No. 17-55635

In the United States Court of Appeals for the Ninth Circuit

SONNY LOW, et al.,
Plaintiffs-Appellees,

SHERRI B. SIMPSON,
Objector-Appellant

v.

TRUMP UNIVERSITY, LLC, AKA TRUMP ENTREPRENEUR INITIATIVE, a New York limited liability company, and DONALD J. TRUMP,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

OBJECTOR-APPELLANT'S CORRECTED REPLY BRIEF

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OBJECTOR-APPELLANT'S REPLY BRIEF

I. Class counsel fail to show that the district court's settlement approval was consistent with due process and Rule 23.

A. On the merits, two things bear emphasis at the outset. First, class counsel correctly acknowledge their burden: They must show that "no reasonable class member" could have believed, based on the 2015 class notice, that she would have the ability to opt out of any future settlement. Class Counsel (CC) Br. 2; *see id.* at 37, 45. Second, they do not deny that they would not carry their burden if the notice had informed class members that they would be notified "how to be excluded from any settlement," rather than "how *to ask* to be excluded from any settlement." So the question is: Could a class member have reasonably believed, when she was told that she could "ask to be excluded from any settlement," that she would have the ability to actually *be* excluded from any settlement?

The answer is yes, and it is not a particularly close question. That is how the same language is used throughout the rest of the notice. *See* Opening Br. 25–26. It is the way the Supreme Court and this Court have read virtually identical class-notice language ("request to be excluded") in other cases involving opt-out rights. *See id.* at 26–28. It is what the drafters of this notice language—the plain-language experts retained by the Federal Judicial Center for that purpose—intended when they wrote, refined, and tested it in the field. *See* Notice Experts Br. 9–13. And it is how courts have read the same language in cases confronting the very scenario

presented here. *See* Opening Br. 28–29. Our brief identified two cases in which courts and class-action litigators understood the exact same language, from notices of pendency that are indistinguishable from the one at issue here, to provide a settlement-stage opt-out. We have found numerous additional examples of courts doing the same—including one from a California district court just last week.[1]

[1] *See, e.g.*, *Hoffman v. Blattner Energy Inc.*, No. 14-cv-2195, ECF No. 94-1, at 5 (C.D. Cal. Sept. 1, 2016) (notice of pendency informing class members: "If you stay in and Plaintiff obtains money or benefits, either as a result of the trial or a settlement, you will be notified about how to apply for a share (or how to ask to be excluded from any settlement)."); ECF No. 109 in *Hoffman*, at 5 (July 17, 2017) (court order preliminarily approving settlement: "***Any Class Member may choose to opt-out of and be excluded from the Class***"); *see also, e.g.*, *Rehberg v. Flowers Foods, Inc.*, No. 12-cv-596, ECF No. 143-1, at 5 (W.D.N.C. June 5, 2015) (notice of pendency: "If you stay in and the Plaintiff obtains money or benefits, either as a result of the trial or a settlement, you will be notified about how to apply for a share (or how to ask to be excluded from any settlement)."); ECF No. 242 in *Rehberg*, at 6 (Mar. 17, 2017) (court order: "***Any person falling within the definition of the Settlement Class may, upon his or her request, be excluded from the Settlement Class.***"); *see also, e.g.*, *McWilliams v. Advanced Recovery Sys.*, Inc., No. 15-cv-70, ECF No. 59-1, at 3 (S.D. Miss. Mar. 23, 2016) (notice of pendency: "If you stay in and the Class Representative obtains money or benefits, you will be notified about how to apply for a share (or how to ask to be excluded from any settlement)."); ECF No. 80 in *McWilliams*, at 8 (Oct. 20, 2016) (court order: "***Any class member who submits a valid and timely request for exclusion will not be bound by the terms of the Settlement Agreement.***"); *see also, e.g.*, *Perrin v. Papa John's Int'l, Inc.*, No. 09-cv-1335, ECF No. 313-1, at 5 (E.D. Mo. Apr. 1, 2014) (notice of pendency: "If you stay in and the Plaintiffs obtain money or benefits, either as a result of a trial or a settlement, you will be notified about how to apply for a share (or how to ask to be excluded from any settlement)."); ECF No. 441 in *Perrin*, at 4 (Sept. 23, 2015) (court order: "***Any Settlement Class Member who requests exclusion from the Settlement will not be bound by the Settlement.***").

