an allegation that Facebook itself created the content in Sponsored Stories (Schachter ER 114), but the evidence adduced in discovery disproved this theory. Facebook does not contribute to the substance of the users' social actions on Facebook, but instead offers neutral tools, such as the "like" button, through which users may share their support for and affiliation with companies, organizations, causes, and more. *See*,

e.g., *Carafano*, 339 F.3d at 1125 (defendant immune where the information about which plaintiff complained was "transmitted unaltered to profile viewers"); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009) (holding, in case involving claims based on allegedly fraudulent online advertisements, that "a website operator does not become liable as an 'information content provider' … when it merely provides third parties with neutral tools to create web content …").

Use of Name or Likeness. Section 3344 imposes liability only where a defendant "knowingly uses another's name, voice, signature, photograph, or likeness" for commercial purposes. But many users either do not upload a photograph at all, or upload a profile picture that does not contain their image or likeness. (*See* SER 368, ¶¶ 2-3; *see also, e.g.*, SER 325 (unredacted portions only), 338, 348.) And, as the district court recognized, "some do not use their own name." (Schachter ER 5; *see* SER 263.) Such users lacked viable claims under § 3344, and their presence alongside other class members would have posed an obstacle to class certification.

More generally, Plaintiffs faced a substantial challenge to demonstrate how the policies of § 3344 are even implicated by the mere republication of content that already was voluntarily shared with the exact same audience. Certainly, any "privacy" or "publicity" concerns are at a minimum, given the very limited circle of "friends" with whom personal information is shared and the voluntary nature of

the act of sharing information. This limited, closed publication context is vastly different from the typical "right of publicity" case, in which a plaintiff's name or likeness is broadcast in unexpected ways and unexpected places to individuals who otherwise would not have seen it.

Barriers to UCL Claim. Plaintiffs' UCL claim also would have faced significant obstacles. As a threshold matter, Plaintiffs would not have been able to satisfy the standing requirement of the UCL because (as explained above) they suffered no injury in fact and lost no money or property as a result of Sponsored Stories. *See* Cal. Bus. & Prof. Code § 17204. And even if they could prove standing, Plaintiffs' UCL claim would have failed on the merits. Plaintiffs originally alleged that Facebook's SRR misled users (Schachter ER 62), but the named plaintiffs conceded they could not prove the reliance necessary to satisfy the "fraud" test of the UCL (SER 288, 293, 309). S*ee, e.g.*, *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012) (UCL "requires named class plaintiffs to demonstrate reliance"). Nor could Plaintiffs have prevailed under the UCL's "unlawful" or "unfairness" tests. The former theory depended on proof that Sponsored Stories violated § 3344, and would have failed alongside that claim, and the latter theory would have failed because users "like" companies and causes specifically to share that content, and their affinity for it, with friends, and thus were not unfairly harmed when their "likes" were rebroadcast to those same

friends through Sponsored Stories. *See, e.g.*, *S. Bay Chevrolet v. GMAC*, 72 Cal. App. 4th 861, 886-87 (1999). Moreover, as noted above, Plaintiffs never could have collected restitution—the only monetary remedy available under the UCL—because they never paid Facebook any money to use the service and the UCL prohibits non-restitutionary disgorgement of profits. *Korea Supply v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150-52 (2003).

B. Plaintiffs Faced Risky and Protracted Litigation and Serious Challenges to Maintaining a Certified Class

The district court also recognized that Plaintiffs faced "other significant barriers to class certification and/or … recovery," and that even if Plaintiffs ultimately prevailed on the merits, it would have only been "after a protracted and very expensive journey." (Schachter ER 5.) In particular, the district court perceived a "significant risk" that class certification would prove unwarranted in light of consent issues. (*Id.* at 4-5.) *Cf. In re Google Inc. Gmail Litig.*, No. 13-MD-2430-LHK, 2014 WL 1102660, at *21 (N.D. Cal. Mar. 18, 2014) (denying class certification in light of "intensely individualized" inquiries about whether Gmail users had expressly or impliedly consented to alleged interceptions of email); *Block v. Major League Baseball*, 65 Cal. App. 4th 538, 544 (1998) (denying certification of claim under § 3344 because consent was an individualized issue); *see also, e.g.*, *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 329 (5th Cir. 2008) (consent individualized); *Torres v. Nutrisystem, Inc.*, 289 F.R.D. 587,

595 (C.D. Cal. 2013) (same). At a minimum, the settlement avoided years of protracted litigation with a very uncertain outcome for Plaintiffs. *Officers for Justice*, 688 F.2d at 629 (fact that "many years may be consumed by trials and appeals" weighed in favor of settlement).

C. The Relief in the Settlement Is Fair, Reasonable, and Adequate

The district court acted well within its discretion in holding that the $20 million monetary award and substantial injunctive relief were "on balance … fair, reasonable, and adequate" and provided "meaningful benefits to the class members." (Schachter ER 6-7.) After the district court expressed concerns about the lack of a monetary component in the parties' initial settlement, the parties added a direct monetary payment as part of the amended settlement, and also added more substantial injunctive relief. Given these substantial provisions, the district court did not err in finding the relief adequate as a whole. *Cf. Officers for Justice*, 688 F.2d at 628 (relying on injunctive relief component of settlement as supporting fairness and adequacy of settlement).[7]

[7] Although no objector has pressed the issue on appeal, Facebook's recent deprecation of Sponsored Stories (see *supra* at 12-13) does not undermine the substantial relief obtained by Plaintiffs under the settlement. The $20 million settlement fund provides meaningful monetary recovery for the claims asserted in the case. Facebook also will continue to be bound by the injunctive relief provisions to the extent it continues to offer products that fall within the scope of the settlement agreement. (Schachter ER 30, ASAR § 1.29.) The district court retains jurisdiction over the administration of the settlement (Schachter ER 42, 44,
(footnote continued)

This Court has made clear that district courts need not compare settlement relief to theoretical damages, statutory or otherwise, because such predictions—which depend on issues that are bound to be contested at trial—are inherently "speculative and contingent." *Lane*, 696 F.3d at 823. Nevertheless, the district court did not abuse its discretion in deeming the $20 million monetary component a fair compromise, in light of the fact that Plaintiffs would have difficulty showing *any* monetary harm and the fact that the $20 million payment amounted to 27% of Plaintiffs' *best case* argument even if the profits that Facebook allegedly earned from the contested practices were the appropriate measure. *See Officers for Justice*, 688 F.2d at 628 (finding settlement for fraction of potential liability fair, reasonable, and adequate given litigation risks).

