Consol. Nos. 13-16819, 13-16918, 13-16919,
13-16929, 13-16936, 13-17028

In The United States Court Of Appeals For The Ninth Circuit

ANGEL FRALEY, et al.,
Plaintiffs – Appellees

v.

H.L.S., through her mother, Shelia L. Shane,
Objector-Appellant

v.

FACEBOOK, INC.,
Defendant – Appellee.

On Appeal from the Northern District of California
Case No. 3:11-cv-01726-RS
The Honorable Richard Seeborg, District Judge

REPLY BRIEF OF APPELLANT H.L.S.

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INTRODUCTION

In their attempt to defend the proposed class settlement, Appellees minimize and disregard important differences in the minor and adult subclasses' claims. By downplaying the strength of the minor class members' claims, Appellees vividly demonstrate the patent conflict under which they labor in representing the interests of both the minor and adult subclasses. The district court failed to consider that conflict, and thus bypassed the threshold inquiry of whether the interests of these distinct subclasses conflicted in a way that required independent counsel to fulfill Rule 23(a)(4)'s adequate representation requirement. Instead, the court improperly attempted to evaluate the strength of the minor subclass's admittedly different claims, despite Appellees' conflicted (and thus inadequate) representation of those claims.

To certify a settlement-only class, the district court must give heightened consideration to whether the settlement is fair, adequate, and reasonable to all class members. But this is the *final* step in the analysis, not the first. As the Supreme Court has made clear, certification and approval of a settlement-only class is a two-step

process. The district court must first conduct a "rigorous analysis" of *all* of the core certification requirements of Rules 23(a) and 23(b). Only then should the court consider the fairness, adequacy, and reasonableness of the proposed settlement. Because the district court did not determine whether the minor subclass was adequately represented before turning to the fairness of the settlement, the court abused its discretion.

Appellees and the district court attempted to assess the strength of the minors' claims in the absence of an un-conflicted representative advocating (and defending) the minors' position, even while simultaneously acknowledging that assessing the merits of class members' claims is not a proper part of the class certification analysis.[1] Their assessments of the perceived weaknesses of the minors' claims, however, miss the mark. The relevant question when considering whether a subclass is adequately represented is not whether the subclass's claims are stronger or weaker than those of other class members, but whether they are different and conflicting. Rule 23(a)(4)

[1] Counsel for H.L.S. has also opined on the strength of the minors' claims, but has done so in its role as counsel for an objecting class member, highlighting the inadequacy of the minors' representation. *See* Br. Appellant H.L.S. ("H.L.S. Br.") 28, DktEntry: 47-1.

requires the conflicting interests of subclasses to be fairly and adequately represented in settlement negotiations to ensure that no subclass's interests are sacrificed for the benefit of another subclass.

Only adversarial representation of competing interests can ensure the adequate representation of those interests, and of the fairness of the proposed settlement as a whole. Appellees' and the district court's decision to create a minor subclass was a recognition of important differences in the minors' and adults' claims. The district court then disregarded those very differences that made subclassing appropriate in the first place, when it refused to appoint separate counsel to represent the minors' acknowledged, different interests. The integrity of the settlement negotiations and their outcome were fatally undermined by the lack of an adequate representative advocating the minors' unique position during those negotiations. Thus, the district court's approval of the proposed settlement, despite such a basic procedural shortcoming, was an abuse of discretion that this Court should reverse.

ARGUMENT

I. A Class or Subclass Must be Certifiable Before the Fairness of the Settlement is Considered

Both Plaintiffs-Appellees ("Mainzer") and Defendant-Appellee ("Facebook") ignore the clear, controlling teaching of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).[2] Mainzer and Facebook contend that *Amchem* and *Ortiz* are inapposite because they dealt with distinctions among asbestos claimants. (Mainzer Br. 41; Ans. Br. Defendant-Appellee 66, DktEntry: 88-1 ("Facebook Br.").) That is simply not true. The fundamental considerations that drove the decisions in *Amchem* and *Ortiz* were not that claims there were for a serious disease, but rather the competing interests of factions within the classes in those cases. *Amchem*, 521 U.S. at 620; *Ortiz*, 527 U.S. at 858. Courts have applied *Amchem* and *Ortiz* in a wide variety of non-asbestosis contexts. *See, e.g., Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 188 (3d Cir. 2012) (applying *Amchem* and *Ortiz* to require subclasses in

