



August 20, 2012

Clerk of the United States District Court for the Northern District of California
 San Francisco Courthouse, 17th Floor, Courtroom 3
 450 Golden Gate Ave.
 San Francisco, CA 94102

Attention: The Honorable Richard G. Seeborg

Re: Fraley v. Facebook, No. 11-01726

1718 Connecticut Ave NW

Suite 200

Washington DC 20009

USA

+1 202 483 1140 [tel]

+1 202 483 1248 [fax]

www.epic.org

Dear Judge Seeborg:

We are writing to you regarding *Fraley v. Facebook*.¹ EPIC supports your recent decision to reject the preliminary settlement.² As we explained in our earlier letters to Judge Koh, the proposed settlement did not provide a substantial benefit to Facebook users nor was the *cy pres* allocation aligned with the interest of class members.³

We write now to bring to your attention to a timely and related matter, the Federal Trade Commission's August 9, 2012 Settlement with Facebook.⁴ Under the final settlement, Facebook is:

- barred from making misrepresentations about the privacy or security of consumers' personal information;
- required to obtain consumers' affirmative express consent before enacting changes that override their privacy preferences;
- required to prevent anyone from accessing a user's material more than 30 days after the user has deleted his or her account;
- required to establish and maintain a comprehensive privacy program designed to address privacy risks associated with the development and management of new

¹ No. 11-01726 (N.D. Cal. filed Apr. 8, 2011).

² *Id.* (order denying motion for preliminary approval of settlement agreement).

³ Letter from Marc Rotenberg, Executive Director, Electronic Privacy Information Center, to The Honorable Lucy H. Koh (July 12, 2012), <https://epic.org/privacy/facebook/EPIC-Ltr-Koh-Fraley%207-12-12.pdf>; Letter from EPIC et. al, to The Honorable Lucy H. Koh (July 12, 2012), <https://epic.org/privacy/facebook/EPIC-et-al-Fraley-Cy-Pres-Ltr-7-12-12.pdf>.

⁴ In the Matter of Facebook, Inc., a corporation, Final Decision and Order (FTC File No. 092 3184), Federal Trade Commission (2012) <http://www.ftc.gov/os/caselist/0923184/120810facebookdo.pdf> [Hereinafter *FTC Final Order*] (Exhibit 6); *See also* Fed. Rules of App. Proc. 28(j) (Citation of Supplemental Authorities); Circuit Rule 28-6 (Citation of Supplemental Authority).

and existing products and services, and to protect the privacy and confidentiality of consumers' information; and

- required, within 180 days, and every two years after that for the next 20 years, to obtain independent, third-party audits certifying that it has a privacy program in place that meets or exceeds the requirements of the FTC order, and to ensure that the privacy of consumers' information is protected.⁵

As the Federal Trade Commission explained, “[t]he proposed order also contains standard record-keeping provisions to allow the FTC to monitor compliance with its order.”⁶

By comparison, the proposed benefits claimed by class counsel in *Fraleley* are almost inconsequential. At least two of the ten provisions in the FTC Final Order could apply to privacy issues arising from “Sponsored Stories.” For example, Part I of the FTC Order prohibits Facebook from “misrepresent[ing] in any manner, expressly or by implication, the extent to which it maintains the privacy or security of covered information.”⁷ Express or implied misrepresentations include statements related to “its collection or disclosure of any covered information,” “the extent to which a consumer can control the privacy of any covered information maintained by [Facebook] and the steps a consumer must take to implement such controls,” and “the extent to which [Facebook] makes or has made covered information accessible to third parties.”⁸

Part II requires Facebook to disclose and obtain consent “prior to any sharing of a user’s nonpublic user information by [Facebook] with any third party, which materially exceeds the restrictions imposed by a user’s privacy setting(s).”⁹ The disclosure must be “clear[] and prominent[],” “separate and apart from any ‘privacy policy,’ ‘data use policy,’ ‘statement of rights and responsibilities’ page, or other similar document,” and must contain “(1) the categories of nonpublic user information that will be disclosed to such third parties, (2) the identity or specific categories of such third parties, and (3) that such sharing exceeds the restrictions imposed by the privacy setting(s) in effect for the user.”¹⁰

The FTC’s consent order already requires that Facebook “make it clear” to users how the company uses their covered information in Sponsored Stories. Specifically, Part I of the order prohibits Facebook from misrepresenting “expressly or by implication, the extent to which it maintains the privacy or security of covered information,” including

⁵ Federal Trade Commission, “Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises,” (Nov. 29, 2011), <http://www.ftc.gov/opa/2011/11/privacysettlement.shtm> [hereinafter *Facebook Settles FTC Charges*] (Exhibit 4); see also Federal Trade Commission, “FTC Approves Final Settlement with Facebook,” (Aug. 10, 2012), <http://www.ftc.gov/opa/2012/08/facebook.shtm>.