The district court also correctly recognized that aggregating statutory damages of $750 per user across the class would have created significant due process, fairness, and manageability concerns. (Schachter ER 7.) *See Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 25 (2d Cir. 2003) ("aggregation in a class action of large numbers of statutory damages claims potentially distorts the

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ASAR §§ 3.9(g), 5.1), and Plaintiffs may seek a compliance audit if there is good cause (Schachter ER 33, ASAR § 2.1(e)). Moreover, the recent changes to Facebook's advertising options will not affect Facebook's compliance with other provisions of the settlement, particularly those that facilitate parental involvement and provide additional information about how advertising works on Facebook. (*See, e.g.*, Schachter ER 31-33, ASAR §§ 2.1(a) , 2.1(c), 2.1(d).)

purpose of both statutory damages and class actions" such that "the due process clause might be invoked" so as to "reduce the aggregate damage award") (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974) (class actions are not a superior way of resolving disputes involving such penalties, where the result would be aggregation of fees far in excess of any monetary harm to the class) (citing *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972)); *see also Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 714 (9th Cir. 2010) ("Courts have heavily relied on *Ratner*'s reasoning for the proposition that Rule 23(b)(3)'s superiority requirement authorizes consideration of the proportionality between the potential damages and the actual harm."). Accordingly, the district court did not abuse its discretion in finding the overall relief afforded in the settlement to be fair, reasonable, and adequate.

D. The Settlement Resulted from Arm's-Length Negotiations by Experienced Counsel and Drew Few Objections

The district court specifically found that "[t]he record leaves no doubt that this settlement was the product of arms-length negotiations and compromise," arrived at through mediation overseen by "a renowned retired federal magistrate judge following months of active, adversarial, litigation," including extensive motion practice and discovery. (Schachter ER 2-3.) *See Bluetooth*, 654 F.3d at 947 (court must determine that "the settlement is 'not the product of collusion

among the negotiating parties'"). The court further found that the settlement had been negotiated by "experienced and informed counsel," and reflected the "private consensual decision of the parties." (Schachter ER 4.) These findings are entitled to deference. *Lane*, 696 F.3d at 825; *Churchill Village*, 361 F.3d at 577.

The district court also satisfied its burden to consider and respond to non-frivolous objections. *Dennis*, 697 F.3d at 864 (noting court must "give a reasoned response to all non-frivolous objections"). Recognizing that it had received relatively few objections, and that only a "miniscule" percentage of class members had opted out of the settlement, the court nevertheless addressed and explained its response to each category of objections. (Schachter ER 11-13 & n.12.) In particular, the court reasoned that many of the objections unrealistically expected class members to receive the maximum amount of statutory damages that were theoretically available; that the injunctive relief provided important benefits to minors and their parents; and that the objections to the attorneys' fees award lacked merit. (*Id.* at 12-13.)

* * *

Ultimately, the court acted well within its discretion in approving the class settlement. It weighed all of the *Hanlon* factors, applied the proper pre-certification mode of analysis, and made reasoned and comprehensive findings. The settlement should therefore be affirmed.

III. The Arguments Advanced by Objectors Do Not Demonstrate a Clear Abuse of Discretion by the District Court

A "party objecting to a class action settlement" bears a "heavy burden" of demonstrating that the negotiated agreement is unreasonable. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (citing *Moore v. City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980)). Objectors have not met that burden.

A. The District Court Acted Within Its Discretion by Approving the Settlement Notwithstanding Objectors' Arguments About State Laws Regarding Minors

The Schachter objectors argue that the district court should have rejected the settlement because it "authorizes Facebook to use a minor's likeness for advertising without parental consent," in violation of seven state laws. (Schachter Br. 19.) The K.D. objectors further argue that Facebook would be permitted to use minors' likenesses in violation of certain provisions of the California Family Code. (K.D. Br. 41-46.) These arguments did not require the district court to disapprove the settlement. As the district court recognized, this type of objection "would have the Court decide—in plaintiffs' favor—the *merits* of the dispute," which is precisely what settlement is designed to avoid. (Schachter ER 12 (emphasis in original).) And in any event, the settlement does not authorize any violation of state laws—let alone the sort of clear or obvious violation that might call into question the validity of the settlement.

1. Only If a Settlement Authorizes a Clear Violation of Well Established Law Should a District Court Reject the Settlement on that Basis

This Court has recognized that the very purpose of settlements would be defeated if district courts were required to turn the settlement approval process into a "trial or rehearsal for trial" and undertake the kind of merits inquiry that Objectors seem to envision:

> [T]he the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to 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 outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The 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; *accord Rodriguez*, 563 F.3d at 964. Indeed, a district court could not comply with this Court's instruction to avoid "reach[ing] any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute," *Officers for Justice*, 688 F.3d at 625, if it had to decide the merits of a plaintiffs' allegations that the defendant violated the law. Rather, a district court must "consider[ ] the merits only insofar as they are relevant in determining the probable outcome of the litigation, and thus give some indication of the fairness and justice of the settlement." *Moore*, 615 F.2d at 1271.

The principal case upon which Objectors rely (Schachter Br. 19), *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977), holds that only a settlement

should be rejected if it "authorizes the continuation of *clearly* illegal conduct." *Id.* at 686 (emphasis added). Other circuits agree. *See, e.g.*, *Robinson v. Shelby County Bd. of Educ.*, 566 F.3d 642, 649 (6th Cir. 2009); *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1385 (8th Cir. 1990); *cf. Officers for Justice*, 688 F.2d at 625.

To warrant rejection under this standard, a settlement must authorize conduct that is *clearly illegal under existing precedent*. "'[T]he court must not decide unsettled legal questions; any illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis.'" *Isby*, 75 F.3d at 1197 (quoting *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 320 (7th Cir. 1980), *overruled in part on other grounds by Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998)); *accord Robertson*, 556 F.2d at 686. In other words, a settlement may not be rejected as allowing unlawful conduct unless "prior judicial decisions … have found that practice to be illegal or unconstitutional as a general rule.'" *Little Rock*, 921 F.2d at 1385 (quoting *Armstrong*, 616 F.2d at 321); *accord Isby*, 75 F.3d at 1197.