So the only way that class counsel could prevail on appeal is if all these people and courts were wrong—and not just wrong, but unreasonable. Class counsel cannot clear that high bar. To the contrary, neither class counsel nor their amici identify a single case in which any court has read the notice in their preferred way, much less one in which a court concluded that this was the *only* reasonable way to read the notice. And although they assert (at 9) that the meaning of the phrase "ask to be excluded" is "clear," they advance no coherent explanation of what that meaning is or why the language was included in the first place. Instead, they hypothesize *two different interpretations* of what it might have meant—neither of which is persuasive, and neither of which they defend with much zeal.

Class counsel's first suggestion is that the language was included to address a remote possibility: that there could be class members who would want to stay in the class and relinquish their claims, but "who might wish to refuse direct settlement payment and thus might want 'to ask to be excluded from any settlement.'" CC Br. 44. That is about as plausible as it sounds. For one thing, as class counsel acknowledge (at 44–45), class members who don't want to receive settlement money need not do anything. They would be excluded from the recovery "by simply not submitting a claim." *Id.* at 45. For another thing, it is highly unlikely that the notice sought to reassure nervous class members—in a paragraph in the section called "Your Rights and Options"—that, yes, they could remain in the class

and hand over their valuable claims for nothing. If this were the real meaning, why limit the reassurance to "any settlement"? If class counsel were really "obliged [to] prepare for [the] possibility" that claims would "be paid directly" to class members, against their will, wouldn't class counsel be just as "obliged" to do so in the event of a favorable judgment at trial? *Id.* at 44. The answer is obvious. This proposed reading is not just improbable—it is completely farfetched.

And so class counsel fall back on a second, very different meaning. On this reading (which the district court adopted), the "plain" meaning of "ask to be excluded" is that it *did* refer to opting out, but merely provided class members like Ms. Simpson the "right to be notified of how to *ask* the Court to exclude her from the Settlement." *Id.* at 45. Class counsel claim that they fulfilled their obligation because "the settlement notice provided a vehicle through which Simpson could place her 'request' before the court"—she could file an objection to the settlement *as a whole* based on its *failure* to provide her with an opportunity to opt out. *Id.* at 48.

This interpretation—that the language means only that you can *ask* to be excluded, even as the settlement mandates that your request be denied—makes the promise utterly meaningless. It is wordplay invented by lawyers to justify a procedure after the fact—not a genuine explanation for why the language was included by the Federal Judicial Center, or what meaningful information it seeks to convey to class members. As the notice experts who actually drafted the language

at issue explain: "No reasonable recipient of the notice . . . would read it to promise only the right to file a request that the court would then automatically deny. To read it that way ignores the obvious implication of the notice's language that the opportunity to request exclusion would be *meaningful*." Notice Experts Br. 12. It is the equivalent of Trump University promising to explain how dissatisfied students can ask to get their money back at the end of the course, and then after the course is over saying, "Here's how to get your money back: You can't." *Id.* at 12–13.

What class counsel never explain is why they promised class members an opportunity to request exclusion if it would be meaningless. As in: What did this accomplish? Nor do they explain how an ordinary class member would know that the opportunity would be meaningless—even when the same phrase, in the rest of the notice, was mandatory, not meaningless. They posit that class members would pick up on "the shifting contexts," but that does not explain why the same phrase would mean two diametrically opposite things in the same document: an automatic yes in one context, an automatic no in the other. *See* CC Br. 46. If anything, the "contextual cues" signaled that a request to be excluded meant what courts have universally construed it to mean: the actual ability to be excluded. *Id.* at 22.

Indeed, when class-action litigators (and district judges) actually want the notice of pendency to convey that a second opt-out right is not guaranteed, they have changed the language in the Federal Judicial Center's model notice to make

this clear. In one case, for example, the notice was modified to say what class counsel claim that their notice means: "If you stay in the Class and the Class Representatives obtain money for the Class, either as a result of a trial or a settlement, you will be notified about how to apply for a share (or how to ask to be excluded from any settlement, *if the Court permits a second period of exclusion*)." *Khoday v. Symantec Corp.*, No. 11-cv-180, ECF No. 336-2, at 4–5 (D. Minn. June 26, 2014) (emphasis added). And even in that case, class members were later given the opportunity to opt out of the settlement that was reached. *See* ECF No. 400 in *Khoday*, at 2 (Oct. 8, 2015) (court order: "A person who submits a valid Request for Exclusion shall not be bound by the Settlement Agreement.").

