

1 COOLEY LLP
MICHAEL G. RHODES (116127)
2 (mrhodes@cooley.com)
MATTHEW D. BROWN (196972)
3 (brownmd@cooley.com)
JEFFREY M. GUTKIN (216083)
4 (gutkinjm@cooley.com)
101 California Street, 5th Floor
5 San Francisco, CA 94111-5800
Telephone: (415) 693-2000
6 Facsimile: (415) 693-2222

7 Attorneys for Defendant FACEBOOK, INC.

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

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

16 Plaintiffs,

17 v.

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

19 Defendants.
20

Case No. CV 11-01726 RS

**RESPONSE TO AMICUS CURIAE
MEMORANDUM OF CENTER FOR
PUBLIC INTEREST LAW AND
CHILDREN'S ADVOCACY
INSTITUTE IN OPPOSITION TO
PROPOSED SETTLEMENT
AGREEMENT**

DATE: August 2, 2012
TIME: 1:30 p.m.
DEPT.: 3
JUDGE: Hon. Richard Seeborg

21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 Defendant Facebook, Inc. (“Facebook”) hereby responds to the Amicus Curiae
 3 Memorandum (“Amicus Brief”) of the Center for Public Interest Law and Children’s Advocacy
 4 Institute (the “Amici”) in Opposition to Proposed Settlement Agreement. Although Facebook
 5 doubts the Amicus Brief is properly before the Court,¹ Facebook responds to briefly address
 6 fundamental misstatements in the Brief concerning (1) the governing law relevant to the proposed
 7 settlement in this action (the “Settlement”), (2) the nature of the claims being settled, and (3) the
 8 terms of the proposed Settlement.

9 **II. ARGUMENT**

10 **A. Amici’s opposition is premised on a misunderstanding of the governing law.**

11 Amici’s chief objection to the Settlement arises from their false belief that “[t]he
 12 settlement purports to stipulate, on behalf of all minors, to a violation of the California Family
 13 Code, which prohibits minors from contracting for the use of their names and likenesses.”
 14 (Amicus Br. 3.) According to Amici, there is a “legal prohibition in California on minors
 15 contracting for almost anything, including expropriation of their names and likenesses.” (*Id.* at
 16 1.) Amici claim this purported prohibition arises from California Family Code § 6701(a) and (c)
 17 (*see* Amicus Br. 3-4), parroting the idiosyncratic legal theory advanced by the plaintiffs in the
 18 related action of *C.M.D. v. Facebook, Inc.*, 5:12-cv-01216-RS (N.D. Cal.) (previously styled as
 19 *E.K.D. v. Facebook*).² Amici’s arguments have no basis in the law.

20 Under California law, “[e]xcept as provided in Section 6701, a minor may make a contract
 21 in the same manner as an adult, subject to the power of disaffirmance” Cal. Fam. Code

22 _____
 23 ¹ In general, a non-party may file an amicus brief only with (1) the consent of all the parties, or
 24 (2) leave of the court. *Cf.* Fed. R. App. P. 29(a); N.D. Cal. Civ. L.R. 7-3(d) (requiring court
 permission to make filings after reply is filed (i.e., after close of briefing)). Here, Amici failed to
 obtain either Facebook’s consent or leave of the Court.

25 ² Because Amici’s arguments duplicate those of the *C.M.D.* plaintiffs, they are entitled to no
 26 weight. *See Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997). Notably, these arguments have
 27 already been rejected in the *C.M.D.* case itself. *See E.K.D. v. Facebook, Inc.*, 3:11-cv-00461-
 28 GPM-SCW (S.D. Ill. Mar. 8, 2012) (transferring case to the Northern District of California); *see also* Facebook’s Mot. to Dismiss at 9-14, *C.M.D. v. Facebook, Inc.*, 5:12-cv-01216-RS (N.D. Cal. May 21, 2012), ECF No. 109.

1 § 6700. Under § 6701, minors are forbidden from entering only a narrow range of contracts,
2 including those that “[g]ive a delegation of power,” § 6701(a), or relate to “personal property not
3 in the immediate possession or control of the minor,” § 6701(c). Citing no authority, Amici claim
4 that the proposed Settlement sanctions a violation of these provisions by (1) “pretending that a
5 minor has consented (delegated to Facebook the power) to the use of his or her name and
6 likeness”; and (2) contracting with minors with respect to “images that are in Facebook’s
7 possession or control and not in the immediate possession or control of the minor.” (Amicus Br.
8 3-4.) Amici are wrong on both counts.

9 Family Code § 6701(a) and (c) are fundamentally inapplicable to any aspect of either the
10 *Fraley* litigation or the Settlement. As confirmed by nearly 100 years of case law, § 6701(a)
11 “declare[s] the rule that an infant [can]not execute contracts through an agent having only a
12 delegated authority executed by the infant.” *Hakes Inv. Co. v. Lyons*, 166 Cal. 557, 560 (1913);
13 *see also, e.g., Blankenship v. Hearst Corp.*, 519 F.2d 418, 425 (9th Cir. 1975) (minor cannot enter
14 partnership because he cannot delegate power under California law); *Schumm v. Berg*, 37 Cal. 2d
15 174, 182 (1951) (contract by minor’s purported agent void); *Casey Wasserman Living Trust v.*
16 *Bowers*, No. 5:09-CV-180-JMH, 2011 U.S. Dist. LEXIS 46451, at *4-7 (E.D. Ky. Apr. 29, 2011)
17 (collecting cases). Neither Facebook’s current terms of service nor the revisions contemplated by
18 the Settlement purport to delegate to Facebook a power of agency (i.e., the power to enter
19 contracts on the minor’s behalf), and Amici do not claim otherwise. Thus, § 6701(a) is
20 inapposite.