Here, by contrast, there was no clear violation of existing law but rather an ongoing, hotly litigated dispute, such that the settlement reflected a compromise

that avoids for both parties the "risk, expense, complexity, and … duration" of obtaining a ruling on the merits. *Hanlon*, 150 F.3d at 1026.

2. The Settlement Does Not Authorize Any Conduct that Violates State Laws, Let Alone Clearly Illegal Conduct Under Well Established Law

The Schachter objectors cite the laws of seven states that require the consent of a parent or guardian before a party may use the name or likeness of a minor for advertising purposes, with certain exceptions. (*See* Schachter Br. 21-24 (citing Cal. Civ. Code § 3344(a); Fla. Stat. Ann. § 540.08(1), (6); N.Y. Civ. Rights Law § 50; Okla. Stat. Ann. tit. 21, § 839.1; Tenn. Code Ann. § 47-25-1105(a); Va. Code Ann. § 8.01-40(A); Wis. Stat. Ann. § 995.50(2)(b)).) But Sponsored Stories never violated any state law, and the settlement agreement itself, which requires Facebook to implement a host of tools for users to control the republication of content they generate, does not do so either.

As an initial matter, although Objectors invoke the laws of multiple states, there can be little dispute (as the district court recognized) that only California law applies because the SRR contained a California choice of law provision (Schachter ER 13)—a conclusion the Schachter objectors do not challenge. (Schachter Br. 32.) Indeed, in a related case filed by opt-outs from this settlement (represented by counsel for some of Objectors here), the district court enforced the choice of law

provision and dismissed claims brought by minors purportedly under Illinois law. *C.M.D.*, 2014 WL 1266291, at *5.

At any rate, Objectors have not shown the settlement violates the law of California or of any other state, much less that it clearly or obviously violates any such law. To the contrary, there were serious and substantial questions as to whether Plaintiffs ever could have proven a violation of state laws such as § 3344.

To begin with, the claims of teen Facebook users faced the same legal problems as the claims of broader class discussed above: They faced significant hurdles to demonstrate the absence of consent (express or implied); they had no viable way to prove injury from the republication of their social actions in Sponsored Stories; the newsworthiness exception to § 3344 would have barred the minors' claims; some Facebook users, including teens, did not use their real names or profile pictures with their actual likenesses; and the Communications Decency Act § 230 immunized Facebook from liability for republishing user-generated content, such as "liking" a company, organization, or cause.

Moreover, to the extent that Objectors' theory is that teens cannot consent to any use of their "like" in a commercial context, Plaintiffs would have faced a substantial burden of overcoming the First Amendment concerns raised by any state law parental consent requirement that would prohibit teenage Facebook users from voluntarily associating their "likes" with commercial products, services, or

other content. As noted above, speech commenting on or endorsing a commercial product is fully protected by the First Amendment—protection that applies to the speech of teens and that cannot be curtailed through state-imposed parent consent requirements. Indeed, the Supreme Court in *Brown*, in striking down a California law banning the sale of violent video games to minors absent parental consent, made clear that such government-imposed parental consent requirements may not be used to compromise the First Amendment rights of teens. *Brown*, 131 S. Ct. 2729. Although the State, as well as a dissenting Justice, argued that the video game law imposed a legitimate parental consent requirement, *see id.* at 2752 (Thomas, J.), the Court disagreed, holding that the traditional right of parents "to control what their children hear and say" does not mean "that the state has the power to prevent children from hearing or saying anything *without their parents' prior consent*." *Id.* at 2736 n.3 (emphasis in original) (majority opinion).

The Schachter objectors fault the district court for "duck[ing] the question" of COPPA preemption (Schachter Br. 34), but the district court correctly declined to reach the merits of this issue. Its role was only to evaluate whether the preemption argument was colorable, as opposed to a "clearly" meritless argument under "[ ]settled" law, and thus should be considered as a factor raising litigation risk and therefore supporting a compromise settlement. *Isby*, 75 F.3d at 1197;

accord Moore, 615 F.2d at 1271. As discussed above, the district court's conclusion that COPPA presented litigation risk for Plaintiffs was correct.

In any event, Objectors' arguments against COPPA preemption are not supported. They concede that "'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated.'" (Schachter Br. 38 (emphasis in original) (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002)).) And although they insist that Congress intended no such result here, both the text and the legislative history reflect precisely that intent, as shown above. And there is certainly no established law holding otherwise; the only authority on point, in fact, supported Facebook's position. *See Cohen v. Facebook*, *supra*, SER 160 & 162. It was entirely appropriate for the district court to avoid any definitive ruling on this contested legal issue in approving the settlement.

Even if some issue of parental consent could survive these formidable challenges, Facebook offered significant evidence showing that parents often are actively involved with their teenagers' use of Facebook, and thus do impliedly or expressly consent to their online activities. For example, one named plaintiff's parent testified that he and his teenage child discussed safe use of Facebook extensively *before* the teen signed up and that the parent sat down with the teen at the time of registration and may have clicked the "Sign Up" button and agreed to

Facebook's terms of use on his minor child's behalf. (SER 319-20.) Facebook also showed that a substantial percentage of teens are friends with a parent, which means that parents have access to their child's activities on Facebook, including in Sponsored Stories. (SER 364, ¶ 11.) For this reason, individual issues as to implied parental consent would have defeated many class members' claims.

Finally, despite these substantial problems with Plaintiffs' "parental consent" theories, the settlement nonetheless directly addresses the relevant concerns by providing meaningful new controls for both parents and teens without directly curtailing teens' expressive rights. The settlement requires Facebook to provide an "easily accessible link"— available to parents who use Facebook and those who do not—through which parents can "opt out" and "prevent the names and likenesses of their minor children from appearing alongside Facebook ads." (Schachter ER 32, ASAR § 2.1(c)(iii).) Facebook also will encourage users to confirm their parent-child relationships on Facebook, facilitating additional parental involvement. (*Id.*, ASAR § 2.1(c)(ii).) And if a minor using Facebook indicates that his or her parents are not on Facebook, the minor will be ineligible to appear in Sponsored Stories until he or she reaches age 18, or until a parent joins Facebook and becomes friends with the teen. (*Id.*, ASAR § 2.1(c)(iii).)

