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February 12, 2014

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## FILED VIA OVERNIGHT MAIL

Molly C. Dwyer, Clerk of the Court  
United States Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

**Re: *Fraley v. Facebook*, 13-16918: Letter of *Amicus Curiae* Campaign for a Commercial Free Childhood Supporting the Objector-Appellants Schachter et al.**

Dear Ms. Dwyer:

Campaign for a Commercial Free Childhood (“CCFC”) respectfully submits this letter<sup>1</sup> as *amicus curiae* in support of the brief submitted by the Schachter Objector-Appellants (“Schachter Brief”) appealing from the district court’s Final Approval Order.<sup>2</sup> We ask you to forward this letter to those judges assigned to hear this case for their consideration.

CCFC writes to ask the Court to reject the *Fraley* Settlement Agreement<sup>3</sup> because it is bad for children. Specifically, this settlement is bad for children because it provides a release of liability without forcing Facebook to make any real changes that would protect children from the commercial use of their names and images. Moreover, the settlement authorizes Facebook to continue to violate laws in seven states that provide greater protections for minors.

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<sup>1</sup> This *amicus* letter is submitted in accordance with the Circuit Advisory Committee Note to Rule 29-1.

<sup>2</sup> The Order Granting Motion for Final Approval of Settlement Agreement, *Fraley v. Facebook, Inc.*, 2013 WL 4516819 (N.D. Cal. Aug. 26, 2013) (“Final Approval Order”) (Dkt. 359) is available at: [http://www.fraleyfacebooksettlement.com/docs/2013-08-26-Order\\_Granteeing\\_Final\\_Approval.pdf](http://www.fraleyfacebooksettlement.com/docs/2013-08-26-Order_Granteeing_Final_Approval.pdf).

<sup>3</sup> A copy of the Amended Settlement Agreement and Release (“*Fraley* Settlement Agreement”) (Dkt. 235-1) is available at: <http://www.fraleyfacebooksettlement.com/docs/sa.pdf>.

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Not only is the settlement bad, it is worse than no settlement at all. CCFC believes this so strongly that it has decided to reject the approximately \$290,000<sup>4</sup> – more than 90% percent of CCFC’s annual budget<sup>5</sup> – that it anticipated receiving from this settlement as a *cy pres* recipient. After careful reflection and a deeper understanding of the settlement, CCFC now believes it was wrong to agree to serve as a *cy pres* recipient. CCFC writes this letter in the hope that it is not too late to correct that mistake.

## I. CCFC’s Interest

CCFC is a non-profit organization devoted to helping parents raise healthy families by limiting commercial access to children and ending the exploitive practice of child-targeted marketing. CCFC organizes parents, educators, and healthcare professionals to advocate for policies and practices that protect children from harmful marketing. CCFC’s staff are internationally recognized experts on the impact of media and marketing on children.

## II. CCFC Rejects Any *Cy Pres* Distributions from the *Fraley* Settlement Agreement Because This Settlement Is Harmful to Minors

In exchange for releasing<sup>6</sup> Facebook from liability for any past harm to minors that was caused by the use of the names or images of teenagers in Facebook’s Sponsored Stories,<sup>7</sup> minors receive almost nothing. The “relief” provided to teenagers by the *Fraley* Settlement Agreement is hollow and meaningless because:

- 1.) the protections for minors are structured as “opt-in” rather than “opt-out,” requiring minors to either:
  - a) indicate in their profile that their parents do not have Facebook accounts, triggering Facebook to exclude the minor from Sponsored Stories until age 18, or

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<sup>4</sup> CCFC is currently named as one of the *cy pres* recipients in the *Fraley* Settlement Agreement and stands to receive six percent of the funds available for *cy pres* distribution. *Fraley*, 2013 WL 4516819 at \*6 n.7. Based on district court docket numbers 341, 359, 360, and 435, CCFC calculates that the total amount available for *cy pres* recipients will be approximately \$4.8 million (\$20,000,000 settlement fund - \$9,224,910 payments to class members - \$4,685,977.23 in fees for plaintiffs’ attorneys, \$970,000 for settlement administration expenses - \$281,591.08 in costs for plaintiffs’ attorneys - \$4500 incentive awards to named plaintiffs = \$4,833,021.69 *cy pres* funds). Six percent of the *cy pres* funds will be almost \$290,000 ( $\$4,833,021.69 \text{ } cy \text{ pres funds} \times 0.06 = \$289,981.30$ ).

<sup>5</sup> CCFC’s total expenses from 2012-2013 were \$318,984. *Annual Report: July 1, 2012 to June 30, 2013*, available at: <http://www.commercialfreechildhood.org/sites/default/files/annualreport2012-2013.pdf>. Anticipated *cy pres* award as a percentage of total expenses from 2012-2013 was calculated as follows:  $\$289,981.30 / \$318,984 \times 100 = 90.91$  percent.