In the end, class counsel effectively urge this Court to overlook the serious deficiency in the notice. They want the Court to pretend as if the notice they chose to use did not say that class members could "ask to be excluded from any settlement"—in the same way that they could "ask to be excluded" from the class—because *other* statements in the notice were clear. But the part of the notice that most comprehensively spelled out the consequences of remaining in the class is paragraph 13, under the heading "What happens if I do nothing?" ER 111. And the best reading of that paragraph—and indeed the best reading of the whole section entitled "Your Rights and Options"—is that class members who did not "ask to be excluded before the trial" would be bound by the judgment, "regardless

of whether the Plaintiffs win or lose the trial." *Id.* But if the case did *not* go to trial, and instead resulted in "any settlement" that would bargain away their claims, class members would have the opportunity "to be excluded." *Id.* Or at least a reasonable class member could read the notice in this way.

Thus, at most, the notice is arguably ambiguous about whether Ms. Simpson and other class members would be able to exclude themselves in the event of a settlement. But any ambiguity must be construed in the class members' favor. *See Stetson v. Grissom*, 821 F.3d 1157, 1164 (9th Cir. 2016) ("All relevant documents were drafted by Class Counsel. Thus, in accordance with the general principle of *contra proferentem*, we construe the ambiguity against them."). This is particularly so in light of the strict requirements that due process and Rule 23 impose on class-action notices. *See Negrete v. Allianz Life Ins. Co. of N. Am.*, 2010 WL 4116852, at *12 (C.D. Cal. 2010) (holding that, "[g]iven the ambiguities" in the class notice, it did "not sufficiently apprise" class members of their opt out rights); *McBean v. City of New York*, 260 F.R.D. 120, 137 (S.D.N.Y. 2009) (holding that "ambiguity in the Class Notice" made it "fundamentally unfair to preclude the claims" of class members on that basis). Given the stakes, it is far better to err on the side of caution than for this Court to lend its imprimatur to a procedure that would allow the model notice to be used in a way that's contrary to what its authors intended, and that accomplishes nothing but the possibility of deception.

Class counsel effectively concede that, if the notice guaranteed Ms. Simpson the opportunity to opt out of any future settlement, they were required to make good on that promise. That is so whether the problem is conceived of as a violation of due process or as a failure to satisfy Rule 23(c)(2), which requires that the class receive "the best notice that is practicable under the circumstances," Fed. R. Civ. P. 23(c)(2)(B), and that the notice set forth "the time and manner for requesting exclusion" and indicate that "the court *will* exclude from the class any member who requests exclusion" pursuant to that notice, Fed. R. Civ. P. 23(c)(2)(B)(v) (emphasis added). *See* Opening Br. 31-33. Either a second opt-out was required, or else the notice was misleading and hence inadequate.

B. Our opening brief also explained why due process would require that Ms. Simpson be given the opportunity to opt out of the settlement even if she had not been promised that opportunity. *See* Opening Br. 34–37. Due process is flexible, and turns on "the individual interest sought to be protected by the Fourteenth Amendment." *Jones v. Flowers*, 547 U.S. 220, 229 (2006). In class actions involving "small recoveries"—cases that "do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)—failure to offer an opt out right when settlement terms are first put on the table may be tolerable. But that isn't the case here. Ms. Simpson's claims have a potential value that approaches six figures—equivalent to the value

of many people's homes. She thus has a "substantial stake" in making *her own* decision "on whether and when to settle." *Id.* at 616. Yet she was forced to make an opt-out decision at a very early stage, before anyone was aware of the possibility of a settlement, let alone what the terms might be. Because she could not meaningfully make that decision with no information, she cannot now be forced to settle her claim consistent with due process under these circumstances.

Rather than confront the force of this argument, class counsel hide behind *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 688 F.2d 615, 634 (9th Cir. 1982), which they claim (at 50) "forecloses" our argument. They also equate our position (wrongly) with a challenge to the constitutionality of Rule 23. Once those points are swept aside, however, class counsel cannot say *why* due process should permit the settlement procedure in this case. That omission is more significant than anything class counsel do say.