The Schachter objectors contend that not all parents and children on Facebook will use these tools, and argue that the settlement should have imposed a

more stringent "opt-in" regime. (Schachter Br. 24-25.) But the district court considered that specific objection and rejected it, reasoning that Objectors were simply advocating for a "better" deal, that they gave insufficient weight to Facebook's many defenses, and that the new tools required by the agreement provided benefits that might have been difficult or impossible to obtain even if Plaintiffs prevailed at trial. (Schachter ER 8-9.) The court's reasoned disagreement with Objectors is precisely the type of issue on which its judgment is entitled to the highest deference. *See Hanlon*, 150 F.3d at 1026-27.

3. The Settlement Does Not Violate Any Provisions of the California Family Code

The K.D. objectors argue that the settlement authorizes a violation of certain provisions of the California Family Code limiting contracts by minors. (K.D. Br. 38-49.) But the K.D. objectors cannot come close to showing the settlement *clearly* violates *well established* state law. *Isby*, 75 F.3d at 1197. They cite no authority applying the relevant Family Code provisions in circumstances even remotely similar to this case, and the Family Code sections they invoke in fact are inapplicable to the circumstances here. Indeed, like the COPPA defense, the only relevant authority *supports* Facebook's position.

(a) The Settlement Does Not Violate Family Code § 6701(a)

The K.D. objectors incorrectly contend that Family Code § 6701(a), which provides in full that a minor cannot "[g]ive a delegation of power," bars the settlement. (K.D. Br. 41-43.) The California Supreme Court long ago construed this provision to mean that "an infant [cannot] execute contracts through an agent." *Hakes Inv. Co. v. Lyons*, 166 Cal. 557, 560 (1913); *see also Schumm v. Berg*, 37 Cal. 2d 174, 182 (1951). This creates an exception to the general rule, stated in Family Code § 6700, that "a minor may make a contract in the same manner as an adult, subject to the power of disaffirmance."

The K.D. objectors do not dispute that § 6701(a) addresses agency delegations, but contend that a minor's agreement to Facebook's SRR *does* create an agency relationship, with Facebook serving as the agent of the user, such that the entire SRR should be deemed void. (*See* K.D. Br. 42.)

This argument is incorrect. Agency entails a "fiduciary relationship" between the agent and principal, and requires that the "agent shall act on the principal's behalf and subject to the principal's control." Rest. 3d of Agency § 1.01 (2006). No such fiduciary relationship exists here, as the district court made clear in dismissing this identical assertion by a class member who opted out of the settlement at issue here and who is represented by the same counsel as the H.L.S. objectors. As that court held, the permission a user grants Facebook under the

SRR to utilize names or pictures in certain ways "is not tantamount to appointing Facebook as an agent" but rather is "no different from garden-variety rights a contracting party may obtain in a wide variety of contractual settings." *C.M.D.*, 2014 WL 1266291, at *4. That conclusion echoes an earlier ruling that a teenage user's purchase of credits on Facebook does not create an agency relationship but rather constitutes an ordinary contract—an "arms-length transaction involving offer, acceptance and consideration." *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 999 (N.D. Cal. 2012) (§ 6701(a) did not bar a purchase by a minor because there was no agency relationship).

The K.D. objectors argue that, unlike with the purchase at issue in *I.B.*, there was no contract here because there was no consideration and "the only entity receiving any compensation or benefit is Facebook itself." (K.D. Br. 42-43 n.8.) But this argument ignores the substantial benefits that Facebook users receive by being able to use Facebook's popular and engaging social networking service at no charge—as over a billion Facebook users can attest. And even if *I.B.* could be distinguished in this manner, *C.M.D.* cannot be.

(b) The Settlement Does Not Violate Family Code § 6701(c)

The K.D. objectors also argue that the settlement authorizes a violation of Family Code § 6701(c), which sets forth another exception to the general rule that a minor may make a contract in the same manner as an adult. (K.D. Br. 43-46.)

Section 6701(c) prohibits a minor from "[m]ak[ing] a contract relating to any personal property not in the immediate possession or control of the minor." California courts have interpreted this provision to mean only that a minor "cannot contract with respect to a future interest," *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi*, 51 Cal. App. 4th 1302, 1307 (1996); *see also Morgan v. Morgan*, 220 Cal. App. 2d 665, 675 (1963) (minor may not transfer right to future wages), and also have generally limited its application to "*tangible* personal property," *C.M.D.*, 2014 WL 1266291, at *4. As the district court held in *C.M.D.*, the provision does not apply to the use of a person's name or profile picture in connection with a "like" statement online expressing a preference for or affinity with a product, service, cause, or event.

At any rate, § 6701(c) would not bar minors from agreeing to the SRR—even if a user's "like" constituted tangible personal property and affected a future interest—because Facebook users are in the "immediate possession [and] control" of all of their personal information on Facebook at all times: They can remove any and all such information at will, or even delete their account. Although the K.D. objectors suggest that Facebook users lack "exclusive possession or control" over the information they post on Facebook (K.D. Br. 45), the word "exclusive" does not appear in the statute, and its reference to "possession or control" confirms that § 6701(c) is inapplicable to intangible property. In light of the K.D. objectors'

failure to cite a single case concluding otherwise, the district court acted well within its discretion in concluding that § 6701(c) was no obstacle to the settlement.

(c) The Settlement Does Not Violate Family Code §§ 6750 *et seq.*

The K.D. objectors also suggest in passing that the settlement authorizes the violation of Family Code § 6750 *et seq*. (K.D. Br. 46.) But this argument makes little sense. These provisions apply only to contracts "*pursuant to which*" a minor is paid as an entertainer or athlete. Family Code § 6750(a)(1)-(3) (emphasis added). The vast majority of teenage Facebook users are not paid entertainers or athletes, and the few who may fall into that category are not paid pursuant to the SRR, which establishes the contractual relationship between Facebook and its users.