<sup>6</sup> The releases are contained in section five of the *Fraley* Settlement Agreement. *See also* Schachter Brief 7-8.

<sup>7</sup> Sponsored Stories are defined in ¶ 1.29 of the *Fraley* Settlement Agreement.

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- b) identify their parents on Facebook, which would allow parents who confirm the relationship to access a setting that blocks their child from appearing in Sponsored Stories (Schachter Brief 9-10, 24-27<sup>8</sup>);
- 2.) minors are only “encouraged” and not required to identify parents who are on Facebook (Schachter Brief 9-10, 25-26);
- 3.) Facebook will use the names and images of minors based on their “representations” of parental consent rather than actual parental consent (Schachter Brief 9, 24-26); and
- 4.) Facebook is only required to maintain these additional “opt-in” protections for two years after the settlement becomes final (Schachter Brief 8, 10).

Few children will identify parents who are on Facebook or indicate that their parents are not on Facebook. Even where children do confirm the relationship with their parents, few parents will take – or even know about – the additional steps required to disable Sponsored Stories. The net result of the above settlement terms will be that, for the vast majority of children, Facebook can continue to use their names or images in Sponsored Stories without any limitation.

In addition to failing to provide any real benefits for teenagers, the *Fraleley* Settlement Agreement authorizes Facebook to use the images of minors without parental consent in violation of laws in California, Florida, New York, Oklahoma, Tennessee, Virginia, and Wisconsin. Schachter Brief 19-27.

In light of these problems, CCFC concluded that the *Fraleley* Settlement Agreement harms vulnerable teenagers and their families under the guise of helping them. A full understanding of these problems led CCFC to decide to reject any *cy pres* funds from this settlement. Despite the significant financial loss that this could represent, CCFC can no longer be a part of a settlement that it now understands would directly conflict with its mission.

### **III. Principled Objections by *Cy Pres* Recipients Should Be Considered on Appeal**

CCFC is unaware of any other cases where a *cy pres* recipient objected to the terms of a settlement on appeal. However, it is appropriate for this Court to consider principled objections by *cy pres* recipients where, as here, the *cy pres* award formed a critical component of the settlement itself. As the district court judge wrote in the Final Approval Order:

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<sup>8</sup> To avoid repeating the arguments made by Schachter, CCFC refers the Court to the relevant pages in the Schachter Brief for additional details.

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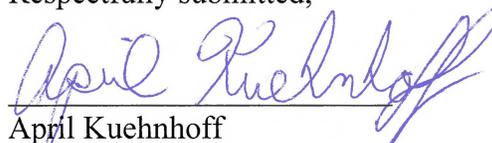
[A]bsent availability of a *cy pres* component, it simply might not have been feasible to settle this action, a result which plainly would conflict with the strong policy favoring settlements . . . Thus, while the circumstances are somewhat unusual, *cy pres* distribution is an acceptable approach to providing relief to the class in this action.

*Fraleley*, 2013 WL 4516819 at \*6. In such cases, opposition by *cy pres* recipients should be treated as analogous to opposition by named plaintiffs, which is granted consideration on appeal. See *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 997 (9th Cir. 1985) (remanding so that district court could consider named plaintiff's objections to the class settlement in detail); Federal Judicial Center, *Manual for Complex Litigation* § 21.642 (4th ed.) (“[t]he court should examine closely any opposition by class representatives to a proposed settlement”).

#### IV. Conclusion

For the reasons stated above and in the Schachter Brief, CCFC respectfully requests that this Court vacate the district court's approval of the *Fraleley* Settlement Agreement.

Respectfully submitted,



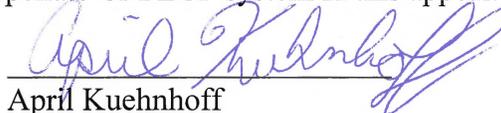
April Kuehnhoff  
Massachusetts Bar #676230

*Attorney for Amicus Curiae  
Campaign for a Commercial Free  
Childhood*

#### CERTIFICATE OF SERVICE

I, April Kuehnhoff, counsel for Campaign for a Commercial Free Childhood, on whose behalf this letter is being filed with the Court, certify that this letter is being sent to the Court by Federal Express on February 12, 2014, overnight delivery, for anticipated receipt by the Court and filing on February 13, 2014. On February 12, 2014, I emailed a copy of this letter to all parties whose emails are registered in the Court's appellate CM/ECF system in this appeal.

Dated: February 12, 2014



April Kuehnhoff  
Massachusetts Bar #676230