⁶ *Facebook Settles FTC Charges*, *supra* note 5.

⁷ See *FTC Order*, *supra* note 4 at 3.

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.*

“the extent to which a consumer can control the privacy of any covered information maintained by [Facebook] and the steps a consumer must take to implement such controls.”¹¹ Furthermore, the order prohibits deception by *implication* in addition to explicit statements, meaning that the order requires that Facebook do more than simply refrain from making false statements regarding Sponsored Stories—Facebook must also adequately explain Sponsored Stories. Thus, revisions to Facebook’s Statement of Rights and Responsibilities designed to remedy implicit misrepresentations would already be required by the FTC’s consent order.

It remains unclear what benefit, if any, the proposed settlement provides to class members that is not already set out in the FTC Final Order.¹²

The Electronic Privacy Information Center (“EPIC”), the Center for Digital Democracy (“CDD”), and the Privacy Rights Clearinghouse (“PRC”) are primarily responsible for initiating, pursuing, and finalizing the Facebook matter with the Federal Trade Commission. On behalf of Facebook users, we filed a detailed, 29-page complaint with the Commission when the company sought to expose the personal information of users, including their image and likeness, for commercial purposes without their consent.¹³ EPIC filed a supplemental 16-page complaint with the Commission when more evidence became available.¹⁴ Following the Commission’s announcement of a proposed settlement and pursuant to a request for public comment, EPIC provided 31 pages of detailed recommendations to the Commission on the proposed order to ensure that the interests of Facebook users were adequately protected.¹⁵

The final FTC order settlement with Facebook reflects many of the factual findings and proposed relief set out in EPIC’s initial complaint. The Commission has acknowledged EPIC’s substantial role in this matter and thanked us for our work on behalf of Internet users.¹⁶ All of this is set out in the attached exhibits.

¹¹ *Id.* at 3.

¹² Although the settlement would require Facebook to create a “mechanism” that allows users to opt-out of future sponsored stories, EPIC explained in a previous letter that this undefined mechanism is likely to go unused, and thus will provide a benefit that is largely illusory.

¹³ See Complaint from EPIC to the FTC re: In the Matter of Facebook, Inc., a corporation, <http://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf> (Dec. 17, 2009) (Exhibit 1).

¹⁴ See Supplemental Complaint from EPIC to the FTC re: In the Matter of Facebook, Inc., http://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf (May 5, 2010) (Exhibit 2).

¹⁵ See Comments of EPIC to the FTC re: in the Matter of Facebook, Inc. (FTC File No. 092 3184), <http://ftc.gov/opa/2011/11/privacysettlement.shtm> (Dec. 27, 2011) (Exhibit 5).

¹⁶ Letter from David Vladeck, Director, FTC Bureau of Consumer Protection, to Marc Rotenberg, Director, EPIC (Jan. 14, 2010), https://epic.org/privacy/infacebook/Facebook_Vladeck_Letter.pdf (Exhibit 3) (“Thank you for your recent complaint to the Commission regarding changes to Facebook’s privacy settings . . . Your most recent complaint raises issues of particular interest for us at this time.”); Letter from Donald S. Clark, Secretary, FTC, to Marc Rotenberg et. al (July 27, 2012), <https://epic.org/privacy/facebook/Facebook-Ltr-To-EPIC-07-27-12.pdf> (Exhibit 7) (“The Commission thanks EPIC for its petition and other correspondence about Facebook’s privacy practices and appreciates its support of the proposed complaint.”).

But remarkably, in the *Fraleley* matter, which raised only a small subset of the issues we pursued with the Federal Trade Commission, EPIC, CDD, and PRC were excluded by class counsel from the proposed *cy pres* allocation. The proposed settlement actually proposes a dozen organizations that *did not participate* in the FTC case against Facebook or propose any relief for Facebook users.