B. The District Court Did Not Abuse Its Discretion in Declining to Require Separate Counsel for the Minor Subclass

The H.L.S. objectors argue that separate counsel was required for the adult and minor classes. (H.L.S. Br. 12-34; *see also* Cox Br. 6-9 (same).) But there was no conflict—much less a fundamental or serious conflict—between the adult and minor class members.

The H.L.S. objectors' conflict argument rests primarily on *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), but neither case governs the situation here. *Amchem* involved two distinct

groups: individuals who already had developed serious medical conditions through their exposure to asbestos, and individuals who had been exposed to asbestos but had yet to develop symptoms. 521 U.S. at 602-03. The Court rejected certification of a single settlement class because "the interests [of] the single class [were] not aligned"—the "currently injured" wanted "generous immediate payments," a goal that "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 626.

Ortiz was similar: Named plaintiffs sought to represent holders of both "present and future claims," as well as both individuals who had been exposed to asbestos before the expiration of the defendant's insurance policy (which provided the vast majority of the settlement funds) and those who had been exposed later. 527 U.S. at 856-57. The Court held that "it is obvious after *Amchem*" that this clear divergence of interests among distinct groups of class members "requires division into homogeneous subclasses … with separate representation to eliminate conflicting interests of counsel." *Id.* at 856.

Amchem and *Ortiz* do not hold that all conflicts between subgroups of a class require separate counsel. Rather, both cases involved "atypical circumstances" in that they were "massive tort 'class action[s] prompted by the elephantine mass of asbestos cases' that 'defie[d] customary judicial administration.'" *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 646 (8th Cir.

2012) (quoting *Ortiz*, 527 U.S. at 821). As a result, courts consistently have read *Amchem* and *Ortiz* to require separate counsel only where a "conflict among subgroups of a class" is "fundamental." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011); *see also Hanlon*, 150 F.3d at 1020-21 (conflict must be "insurmountable" and "irreparable" to require separate counsel for subclass). The conflict must "'go to the heart of the litigation,'" such that the class members lack the same "objectives," "factual and legal positions," and "interest in establishing the liability of [the defendant]." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430-31 (4th Cir. 2003) (quoting 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:14 (4th ed. 2002)).

Judged by that standard, the district court acted well within its discretion in declining to require separate counsel for the minor subclass. The minor and adult class members shared the same objective and burden of proving that Sponsored Stories violated the law, and both groups were eligible to receive similar relief if they were successful. *See* Cal. Civ. Code § 3344(a); Cal. Bus. & Prof. Code § 17203 (specifying relief available to "the injured party" or "any person," respectively). Even if certain arguments pertained only to minors, those arguments were not inconsistent—or even in tension—with the interests of the adults.

The only even colorable potential conflict was that both the adults and minors had a theoretical interest in maximizing their share of recovery at the

expense of the other group. But that is true in *any* class action involving theoretical or potential differences between potential subgroups, and this Court has made clear that such hypothetical conflicts are insufficient to require separate representation. *See, e.g.*, *In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 462-63 (9th Cir. 2000) (alleged conflict between different groups of securities purchasers was "illusory" even though one group had stronger claims than the other); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378 (9th Cir. 1993) (separate representation was not required simply because subgroups sought to maximize their own share of total recovery).

The district court recognized that the minor group's claims were not substantially stronger than those of the adults. (Schachter ER 13.) The H.L.S. objectors nevertheless argue that the minors' claims do not need to be "substantially stronger; they just need to be different in a way that *arguably* makes them stronger." (H.L.S. Br. 27 (emphasis added).) But that argument is inconsistent with the established rule that only *fundamental* conflicts require separate counsel. Separate counsel are simply not required whenever any difference between subgroups "arguably" made one group's claims stronger—a rule that would be impractical, inefficient, and contrary to this Court's precedents. *See, e.g.*, *Mego*, 213 F.3d at 462-63; *Torrisi*, 8 F.3d at 1378.

The district court adequately addressed the differences between the minor and adult groups by creating a separate minor subclass. *Amchem* and *Ortiz*, by contrast, had no subclasses—a fact that made it difficult to analyze the separate concerns pertaining to each group. *See Amchem*, 521 U.S. at 603; *Ortiz*, 527 U.S. at 832. And here, two of the three named plaintiffs were members of the minor subclass—a factor this Court has deemed significant. *Rodriguez*, 563 F.3d at 961.

The settlement also directly addressed the specific concerns of the minor subclass, both by including injunctive relief designed to educate parents and teens about how advertising on Facebook works and to strengthen parents' ability to control their children's appearance in Sponsored Stories (*see* Schachter ER 32, ASAR § 2.1(c)), and by providing for *cy pres* contributions to organizations with a particular focus on the online protection of minors. *Cf. Ortiz*, 527 U.S. at 857 (noting that the absence of relief for class members with immediate injuries indicated a lack of adequate representation).

The H.L.S. objectors cite two Second Circuit cases, *Literary Works*, 654 F.3d 242, and *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229 (2d Cir. 2007) (H.L.S. Br. 20-26), but these cases are not a barrier to the settlement. *Central States* involved "antagonistic interests" and conflicting legal positions between subgroups, with one subgroup disputing that a separate subgroup was entitled to *any* recovery. 504

F.3d at 246. And in *Literary Works*, one subgroup's claims were "indisputably" worth significantly less than another subgroup's claims, and the settlement treated one subgroup's claims unfavorably for reasons unexplained by the record. 654 F.3d at 253. No similar conflicts existed here. The district court thus acted well within its discretion in handling the minor subclass.

C. The District Court Did Not Abuse Its Discretion By Approving a Settlement Requiring a $20 Million Payment

The Lally objectors argue that the district court abused its discretion because the settlement does not "represent a meaningful percentage recovery" based on the $750 in statutory damages theoretically available under § 3344. (Lally Br. 10-11.) This Court has rejected the argument that the theoretical availability of a large statutory damages award renders even a settlement that makes *no* individual payments to class members unreasonable. *Lane*, 696 F.3d at 824 (affirming approval of settlement with no individual payments, notwithstanding $2,500 statutory damages provision under the Video Privacy Protection Act, 18 U.S.C. § 2710(c)(2)(A)).