On the first point: It is true that *Officers for Justice* rejects the argument that due process *categorically* "requires that members of a Rule 23(b)(3) class be given a second chance to opt out." *Id.* at 635. But that is not our argument; as explained above, the process due turns on the value of the interest at stake. And although the dicta in *Officers for Justice* could be read broadly—to mean that due process *never* requires a second opt-out—that is not the best reading of the case. In fact, the Court took pains to cabin its holding to the "circumstances and posture of this

case," which involved an objection by "a named plaintiff and class representative" who had "been personally involved in nearly every phase of this litigation, including the settlement negotiations." *Id.* at 623, 633. The Court's analysis, moreover, was based on a looser conception of what due process requires than the Supreme Court has since adopted in the intervening decades. *See* Opening Br. 37. For these reasons, *Officers for Justice* should not be read to foreclose the possibility that, in a different case, on different facts, due process may require a meaningful opportunity to opt out of a settlement extinguishing high-value claims. This is that case.

On the second point: We are not "ask[ing] this Court to declare Rule 23 unconstitutional." CC. Br. 51. Even if Rule 23 did not foreclose the settlement approval here, that is a very different question from whether due process forbids the same result under these particular circumstances.

C. Finally, our opening brief explained why the district court abused its discretion in failing to afford an opt-out period under Rule 23(e)(4). *See* Opening Br. 37-40. In response, class counsel suggests that the district court's discretion is boundless. And, rather than challenging our case-specific argument, they attack a straw man version of it. They mischaracterize it as a plea to regard as an abuse of discretion "every failure to withhold approval from a settlement . . . in a previously

certified case that does not include a second, settlement-stage opt-out opportunity." CC Br. 55. That is not our argument.

To the contrary, our point is that the district court's discretion, while it may be ample, must have legal limits—and those limits were exceeded here. *Cf. Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994) (rejecting the view that a late opt out in a class action "is never allowed so long as the notice given was the 'best practicable'" because, were it otherwise, there would be no limits to discretion and rule permitting extensions "would be meaningless"). Rule 23(e)(4) was specifically added so that courts would have discretion to "refuse to approve" settlements that failed to provide an opportunity to opt out after settlement terms become known. *See* Opening Br. 38. In this case, the settlement extinguishes valuable claims for money damages and does so even though class members had been told that they could "be excluded from any settlement." This is the very sort of "bait-and-switch tactic" that the Second Circuit suggested might demand a second opt-out right under Rule 23, and whose absence made one unnecessary there. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006). Unlike in *Denny*, "the original notice" here did not "inform[] all class members of the basic settlement terms," *id.*, but instead promised a right to opt out of any future (and, at that point, entirely unknown) settlement.

There was no hint of the settlement terms at that time of that notice, there was no good reason for any class member intent on fully vindicating her rights to

opt out at that time, and the settlement releases highly valuable claims that the class could not have brought in the class action. Under these unique circumstances, class counsel offer no good reason why the district court should have denied a second opt-out period here and the Court "cannot conclude as a matter of law that there was no abuse of discretion." *Silber*, 18 F.3d at 1455.

II. Sherri Simpson has standing to appeal the approval of a class-action settlement that would extinguish her claims for money damages.

A. Perhaps recognizing the weakness of its arguments on the merits, class counsel's lead argument on appeal is that Ms. Simpson lacks standing to appeal the district court's approval of a class-action settlement that, if left in place by this Court, will forever extinguish her right to seek treble damages against Trump University. CC Br. 23-35.

But class counsel makes no attempt to even defend the district court's decision on standing. *See id.* at 25 n.8 (abandoning the district court's holding, which fell "under the rubric of redressability," in favor of an argument based on injury and causation). Nor does class counsel even attempt to respond to the standing argument made in our opening brief. As we explained there, "Ms. Simpson has much at stake: She will lose her right to bring treble-damages claims if the settlement is approved and, conversely, will keep that right if she wins." Opening Br. 40.

Ms. Simpson, in other words, has standing not merely "because she is a Class Member." CC Br. 23. Rather, she has standing because she is aggrieved by the loss of her ability to seek treble damages, injunctive relief, and an admission of liability from Trump University—an injury directly caused by the district court's approval of a settlement that binds her and releases her valuable claims. This injury is also redressable on appeal: a reversal will revive her treble-damages claims and her right to a day in court.