While the parties might still reach a settlement that satisfies the requirements of the Court, on the matter of the *cy pres* allocation it is impossible to ignore the significance of the recent FTC order and the role of organizations that actually pursue privacy work on behalf of Facebook users.

Most importantly, the Ninth Circuit has become increasingly skeptical of *cy pres* awards that are not aligned with the interests of class members.¹⁷ Here it is clear that those organizations that have pursued efforts on behalf of class members have been wrongfully excluded. This is clearly detrimental to the interests of class members, contrary to case law, and should not be accepted by this court.

In another very similar matter in which class action attorneys claimed a benefit for class members far less than what EPIC had obtained by virtue of a petition to the Federal Trade Commission, EPIC challenged the proposed *cy pres* allocation.¹⁸ Judge Ware ruled, “the Court does not find good cause to exclude EPIC from the list of recipients of the *cy pres* funds.”¹⁹ He further stated, “EPIC has demonstrated that it is a well-established and respected organization within the field of internet privacy and that it has sufficiently outlined how the *cy pres* funding will be used to further the interests of the class.”²⁰ In the Order Granting Final Approval of the Class Action Settlement, he reallocated *cy pres* funds to EPIC.²¹

¹⁷ See *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (“[The doctrine of *cy pres*] allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the “next best” class of beneficiaries.”). See also *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) (“where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the ‘next best’ distribution.”); *Dennis v. Kellogg Co.*, No. 11-55674, 2012 WL 2870128 at *6 (9th Cir. 2012) (“When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court.”).

¹⁸ *Cy Pres Applicants’ Objection to Class Counsel’s Proposed Cy Pres Distribution*, In re Google Buzz Privacy Litigation, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Mar. 30, 2011), available at http://epic.org/privacy/ftc/googlebuzz/GBuzz_Docs_EPIC_Objection.pdf.

¹⁹ Order Granting Final Approval of Class Action Settlement; Approval of *Cy Pres* Awards; and Awarding Attorney Fees, In re Google Buzz Privacy Litigation, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Mar. 31, 2011) at 2, available at http://epic.org/privacy/ftc/googlebuzz/EPIC_Google_Buzz_Settlement.pdf (Exhibit 8).

²⁰ *Id.*

²¹ *Id.* at 6. See also, *Mirfasihi v. Fleet Mortgage*, No. 01 C 722 (N.D. Ill. July 17, 2007) at 2 (Judge Joan H. Lefkowitz designated the bulk of the *cy pres* award for EPIC, “a public interest research center devoted to privacy education and protection, . . .”)

On behalf of EPIC, CDD, and PRC, we urge you to consider the recent FTC settlement with Facebook, the scope of that Order as compared with the benefits claimed by class counsel in this matter, and the work of the organizations actually aligned with the interests of class members as you make future determinations regarding the *Fraley* matter.

Respectfully,

Marc Rotenberg
President, EPIC
(D.C. Bar 422825, admitted in the Ninth Circuit)

EXHIBITS

- Exhibit 1: EPIC et al. FTC Complaint, In re Facebook (2009)
- Exhibit 2: EPIC, Supplemental FTC Complaint, In re Facebook (2010)
- Exhibit 3: FTC Letter to EPIC, Acknowledging EPIC Complaint (2010)
- Exhibit 4: FTC Announcement of Proposed Consent Order (2011)
- Exhibit 5: EPIC Comments on Proposed FTC Consent Order (2011)
- Exhibit 6: FTC Final Consent Order with Facebook (2012)
- Exhibit 7: FTC Letter to EPIC Regarding Final Consent Order (2012)
- Exhibit 8: Order by Judge Ware, In re Google Buzz Privacy Litigation (2011)

Exhibit 1: EPIC et al. FTC Complaint, In re Facebook (2009)

Exhibit 2: EPIC, Supplemental FTC Complaint, In re Facebook (2010)

Exhibit 3: FTC Letter to EPIC, Acknowledging EPIC Complaint (2010)

Exhibit 4: FTC Announcement of Proposed Consent Order (2011)

Exhibit 5: EPIC Comments on Proposed FTC Consent Order (2011)

Exhibit 6: FTC Final Consent Order with Facebook (2012)

Exhibit 7: FTC Letter to EPIC Regarding Final Consent Order (2012)

Exhibit 8: Order by Judge Ware, In re Google Buzz Privacy Litigation (2011)