[2] Mainzer mischaracterizes *Amchem* as involving a "limited fund, F.R.C.P. 23(b)(1) class action[] where there was no opportunity to opt out." (Ans. Br. Plaintiffs-Appellees 41, DktEntry: 85-1 ("Mainzer Br.")). To the contrary, *Amchem* involved a 23(b)(3) "opt-out" class like the one here. 521 U.S. at 605.

settlement concerning defective automobiles); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 251 (2d Cir. 2011) (holding in a copyright infringement suit that "[t]he ingredients of conflict identified in *Amchem* and *Ortiz* are present here").

In *Amchem*, the Court made clear that "[f]ederal courts, in *any* case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper." 521 U.S. at 622 (emphasis added). The Court rearticulated the point in *Ortiz*: "[R]ule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense." *Ortiz*, 527 U.S. at 858. There is no doubt that *Amchem* and *Ortiz* require adequate representation of subclasses in all class actions.

Here, the district court abused its discretion by failing to conduct a "rigorous" class certification analysis before proceeding to the merits of the proposed settlement. Instead, in a combined order provisionally certifying the class for settlement purposes and preliminarily approving

the proposed settlement, the court made only perfunctory findings that the required elements of Rules 23(a) and (b)(3) had been met. (EOR 30.) Later, in a footnote in the order granting final approval of the settlement, the district court gave short shrift to H.L.S.'s objections to the adequacy of the minor subclass's representation, reasoning that the strength of the minors' claims was "untested." (EOR 26 n.15.) In doing so, however, the court conflated the Rule 23(a) and (e) analyses. Precisely because the minors' claims were "untested," adequate representation of the minor subclass was absolutely critical to ensure their "untested" claims were not unfairly compromised during settlement negotiations. Because the minor subclass's case was not adequately represented, the district court should not have approved the settlement and this Court should reverse.

II. Irrespective of Any Perceived Weaknesses in the Minors' Claims, the Fundamental Differences and Conflicts between the Subclasses' Claims Required Separate Representation

Like the district court, Appellees minimize the strength of the minors' claims, while failing to acknowledge the inherent tension

between those claims and the adults' claims.[3] It is undisputed that the minors' claims are implicated by various statutory provisions that govern their right to enter or disaffirm contracts.[4] (EOR 25-26; Mainzer Br. 44-46.) By definition, adult class members could not have asserted these claims. The claims of adult and minor class members are thus fundamentally different in this respect.

Mainzer and Facebook also point to the fact that the same judge who approved the settlement in this case also dismissed a separate action brought on behalf of minors who opted-out of the *Fraley* settlement. *See C.M.D., et al. v. Facebook, Inc.*, No. C 12-1216 RS, 2014 WL 1266291 (N.D. Ca. 2014), *appeal docketed,* No. 14-15603 (9th Cir. Mar. 28, 2014). (Mainzer Br. 5; Facebook Br. 56-57.) The *C.M.D.* decision, however, does not cure the error here for several reasons. First, the dismissal in *C.M.D.* —which came long after the settlement of this case—does nothing to establish that the minors had adequate

[3] *See, e.g.,* Mainzer Br. 5 ("[T]here is no need for separate representation of the minor teen subclass. If Plaintiff-Respondents' took the positions advocated in *C.M.D. v. Facebook* and by the appellant objectors, Plaintiff-Respondents' case would have suffered the same fate as *C.M.D.* Part of negotiating a great settlement is not taking harsh and untenable positions on the law.").

[4] *See, e.g.,* Cal. Fam. Code § 6701 (restricting right to contract), Cal. Fam. Code § 6710 (allowing disaffirmance of contract).

representation in the settlement negotiations in *this* case. There is no way to know whether the proposed settlement properly reflected the potential value of the minors' unique claims vis-a-vis the adult claims because no one independently represented the minors at the bargaining table. *See In re Literary Works*, 654 F.3d at 253.