Moreover, as the district court explained, it would have been "virtually impossible for plaintiffs to be awarded, and to collect, the full amount of the statutory damages on a class-wide basis." (Schachter ER 11-12; *id.* at 7 (noting due process obstacles to aggregating statutory damages on a classwide basis).) Indeed, even in denying Facebook's motion to dismiss, the district court observed

that Plaintiffs would be required to "prove actual damages" and could not "simply demand $750 in statutory damages in reliance on a bare allegation that their commercial endorsement has provable value." (*Id.* at 126.)

In evaluating the size of a settlement, courts analyze the recovery not as a percentage of the maximum that is theoretically available, but as a "percentage of the actual damages" suffered by the class. *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 334 (E.D. Pa. 2007). Other courts have considered the amount in "realistic damages" the plaintiff could hope to recover at trial. *Feder v. Harrington*, 58 F.R.D. 171, 176 (S.D.N.Y. 1972). As this Court has recognized in the analogous context of antitrust class actions, where prevailing plaintiffs may seek treble damages, courts generally evaluate the fairness of a class action settlement "based on how it compensates the class for past injuries, without giving much, if any, consideration" to the statutory treble damages provision. *Rodriguez*, 563 F.3d at 964; *accord City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 458 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 48 (2d Cir. 2000).

By these metrics, a $20 million settlement is easily justified in a case where Plaintiffs faced significant challenges to prove any actual damages—and where even "under plaintiffs' best case scenario" the financial benefit to Facebook from the Sponsored Stories program was only about $73 million. (Schachter ER 6.) In

fact, the settlement here represents a substantially greater percentage recovery than a number of other court-approved settlements. *See, e.g.*, *In re Baan Co. Securities Litig.*, 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (noting that the median settlement in securities class actions is "3.6% of estimated damages"); *Bradburn*, 513 F. Supp. 2d at 334 (surveying settlements in other cases of between 0.2% and 16 percent of potential recovery).

The Lally objectors argue that in *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006), the Seventh Circuit criticized a tentative settlement (which the trial court had never considered because it refused to certify the class) that would have paid class members just $1. But the Seventh Circuit's concern in *Murray* was that class counsel and named representatives were enriching themselves at the expense of other class members. *Id.* at 952. That concern is absent here.

At any rate, whatever the percentage recovery, "[t]he fact that a proposed settlement may only amount to a fraction of the [total theoretical] recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. This Court should affirm the district court's approval of the settlement because it is clear that the settlement as a whole is a fair, reasonable, and adequate resolution of Plaintiffs' claims—particularly in light of the extensive injunctive relief, which would have been unavailable if Plaintiffs had prevailed in the litigation. (Schachter ER 8-9.)

D. The District Court Did Not Abuse Its Discretion in Approving a Settlement with a *Cy Pres* Component

The Lally and Batman objectors contend that the district court abused its discretion by approving a settlement that entails payments to *cy pres* recipients before class members have been "made whole." (Lally Br. 11; Batman Br. 12.) This argument is meritless.

There is no rule that funds may not be distributed to *cy pres* recipients until class members have been fully compensated. *Cy pres* remedies often are "[u]sed *in lieu of* direct damages to silent class members," not simply as a means for distributing funds left over after full compensation has been paid to class members. *Dennis*, 697 F.3d at 865 (emphasis added). One of the principal purposes of the *cy pres* mechanism is to distribute funds "where the proof of individual claims would be burdensome or distribution of damages costly." *Id.* (quoting *Nachshin*, 663 F.3d at 1038). Indeed, this Court has affirmed settlements that entailed *cy pres* payments but no direct financial compensation to class members. *Lane*, 696 F.3d at 825 (affirming settlement where "it would be 'burdensome' and inefficient to pay the $6.5 million in *cy pres* funds that remain after costs directly to the class because each class member's recovery under a direct distribution would be *de minimis*") (emphasis in original).

The fact that a $15 payment was available to those class members who made claims does not render a *cy pres* component *less* appropriate than in a case where

the entire award is distributed via *cy pres*. The settlement strikes an appropriate balance between providing some payment to those class members who came forward and made claims and providing an indirect benefit via *cy pres* to those class members who did not. It certainly was not an abuse of discretion for the district court to approve a settlement that balances between paying those who come forward and providing a *cy pres* benefit to those who do not. Even if the district court had believed the settlement should have struck a different balance between these goals, it would not have been that court's role to "'delete, modify or substitute certain provisions'" of the settlement, which "must stand or fall in its entirety." *Hanlon*, 150 F.3d at 1026 (quoting *Officers for Justice*, 688 F.2d at 630).

Objectors cite no authority purporting to require that all settlement funds be distributed to those who come forward to make claims. In their lead case, *Klier v. Elf Atochem N.A., Inc.*, 658 F.3d 468 (5th Cir. 2011), the Fifth Circuit recognized that a *cy pres* distribution is appropriate where it is "not feasible" or not "economically viable" to make distributions to class members. *Id.* at 475. In *Klier*, distribution to class members was viable because the class consisted of a relatively small number of individuals who had been exposed to toxic chemicals near an industrial plant. *Id.* at 472. Given the very different circumstances here, the settlement struck a fair balance in awarding $15 to those who made claims (an

increase from the $10 per claimant the settlement initially envisioned) but reserving a portion of the settlement money for *cy pres* recipients whose work benefits all of the approximately 150 million class members. To use that money simply to top off or increase awards to those who made claims would deprive class members who did not make claims of the indirect benefit they would receive from allocating some of the damages award to *cy pres* recipients.

It is true that some courts (although not this Court) have recognized a "policy preference" for distributing funds "to ensure class members recover their full losses" before distributing any money to *cy pres* recipients. *In re Lupron Marketing & Sales Practices Litig.*, 677 F.3d 21, 32 (1st Cir. 2012). But such a policy preference has no relevance here because the class members have sustained no financial losses. And applying such a policy preference here would conflict with the "strong policy favoring settlements" because, as the district court observed, "absent availability of a *cy pres* component, it simply might not have been feasible to settle this action." (Schachter ER 9; *see Syncor*, 516 F.3d at 1101.)

E. The Attorneys' Fees Award Is Not A Basis To Reject the Settlement

A number of objectors argue that the attorneys' fees were excessive. (*See* Batman Br. 16-17; Lally Br. 13-14; Cox Br. 10-13.) Facebook advocated a lower fee in the district court (Schachter ER 16-17, 21), but it has not cross-appealed the

district court's ruling on that issue. In any event, the settlement itself expressly provided that it was *not* contingent on any award of attorneys' fees. (*Id.* at 37, ASAR § 2.7). In such circumstances, "vacatur of the fee award does not necessitate invalidation of the [settlement] approval order." *Bluetooth*, 654 F.3d at 945; *accord Rodriguez*, 563 F.3d at 969 (affirming approval of settlement but reversing and remanding attorneys' fee award). Thus, even if this Court were to agree with Objectors' argument that the attorneys' fee award was excessive, the district court's approval of the settlement still should be affirmed.

The treatment of fees in the settlement agreement itself also is beyond reproach. The agreement did not contain any "clear sailing" provision barring Facebook from challenging Plaintiff's proposed award or provide for the payment of fees apart from the settlement fund. *See Bluetooth*, 654 F.3d at 947 (noting that "clear sailing" provisions and payment of fees separate from class funds may indicate collusion); *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000) (same). Nor was there any "reverter" clause, so the district court's decision to enter a lower fee award than Plaintiffs requested benefited the settlement class, not Facebook. These features confirm the absence of collusion and support the overall fairness of the settlement. *See Bluetooth*, 654 F.3d at 947.

F. The District Court Did Not Abuse Its Discretion in Approving the Settlement Despite An Objection from a Former Class Representative and Withdrawal of Two *Cy Pres* Recipients

The K.D. objectors argue (K.D. Br. 34-35) that the settlement should have been rejected because one former class representative and two *cy pres* recipients objected to it. These claims are inaccurate and, even if true, do not establish any abuse of discretion.

To begin with, former named class representative Angel Fraley objected to the settlement only because she believed she was entitled to an incentive-fee award "between half to twice as much as the other representing class members." (K.D. ER 153.) Ms. Fraley has not pursued her objection on appeal and in any event, she voluntarily withdrew herself as a named representative *before* the parties settled the case. She also complained about the "amount of phone calls from reporters" she had received, "as well as phone calls and emails across the continent from regular people" asking her about the case, and about having to attend "a grueling 9 hour[ ] long deposition [and] miss my plane home due to going overtime." (*Id.*) These plainly would not be appropriate grounds for setting aside a class settlement, given the requirement to consider the "interests and goals [of] the class as a whole." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1325 (2d Cir. 1990).

Even if Ms. Fraley had objected to the substance of the class settlement, this Court and other circuits routinely have upheld the approval of settlements where one or more class representatives objected. *See, e.g.*, *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1241 (9th Cir. 1998); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1177 (8th Cir. 1995); *County of Suffolk*, 907 F.2d at 1325 (court may approve settlement even when a majority of class representatives object).

Nor does fact that two of fourteen proposed *cy pres* recipient have declined the funds cast any doubt on the settlement. The court considers "the reaction *of class members* to the proposed settlement," *Hanlon*, 150 F.3d at 1026 (emphasis added), not those of third parties such as proposed *cy pres* recipients. There is no authority for the proposition advanced by proposed *cy pres* recipient Campaign for a Commercial Free Childhood—which *supported* the settlement below and submitted a declaration under penalty of perjury stating that it believed the settlement would provide a "tremendous benefit" to minor class members (SER 384-85)—that its belated change of heart "should be treated as analogous to opposition by named plaintiffs, which is granted consideration on appeal." (Feb. 12, 2014 Amicus Letter at 4.)

Similarly, contrary to the implication of the K.D. objectors (*see* K.D. Br. 35), the MacArthur Foundation has declined to receive *cy pres* funds not because of an objection to the substance of the settlement, but because it considers itself to

be 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/.

G. Counsel's References to the Fee-Shifting Provision of § 3344 in Depositions Does Not Cast Any Doubt on the Settlement

The K.D. objectors' suggestion (K.D. Br. 35-37) that counsel's references to the mandatory fee-shifting provision of California Civil Code § 3344—which indisputably applies to this case—cast some doubt on the settlement is meritless. The K.D. objectors speculate that asking potential class representatives about the fee-shifting provision in depositions created pressure to settle, but the risk of mandatory fee shifting is relevant to the adequacy of potential class representatives to pursue class claims under § 3344, and thus was an entirely fair question at deposition. Nor is there any evidence that the fee-shifting provision had any impact on decisions made by the class representatives.

Moreover, it makes no sense for the existence of statutory fee shifting to weigh against settlement as a general matter. Such a result would conflict with this Court's strong policy favoring settlements. *Syncor*, 516 F.3d at 1101. And indeed, the very purpose of fee-shifting provisions is to ensure that plaintiffs consider their downside litigation risk before proceeding with a lawsuit under § 3344. Such provisions are not meant to be an obstacle to settlement.

H. This Court Should Not Reach the K.D. Objectors' Arguments Made for the First Time on Appeal

The K.D. objectors offer three additional arguments for setting aside the settlement, none of which were part of K.D.'s filed objections to the settlement. The Court should not consider these arguments, because they were waived. *Trigueros v. Adams*, 658 F.3d 983, 988 (9th Cir. 2011). The arguments are also "merely adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation," and are therefore waived on that basis. *United States v. Alonso*, 48 F.3d 1536, 1544 (9th Cir. 1995). But in the event that the Court does reach the arguments, they are meritless.

The K.D. objectors first argue that the settlement authorizes a violation of the "fundamental liberty interest to parent." (K.D. Br. 50.) But nothing in the settlement agreement purports to remove or interfere with a parent's ability to supervise or limit his or her child's activities on Facebook's free social networking service.[8] In fact, the settlement agreement requires Facebook to create tools to make parental involvement even easier. The cases Objectors cite are far afield. *See Troxel v. Granville*, 530 U.S. 57 (2000) (parents have a constitutional right to determine who may visit a child); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18

[8] The K.D. objectors rely primarily on Civil Code § 3344(a) and similar state law to support their arguments, but those laws do not implicate parental authority over children, but rather impose "*governmental* authority, subject only to a parental veto." *Brown*, 131 S. Ct. at 2735-36 & n.3.