21 Section 6701(c) is equally irrelevant, as it only prevents minors from assigning a future
22 interest, such as designating a beneficiary under an annuity contract, *see Sisco v. Cosgrove*,
23 *Michelizzi, Schwabacher, Ward & Bianchi*, 51 Cal. App. 4th 1302, 1307 (1996), or directing the
24 minor’s employer to pay his wages to a third party, *see Morgan v. Morgan*, 220 Cal. App. 2d 665,
25 675 (1963). Seeking to force a square peg into a round hole, Amici claim that the settlement
26 violates § 6701(c) because the “images . . . are in Facebook’s possession or control, not in the
27 immediate possession or control of the minor.” (Amicus Br. 3-4.) But this argument ignores how
28 Facebook actually works: at all times, Facebook users (“Users”) have “immediate possession or

1 control” over the images they upload to Facebook, Cal. Fam. Code § 6701(c), which they may
2 access or remove from their Facebook accounts at will.

3 Amici’s proposed construction of these provisions is also untenable because it would
4 conflict with other legal provisions. In particular, Family Code §§ 6750 and 6751 expressly
5 contemplate contracts “pursuant to which a minor agrees to . . . license . . . use of a person’s
6 likeness,” specifying that certain such contracts may *not* be disaffirmed if approved by a court.
7 Cal. Fam. Code §§ 6750(a), 6751. This provision would be nonsensical if § 6701 operated as an
8 absolute prohibition on minors entering contracts to license use of their names or likenesses. *Cf.*
9 Cal. Civ. Code § 3344(d) (identifying multiple circumstances, including news, public affairs, or
10 political campaigns, in which use of a person’s name or likeness does not require prior consent);
11 *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992) (Section
12 3344(d) is “designed to avoid First Amendment questions in the area of misappropriation by
13 providing extra breathing space for the use of a person’s name in connection with matters of
14 public interest”).

15 These facts, as well as the relevant case law, make § 6701(c) irrelevant.³

16 **B. Amici mischaracterize the claims at issue in the litigation.**

17 The Amicus Brief likewise mischaracterizes the claims being settled in the case.
18 According to Amici, the *Fraley* litigation implicates “the irreparable harm that comes from the
19 necessarily final publication into a forum that can reach millions and from which the images and
20 information can then not be withdrawn.” (Amicus Br. 4; *see also id.* at 6 (suggesting the lawsuit
21 concerns “youthful indiscretions,” or “bullying and suicides”). This characterization is not only
22 inaccurate (content on Facebook can be deleted), but has nothing to do with the Facebook
23 conduct challenged in the lawsuit—Sponsored Stories, which simply republish stories about
24 Facebook Users’ actions to the same friends with whom the Users have chosen to share the same

25 _____
26 ³ Amici also allege, without authority, that “requiring children to ‘represent that at least one
27 parent or legal guardian has also agreed to Facebook’s use of the child’s name, profile picture, or
28 account information . . . violates the law, public policy, and common sense.” (Amicus Br. 4.)
But Amici cite no law or public policy preventing Facebook from confirming that it has parental
consent for minor Users in this manner.

1 content. It appears as if the Amici are unaware of, or fundamentally misunderstand, the facts of
2 this case. Rather than actually addressing the merits of the Settlement in light of the claims at
3 issue, the Amicus Brief appears to reflect Amici’s views of the perils of teenage Internet use,
4 more broadly. These arguments have no bearing on the fairness of the Settlement, and the Court
5 should disregard them.

6 **C. Amici mischaracterize the terms of the Settlement Agreement.**

7 Nor is there merit to Amici’s claim that the Settlement provides “no benefits to the class.”
8 (Amicus Br. 3.) In fact, the benefits are substantial. In addition to \$10 million in *cy pres*
9 distributions and additional educational information about Facebook advertising, the Settlement
10 gives parents the ability to opt their children out of Sponsored Stories altogether, an option not
11 currently available to parents. (*See* Settlement Agreement § 2.1(c)(ii).) In addition, the
12 Agreement enhances the clarity of Facebook’s terms of use, informing children and parents alike
13 that Facebook Users “permit a business or other entity to pay [Facebook] to display your name
14 and/or profile picture with your content or information,” viewable by the User’s chosen audience
15 and subject to the User’s privacy settings. (*Id.* § 2.1(a).) The Settlement will also give Users the
16 ability to learn which pieces of content they have shared with their Facebook friends that have
17 been displayed in a Sponsored Story and then control which content may appear in additional
18 Sponsored Stories—two features not currently available on the site. (*Id.* § 2.1(b).) Combined
19 with Users’ preexisting ability to control the audience for their posts and Sponsored Stories, the
20 Settlement gives Users direct, granular control over their appearance in Sponsored Stories.

21 The clear benefits of this relief to the class are not diminished by Amici’s unsupported
22 assertion that Users will not (or cannot) understand the changes to Facebook or to the terms of
23 service. (*See, e.g.*, Amicus Br. 5, 6.) As discussed above, this claim rings particularly hollow
24 because Amici themselves appear to have a flawed understanding of how Facebook works and of
25 what this lawsuit is about.

26 **III. CONCLUSION**

27 Amici misunderstand several aspects of the governing law, the claims at issue, and the
28 terms of the Settlement. Accordingly, the Amicus Brief should receive no weight.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: August 1, 2012

COOLEY LLP

/s/ Matthew D. Brown
Matthew D. Brown (196972)

Attorneys for Defendant
FACEBOOK, INC.