Second, the fact that the same district judge approved the settlement of the minors' claims and later dismissed identical claims in a subsequent action does not mean either of those decisions was correct. *C.M.D.* is now on appeal, too. With all due respect to the district judge, he was undoubtedly cognizant of the fact that if he denied Facebook's motion to dismiss in *C.M.D.*, his ruling there would have undermined his ruling in this case, which was already on appeal. While consistency is laudable, being consistent is not the same as being right. The fact that the district judge ruled consistently in both cases does not mean his finding of adequate representation here was correct.

"[H]ow can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?" *In re Literary Works*, 654 F.3d at 253. To paraphrase the Second Circuit, "[e]ven in the absence of any information that the [s]ettlement

disfavors [minors], this structural flaw would raise serious questions as to the adequacy of representation here." *Id.* Minor class members had all the claims adult class members had, plus additional theories of liability based on their special and protected status as minors. Thus, the two subclasses had different and competing claims, and each needed separate representation to press "its most compelling case." *Id.*

Facebook frames this as an illusory allocation conflict between two groups with "theoretical" differences. (Facebook Br. 67-68.) It cites two decisions of this Court in support of the proposition that such "hypothetical conflicts are insufficient to require separate representation." (Facebook Br. 67-68.) Those cases, however, are inapposite. *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454 (9th Cir. 2000), was a securities class action involving an allegedly fraudulent financial disclosure and two groups of purchasers, each preferring a different damage measurement. The early purchasers preferred an out-of-pocket measure, while the late purchasers wanted a rescissory measure. *Id.* at 462. While this damages dispute could have created a real conflict of interest between the classes, the conflict was "illusory" because the early purchasers were never entitled to the out-

of-pocket measure since they did not bring suit before the passage of an intervening statute that limited their recovery to rescissory damages. *Id.* Had multiple options for relief truly been available, this Court likely would have found an impermissible conflict of interest. *Id.* ("The conflict between class members regarding the most favorable measure of damages can create a potential conflict of interest.").

The other case, *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), was decided before *Amchem* or *Ortiz*. In *Torrisi*, the court concluded that objectors purporting to represent a subclass with conflicting interests could sufficiently assess the adequacy of representation by analyzing the merits of the settlement. *Id.* at 1378. That aspect of *Torrisi* is untenable in light of *Amchem* and *Ortiz*.

More fundamentally, the present case does not present an unfounded allocation conflict because the various forms of relief in the settlement reflect "essential allocation decisions" between the minors and the adults. *Amchem*, 521 U.S. at 627. By characterizing the conflicts between these subclasses as illusory, Facebook ignores the importance the district court attached to the injunctive relief included in the settlement. *See* EOR 15 ("The injunctive relief . . . has significant

value and provides benefits that likely could not be obtained outside the context of a negotiated settlement . . ."). The settlement did not just allocate money between classes; it made fundamental judgments about what forms of relief best met the needs of the class members' divergent interests. Such judgments cannot be made without adequate representation. *See Amchem*, 521 U.S. at 627; *Ortiz*, 527 U.S. at 857.

CONCLUSION

Class counsel—the ostensible advocate of the minors' interests—now characterizes the minors' claims as "harsh and untenable," and as a potential obstacle to a "great settlement." (Mainzer Br. 5.) Great for whom? That is hardly the zealous advocacy to which the minor subclass was entitled and which Rule 23 is intended to guarantee. The district court abused its discretion by approving the proposed settlement, and this Court should reverse.

Dated: July 15, 2014

s/ *Aaron M. Zigler*

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CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(a)(7)

The undersigned, counsel of record for the Appellants, furnishes the following in compliance with F.R.A.P Rules 28.1(e)(2(B) and 32(a)(7):

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)((2)(B) and 32(a)(7)(B) because it contains 2,100 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Rule 32(a)(7)(B) sets a limit of 7,000 words for the appellant's reply brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in fourteen-point Century font in both the body and the footnotes.

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