(1981) (due process does not require appointment of counsel in proceedings to terminate parental rights); *Santosky v. Kramer*, 455 U.S. 745 (1982) (due process requires a "clear and convincing evidence" standard for the termination of parental rights).

The K.D. objectors next claim the settlement violates the "explicit privacy guarantee of Article I, Section 1 of the California Constitution." (K.D. Br. 50.) But they cite no authority even suggesting that the settlement violates (let alone *clearly* violates) the California Constitution. *See Isby*, 75 F.3d at 1197. And it is clear a plaintiff has no invasion of privacy claim—under either the California Constitution or tort law—if "voluntary consent is present." *Hill*, 7 Cal. 4th at 26 (1994); *see supra* at 33-36. For the reasons already discussed, the SRR and the variety of existing and additional, proposed privacy settings and controls make clear that Facebook users have the full ability to give or deny consent to appear in Sponsored Stories.

Finally, the K.D. objectors argue that the settlement authorizes a "per se antitrust offense" by tying its social-networking service to its advertising service, (K.D. Br. 51.) K.D's counsel mentioned antitrust law in passing at the settlement approval hearing (SER 64-65), but the argument makes no sense. Tying is "an arrangement where a supplier agrees to sell a buyer a product (the tying product), but 'only on the condition that the buyer also purchases a different (or tied)

product.'" *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1199 (9th Cir. 2012). Facebook users (and parents of minors) are not being forced into participating in Sponsored Stories as a condition of their free access to Facebook. They have full ability to prevent their information from appearing in Sponsored Stories but still use Facebook. In addition, tying is not a "per se" antitrust offense, as the K.D. objectors contend (K.D. Br. 51)—rather, it is evaluated under the rule of reason, and is invalid only if found to be anticompetitive. *Brantley*, 675 F.3d at 1197. Here, the K.D. objectors fail to explain how Sponsored Stories is anticompetitive. To the contrary, advertising on Facebook and similar services enables billions of people around the world to connect and share content with one another.

IV. The Arguments Advanced Only by Amici Also Fail to Demonstrate an Abuse of Discretion by the District Court

Amicus curiae Electronic Privacy Information Center (EPIC) raises a variety of separate challenges to the settlement, none of which was raised below or in this Court by any party to the case. There is no record that would allow this Court to evaluate these arguments, and the Court should follow its normal practice and "not consider arguments raised only in amicus briefs." *United States v. Wahchumwah*, 710 F.3d 862, 868 n.2 (9th Cir. 2012). In any event, the arguments do not show any abuse of discretion by the district court.

EPIC contends that the settlement violates the terms of a November 2011 consent order between Facebook and the FTC, and also runs afoul of the FTC's

guidelines concerning potentially deceptive endorsements and testimonials. (EPIC Br. 9-13.) The FTC's own amicus brief does not suggest that the settlement violates either the consent order or the guidelines. And EPIC itself does not identify any component of the settlement that violates the FTC consent order, which requires, among other things, that Facebook obtain users' consent before it *retroactively* changes privacy settings or displays their personal information to the public. *In re Facebook, Inc.*, No. 092-3184, 2011 WL 6092532, at *3-*4 (FTC Nov. 29, 2011) (consent order). No aspect of the Sponsored Stories product or the settlement involves retroactive changes to the users' privacy settings; as discussed above, Sponsored Stories are displayed to the same audience that could have seen the same content (at most, friends). As for the guidelines, EPIC offers no theory under which Sponsored Stories could be deemed deceptive. They appear only when a Facebook user takes the affirmative step of "liking" a brand or product—a mere republication of the same truthful statement ("Frank Foe likes Mitt Romney") that a person chose to share with his or her friends on Facebook.

EPIC next asserts that the settlement fails to allocate *cy pres* funds to organizations "aligned with the interests of class members." (EPIC Br. 18.) That is demonstrably false. No objector argued that the cy pres recipients' missions were misaligned with the interests of the class; to the contrary, as the district court correctly recognized, "[t]he recipient organizations focus on consumer protection,

research, education regarding online privacy, the safe use of social media, and the protection of minors—the very issues raised in plaintiffs' complaint." (Schachter ER 10 (noting the recipients were "organizations and institutions with demonstrated records of addressing issues closely related to the matters raised in the complaint").) EPIC complains that *it* should have been listed among the *cy pres* beneficiaries. (EPIC Br. 18-19.) But that self-serving objection should be rejected out of hand. Regardless of whether EPIC would have been an appropriate recipient, the district court rightly noted that the organizations the parties selected are *also* worthy recipients. EPIC fails to demonstrate otherwise.

Finally, EPIC contends (EPIC Br. 21-24) that the settlement here "presents many of the same problems identified by" Chief Justice Roberts in his statement respecting denial of certiorari in *Marek v. Lane*, 134 S. Ct. 8 (2013). *Lane* is relevant here in one respect: It is binding precedent in this Court, and its approval of the settlement between Facebook and plaintiffs there confirms that this settlement is appropriate. *Lane,* 696 F.3d at 826. Moreover, the concerns the Chief Justice identified are not present here. Unlike in *Lane*, class members received monetary relief and the *cy pres* recipients are established organizations. *Cf. Lane*, 134 S. Ct. at 8-9. In the Chief Justice's view, the injunctive relief in *Lane* was likely to prove ineffective, *id.* at 8; here, by contrast, the district court

correctly recognized that the injunctive provisions provide "meaningful benefits to class members." (Schachter ER 7.)

CONCLUSION

For the foregoing reasons, the judgment of the district court approving the settlement should be affirmed.

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STATEMENT OF RELATED CASES

The following cases pending in this Court are related to this appeal:

C.M.D. v. Facebook, Inc., No. 14-15603 (appeal from order dismissing claims by Plaintiffs who opted out of settlement that is the subject of this appeal).

Fraley et al. v. Facebook, Inc., No. 14-15595 (appeal from order denying objector's application for attorneys' fees).

CERTIFICATION OF COMPLIANCE

This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is 19,863 words long, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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). The brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

In preparing this certificate, I relied on the word count generated by Microsoft Word 2010.

/s/ Daniel B. Levin
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