Class counsel's contrary argument is foreclosed by *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002)—a Supreme Court precedent discussed in our opening brief (at 41) and left unaddressed by class counsel. There, the Court held that class members who object to settlements that bind them and release their claims present an easy case for Article III standing. Ms. Simpson obviously has a significant economic "interest in the settlement" and that interest "creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). *Devlin* cited with approval an opinion by Judge Easterbrook, which makes the same point with characteristic simplicity: "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *In re Navigant Consulting, Inc., Sec. Litig.*, 275 F.3d 616, 620 (7th Cir. 2001). Where a "settlement will effectively bind the

objectors" and strip them of their damages claims, they "occupy precisely the status [that] the *Devlin* Court sought to protect." *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 572 (9th Cir. 2004). Finding standing in such cases is also consistent with this circuit's "longstanding pre-*Devlin* practice of permitting objecting class members to appeal settlements." *Id.* at 572-73 (collecting cases).

In addition to ignoring *Devlin*, class counsel also choose to remain silent about the distinctions between this case and the Ninth Circuit authority on which they themselves rely—distinctions that we identified in our brief. *See* Opening Br. 41-42. Ms. Simpson is not someone who "asserts no economic or noneconomic injury." *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994). Rather, her grievance is that, "under the court-approved settlement [she] lost [her] rights to sue" Trump University for money damages and she therefore "suffered an injury by the order [she] appealed." *Id.* (citing *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977); *cf. Stetson*, 821 F.3d at 1163 (objector has standing where, "if [s]he prevails, a better settlement might be obtained on remand"). This is enough for standing.

Indeed, despite the ubiquity and importance of notice issues in class actions, class counsel cannot identify one case in which any court has concluded that a class member lacks standing to appeal the approval of a settlement that extinguishes her damages claims, or that the rule is somehow different when that class member

complains about a due-process violation with respect to notice. To the contrary, the cases go the other way. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1012 n.8 (10th Cir. 1993) ("Since the Welches have a stake in the amount of the settlement, they have a sufficient personal stake in the outcome to raise the due process claims."); *Silber v. Mabon*, 957 F.2d 697, 699 (9th Cir. 1992) (class member who challenged district court's refusal to allow him to opt out also necessarily had "standing to challenge the notice procedures themselves."). If anything, as we explain below, the argument for standing is *stronger* when the class member alleges a due-process violation.

B. Overlooking Ms. Simpson's stake in her own damages claims, class counsel assume that Ms. Simpson's injury is merely procedural—the lack of adequate notice. And they further assume that, to seek redress for that injury, she must prove that she relied on the 2015 class notice and that the outcome would be different but for that reliance. CC Br. 23-34. Because Ms. Simpson is plainly aggrieved by the release of her damages claims, this Court need not reach class counsel's argument. But if the Court does reach it, it should hold that the argument fails on its own terms—both legally and factually. Legally: because Ms. Simpson *has* alleged a procedural injury caused by the judgment below and redressable by reversal of that judgment. And, factually: because Ms. Simpson did rely to her detriment on the 2015 notice.

1. First, the law: Class members who object to a settlement on the grounds that the notice violated their rights under due process or Rule 23 need not prove their reliance on specific notice language or show that everything would turn out differently with legally adequate notice. *See Gottlieb*, 11 F.3d at 1012 n.8; *Silber*, 957 F.2d at 699. We have been unable to find any case holding otherwise, and neither (apparently) have the settling parties.

With good reason. The Supreme Court has explained that, for purposes of Article III standing, "'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Ctr. For Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011). This principle means that that the complaining party need not demonstrate that correcting a procedural violation itself would necessarily lead to a different outcome with respect to her concrete interests, so long as "there is some possibility" that it would do so. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (explaining that while a "bare procedural violation, divorced from any concrete harm," is not enough, a "risk of real harm" is sufficient).

So, for example, the Supreme Court has explained that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to

challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." *Lujan*, 504 U.S. at 572 n.7. The risk of concrete harm to Ms. Simpson is far more obvious than it is in this example: She was promised a right to opt out of any settlement and was denied that procedural right. As a result, she risks losing a damages claim worth tens of thousands of dollars in exchange for a fraction of its value. *Cassese v. Williams*, 503 F. App'x 55, 57 n.1 (2d Cir. 2012) (objectors had "procedural" injury sufficient for Article III standing where they argued that Rule 23 "entitles them to notice of a different kind and degree from what they received") (citing *Summers,* 555 U.S. at 496).

In its procedural-due-process jurisprudence, too, the Supreme Court has long recognized that the deprivation of a protected procedural right is enough. "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). Thus, the Court held in *Carey v. Piphus*, 435 U.S. 247 (1978), that a plaintiff is entitled to nominal damages for a deprivation of procedural due process—even where the plaintiff fails

to show that the outcome would have been different had due process been given. "[E]ven if [the plaintiffs] did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome." *Id.* at 266.

2. Next, the facts: Even apart from its legal defects, class counsel's standing argument rests on the unsupported factual assertion that Ms. Simpson never relied on the representation in the 2015 notice that she could seek "to be excluded from any settlement." In fact, far from proving that Ms. Simpson did not rely on that promise, the undisputed record evidence shows that she did. *See* ER 89-90 (Simpson Supp. Decl., ¶¶ 4-6).

Ms. Simpson testified that she "visited the Court-approved case website on several occasions," and that "shortly upon learning a class had been certified, [she] went online, visited the case website and reviewed the detailed [*i.e.*, long-form] notice that was posted there." *Id.* ¶ 4. She further testified that she is "confident that [she] read the promise, contained in Paragraph 13 of the long form notice, that class members would have the opportunity to submit requests for exclusion from any settlement." *Id.* She was unequivocal on the key point: "[a]fter receiving the Class Notice and visiting the case website, it was [her] understanding and expectation that class members would receive the opportunity to opt out in the

event there were a settlement." *Id.* ¶ 5. Moreover, Ms. Simpson made clear that "[i]f I had known that, in actuality, there would be no opportunity to opt out in the event of a settlement—*i.e.*, that I would have no choice but to be bound to any future settlement that Class Counsel agreed to, sight unseen—I would at the very least have investigated all my options and contacted a lawyer familiar with class action practice." *Id.* ¶ 6.

Class counsel submitted no evidence in opposition to Ms. Simpson's sworn testimony, and never sought to depose her or otherwise question her veracity. They thus provide no evidentiary basis to undercut the conclusion that Ms. Simpson did in fact rely on the promise of an opportunity to submit a request for exclusion from any settlement.[2]

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[2] Class counsel misrepresent a statement made by Ms. Simpson's trial attorney, falsely asserting that he "conceded" that the 2015 notice "played no role in her thinking"—*i.e.*, in her initial decision to remain in the class. CC Br. 17. In reality, Judge Curiel asked Simpson's counsel if it was in 2017 that "she then ended up having a change of heart." ER 81. He responded: "I wouldn't characterize it that way, Your Honor." *Id.* Instead, he stated that Simpson was "unhappy with the settlement" and had "expected this right to opt out." *Id.* He clarified that he was not asserting that Simpson was "sitting there consciously aware that she knew clause such-and-so and paragraph such-and-so gave her this right." *Id.* Rather, it was enough that she knew from the notice that she had the right to request exclusion from any settlement, as she affirmed in her declaration. ER 90 ¶ 5.

Class counsel likewise seize on a statement by Simpson's lawyer that Simpson "was not aware of the due process path" when they first spoke. ER 81. But far from supporting the theory that Simpson never relied on the 2015 promise (CC Br. at 17-18), this statement supports her testimony that, before consulting experienced counsel, "I did not know if there was a viable legal claim to be made that the proposed settlement should be rejected" and that, after speaking with

* * *

Sherri Simpson's fraud claims against Trump University are worth as much as $66,310. But, if this settlement is allowed to stand, she'll be forced to give up those claims for only 14% of their value—with no admission of guilt and no public trial. Taking that deal might be a rational choice for some people, but it is Sherri Simpson's choice to make. She "has a substantial stake in making individual decisions on whether and when to settle." *Amchem*, 521 U.S. at 616. In this case, the failure to let her make that decision cannot stand: Either the settlement process failed to deliver a key protection that the class notice had promised, or else that notice was materially misleading. Either way, the judgment must be reversed. Neither Rule 23 nor due process tolerate such "bait-and-switch tactics." *Denney*, 443 F.3d at 271.

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counsel, it "became clear to me that there was indeed a path for addressing the sources of the dissatisfaction that I felt, and had publicly expressed, with the settlement." ER 91-92 ¶ 14, 17.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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July 27, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word length requirements of Circuit Rule 32-1(a) because it contains 5,508 words, exclusive of the portions excluded by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font.

/s/ Deepak Gupta

July 27, 2017 Deepak Gupta

STATEMENT OF RELATED CASES

As required by Circuit Rule 28-2.6, Objector-Appellant states that she is not aware of any case pending before this Court that presents related legal issues.

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I electronically filed the foregoing Corrected Reply Brief for Objector-Appellant with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta