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, ET AL.
Defendants-Appellees.

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

BRIEF OF PLAIN-LANGUAGE NOTICE EXPERTS, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND PROFESSORS OF CONSUMER LAW AS AMICI CURIAE IN SUPPORT OF OBJECTOR-APPELLANT AND SUPPORTING REVERSAL

CHRISTOPHER L. PETERSON
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
383 South University St.
Salt Lake City, UT 84112
(801) 581-6655
christopher.peterson@law.utah.edu

GREGORY A. BECK
1250 Connecticut Ave.
Suite 200
Washington DC 20036
(202) 684-6339
greg@beck.legal

Counsel for Amici Curiae

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are three plain-language experts who participated in the Federal Judicial Center's process of developing the class-action notice language at issue in this appeal; the National Association of Consumer Advocates; and nine of the nation's leading scholars in consumer-protection law.

Todd B. Hilsee created the Federal Judicial Center's Model Class-Action Notices—including the very notice language at issue in this appeal. He joins this brief to assist the Court in understanding the meaning and intent of that notice language, which, as used in this case, promised Trump University class members an opportunity to "be excluded from any settlement." As a class-action notice expert serving the Federal Judicial Center, Mr. Hilsee also developed the FJC's *Judges' Notice and Claims Process Checklist*, and contributed to the FJC's *Pocket Guide on Class Actions*, 3d. He was the first judicially recognized class-action-notice expert in the United States, has earned more court citations noting his expertise than any other person in the field, and has designed notice programs in hundreds of class actions—including the largest global claims process in history, *In re Holocaust Victims' Assets Litigation* (the Swiss banks settlement).

Terri LeClercq served as a consultant to the Federal Judicial Center on law and readability in connection with the published version of its model class-action notices. She retired from the University of Texas where she was Fellow, Norman

[1] All parties have consented to this brief's filing, and no party's counsel authored it in whole or part. No party, party's counsel, or other person—other than amici and its counsel—contributed money that was intended to fund preparing or submitting the brief.

Black Professorship in Ethical Communication in Law. She holds a Ph.D. in English and has written extensively on plain English and readability. She is the author of *Guide to Legal Writing Style*, *Expert Legal Writing*, and *Legal Writing with Style*, along with numerous articles on plain English. She has served on the editorial board of the Legal Writing Institute and the American Association of Writing Directors, received the 2006 recipient of the Lifetime Achievement Award from the American Association of Law Schools, and was the first Ralph Bill Distinguished Visiting Professor, Chicago-Kent Law School. Dr. LeClercq serves as an expert witness on contract and other legal document disputes.

Lawrence Solan served as a consultant to the Federal Judicial Center on law and linguistics in connection with its development of its model class-action notices. *See* https://www.fjc.gov/content/detailed-discussion-methodology. He is the Don Forchelli Professor of Law at Brooklyn Law School and holds both a law degree and a Ph.D. in linguistics. Professor Solan has written extensively on the intersection of law, language, and psychology, and is director of the Center for the Study of Law, Language and Cognition. His most recent books are *The Oxford Handbook of Language and Law* and *The Language of Statutes*, and his previous book, *The Language of Judges*, is widely recognized as a seminal work on linguistic theory and legal argumentation. Professor Solan has been a visiting professor in the Council of Humanities and the Psychology Department at Princeton University, and a visiting professor at Yale Law School. He has also served as President of the International Association of Forensic Linguistics and on the editorial board of the International Journal of Speech, Language and the Law.

The National Association of Consumer Advocates is a nationwide, nonprofit association of more than 1,700 lawyers and law professors who are focused on consumer protection. NACA is dedicated to furthering the ethical representation of consumers. To that end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, published at 255 F.R.D. 215. The *Standards and Guidelines* seek to promote and preserve the class action—which NACA believes is a critical tool for consumer justice—by guarding against its misuse. NACA believes that the decision below undermines the class-action device to the detriment of consumers in two ways—(1) by depriving consumers of the right to "ask to be excluded from any settlement," despite the class notice guaranteeing that right, and (2) by unfairly forcing consumers to choose between making a claim and objecting to the settlement's ban on opting out.

Prentiss Cox is Associate Professor of Law at the University of Minnesota Law School, where he writes and teaches in the area of consumer protection law and public civil law enforcement. He was previously the manager of the Consumer Enforcement Division in the Minnesota Attorney General's Office, where he prosecuted numerous nationally recognized cases involving subprime mortgage lending, foreclosure, banking regulation, state attorney general enforcement authority, consumer fraud, and related matters. He is also a member of the inaugural Consumer Advisory Board of the U.S. Consumer Financial Protection Bureau and is on the Board of Directors of the State Center for Antitrust and Consumer Protection Enforcement, among other activities.

Kathleen C. Engel is a Research Professor of Law at Suffolk University, and a national authority on mortgage finance and regulation, subprime and predatory lending, and consumer protection. Her many publications include a 2011 book published by Oxford University Press, *The Subprime Virus: Reckless Credit, Regulatory Failure and Next Steps*, with Professor Patricia A. McCoy. Professor Engel presents her award-winning research in academic, banking, and policy forums throughout the country and around the world. Professor Engel has advised federal and state agencies on various matters related to financing of loans and served for three years on the Consumer Advisory Council of the Federal Reserve Board.

Adam J. Levitin is Professor of Law at Georgetown University Law Center, where he teaches courses on consumer law. Professor Levitin has previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School, as a member of the Consumer Advisory Board of the U.S. Consumer Financial Protection Bureau, and as Special Counsel to the Congressional Oversight Panel for the Troubled Asset Relief Program. In 2013, he was awarded the American Law Institute's Young Scholar's Medal for his scholarship on consumer protection. He frequently testifies before Congress on consumer protection and financial regulation.

Dalié Jiménez is Associate Professor of Law and Jeremy Bentham Scholar at the University of Connecticut School of Law. Her scholarly interests include empirical and policy work in commercial law, consumer financial protection, bankruptcy, credit and debt collection markets, and the financial distress of American families. She is currently working on a large-scale, randomized control trial evaluating the effectiveness of legal and counseling interventions to help individuals in

financial distress. In 2011-2012, she spent a year as a policy fellow on the founding staff of the U.S. Consumer Financial Protection Bureau, where her work focused on credit reporting, debt collection, student loans, and debt relief.

Nathalie Martin is Professor of Law at the University of New Mexico, where she holds the Frederick M. Hart Chair in Consumer Law. Her research focuses on consumer law and bankruptcy, as well as elder law. Her recent research focuses on high-cost loans (such as payday, title, and installment loans) and includes several empirical studies funded by the National Conference of Bankruptcy Judges. Her works have been cited by the New Mexico Supreme Court as well as the United States Supreme Court. In addition to consumer law, she teaches the Economic Development Clinic and runs a program promoting financial literacy in New Mexico's high schools. She is a regular blogger at *Credit Slips*, the nation's leading blog on debt and credit issues, and a former resident scholar at the American Bankruptcy Institute.

Patricia A. McCoy is Professor of Law at Boston College Law School, where she teaches courses on consumer law, banking, insurance, and financial regulation. In 2010 and 2011, she joined the U.S. Department of the Treasury, where she helped form the new U.S. Consumer Financial Protection Bureau, and, as the CFPB's first assistant director for mortgage markets, oversaw the Bureau's mortgage policy initiatives. Her research focuses on the nexus between financial products, consumer welfare, and systemic risk, analyzed through the lens of law, economics, and empirical methods. In *A Tale of Three Markets: The Law and Economics of Predatory*

Lending (2002), she was among the first to raise alarms about the dangers of subprime loans. She is the author of three books—including, most recently, *The Subprime Virus*, with Kathleen C. Engel. Previously, Professor McCoy was a Visiting Scholar at the MIT Economics Department and served on the Federal Reserve's Consumer Advisory Council and on the board of the Insurance Marketplace Standards Association. In 2012, the American Law Institute named her as an Adviser to the Third Restatement on Consumer Contracts. She currently sits on the Advisory Committee on Economic Inclusion of the Federal Deposit Insurance Corporation.

Christopher Peterson is the John J. Flynn Endowed Professor of Law at the University of Utah's S.J. Quinney College of Law, where he teaches consumer protection courses. From 2012-2016, he served as Special Advisor to the Director and Senior Counsel for Enforcement Policy and Strategy at the U.S. Consumer Financial Protection Bureau. He has also presented his research to Congress, the FDIC, the Federal Reserve Board, and the White House in both Democratic and Republican administrations. His books include the casebook *Consumer Law: Cases and Materials* and *Taming the Sharks: Towards a Cure for the High Cost Credit Market*. He is a recipient of the National Association of Consumer Agency Administrators' Consumer Advocate of the Year Award for his work protecting military service members from predatory-lending practices and is at work on a forthcoming study of the Trump University litigation.

Dee Pridgen is the Carl M. Williams Professor of Law and Social Responsibility at the University of Wyoming College of Law, where her teaching and research

focus on consumer law. Before joining the faculty, she served as an attorney at the Federal Trade Commission's Bureau of Consumer Protection. Her publications include two treatises aimed at practicing attorneys, *Consumer Protection and the Law*, and *Consumer Credit and the Law*, and a law school casebook, *Consumer Law: Cases and Materials* (4th ed. 2013). She is a member of the American Law Institute.

Jeff Sovern is a Professor of Law at St. John's University, where he teaches consumer protection. He has co-authored a casebook titled *Consumer Law: Cases and Materials* (4d ed. 2013), and co-edited *Selected Consumer Statutes* (2007, 2009, 2011, 2013 and 2015 editions), and he is the co-coordinator of the *Consumer Law and Policy Blog* (www.clpblog.org). Professor Sovern's scholarship has been relied on by the U.S. Department of Education and the U.S. Consumer Financial Protection Bureau and is the recipient of the American Council on Consumer Interests' Russell A. Dixon Prize and Applied Consumer Economics Award.

INTRODUCTION

The past several decades have seen a boom in an insidious form of consumer fraud: predatory, for-profit schools. These businesses have several distinguishing features. They make extravagant and false promises of success. They use aggressive recruiting and marketing tactics to prey on vulnerable consumers. They charge exorbitant fees and encourage students to go into debt to make payments. Ultimately, they leave students worse off than if they had never enrolled, with loans they cannot repay and credentials they cannot use.

Even in an industry known for defrauding consumers, Trump University stands out for the egregiousness of its conduct. Donald Trump promised an "Ivy League quality" program, in which "professors" "hand-picked" by Mr. Trump would teach students his real-estate "secrets." The "university," however, was nothing but a series of seminars staffed by high-pressure salespeople. Those salespeople were paid on commission to talk participants into buying additional courses (costing as much as $35,000) and charging those fees to their credit cards if necessary.

Yet class counsel and defendants below agreed to a settlement that failed to even give class members a full refund, much less the treble damages for which their RICO claims provided. Although the district court had broad discretion to approve such a settlement, it erred in denying class members the opportunity to exclude themselves from the settlement *after* learning that they would receive only a fraction of the value of their claims. The class notice promised the class that opportunity, as those who devised the language for the Federal Judicial Center (including

two amici here) intended it to do. It was thus fundamentally unfair for the district court to approve settlement terms that expressly *denied* any opt-out right.

The promised opportunity to opt out was particularly important in this case given the nature of the class's injuries. Unlike many consumer class actions, this is not a case where class members stand to recoup only a few dollars each. Trump University imposed devastating losses on participants, taking thousands or tens of thousands of dollars based on claims that the evidence strongly suggests were fraudulent. With so much at stake, class members deserve a say in the disposition of their claims. For those reasons, this Court should reverse the decision below.

ARGUMENT

I. A Reasonable Class Member Would Have Understood the Language of the Original Class Notice to Promise the Chance to Opt Out of Any Settlement—Just as Its Drafters Intended.

The original notice sent to the class after certification told members what to expect if they chose to stay in the class and the case later settled: "If you stay in, and the Plaintiffs obtain money or benefits, either as a result of the trial or a settlement, you will be notified about how to obtain a share (or how to ask to be excluded from any settlement)." ER 111. The key language ("you will be notified about … how to ask to be excluded from any settlement") has only one reasonable interpretation—at the time of settlement, class members would be given the chance to opt out. Any reasonable class member would have read the notice that way.

And that is, in fact, the notice's intended meaning. The relevant language comes verbatim from a Federal Judicial Center model notice—written by amici

Todd B. Hilsee and Terri LeClercq based on research performed by amicus Lawrence Solan—that was designed to clearly explain the class-action process in plain, non-legal English. *See* https://www.fjc.gov/sites/default/files/materials/2017/ClaAct11.pdf (model notice); *see also* Federal Judicial Center, *Illustrative Forms of Class Action Notices: Overview of Methodology*, https://www.fjc.gov/content/overview-methodology. The language was included by the drafters of the model notice to remind and encourage judges to consider affording class members a second opportunity to opt out after the terms of a settlement become known—a time when a class member's decision is likely "more carefully considered and … better informed," Fed. R. Civ. Proc. 23(e)(4) & 2003 Advisory Comm. Notes—and to provide model language for judges to convey that decision to the class. Concluding that the phrase "opt out" was legalese, the drafters turned to a commonly used synonym: "request for exclusion." They then further simplified that language to state that class members may "ask to be excluded" from a settlement.

It was that simplified language that was included in the final version of the FJC's model notice and, ultimately, in the class-certification notice here. Although worded (out of respect for the district court) as a *request*, the language does not suggest that the request might be denied. When a class has been notified that it has the right to opt out, courts do not ordinarily consider whether to grant or deny opt-out requests; those who ask to opt out are simply deemed opted out. Rather, the language is designed to convey as clearly as possible to class members that they must take a specific action to exclude themselves from the settlement—they must

ask the district court. The phrase "ask to be excluded," in short, is just a more easily understood way of saying "opt out."

The FJC's model notices fulfill Rule 23's requirement that class notices "concisely and clearly state" information "in plain, easily understood language." Fed. R. Civ. Proc. 23(c)(2)(B); *see* Todd B. Hilsee et. al., *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 Geo. J. Legal Ethics 1359, 1365, 1368-69 (2005). As one of the rule's architects explained, class notices are "notoriously difficult to comprehend" and have been the subject of "many complaints about … complexity and unreadability." John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 374 (2005); *see* Hilsee, *Do You Really Want Me to Know My Rights?*, 18 Geo. J. Legal Ethics at 1365. The FJC, for example, found that common legal terms like "class" and "class action" were often confusing to non-lawyers. *See* FJC, *Illustrative Forms of Class Action Notices: Overview of Methodology*; *see also* Hilsee, *Do You Really Want Me to Know My Rights?*, 18 Geo. J. Legal Ethics at 1365. The Advisory Committee on Civil Rules hoped to address those problems both with Rule 23's clear-language requirement and with examples of well-drafted notices—in particular, the FJC's model notices. *See* Rabiej, *The Making of Class Action Rule 23*, 24 Miss. C. L. Rev. at 374 & n.211.

The FJC's goal for each of its model notices was "that the recipients see it, recognize its connection to their lives and self-interests, read it, and act on it." Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 27 (3d Ed. 2010) (citing Hilsee, *Do You Really Want Me To Know*

My Rights?, 18 Geo. J. Legal Ethics 1359). It intended the language of the model notices to be understood as that language was written—for lay people, not lawyers. *See* Hilsee, *Do You Really Want Me To Know My Rights?*, 18 Geo. J. Legal Ethics at 1365. In drafting the model notices, the FJC thus relied on experts and available studies on plain-language legal documents. *See* FJC, *Illustrative Forms of Class Action Notices: Overview of Methodology*. It tested non-lawyers on their comprehension of recent notices from real class actions and asked them to point out unclear terms. *Id.* And it made multiple revisions based on feedback from focus groups, a survey of ordinary consumers, and public comments. *Id.* Because of these efforts, non-lawyer comprehension of one of its notices was significantly higher than comprehension of a comparable notice from a recent class action. *Id.*

Particularly given that background, the notice language at issue here must be understood to have the meaning that a reasonable, non-lawyer member of the class would attribute to it. The district court's reading—that class members could *ask* to be excluded but could not expect their requests to be honored—does the opposite. No reasonable recipient of the notice (and especially no reasonable non-lawyer recipient) 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*.

To give a comparable example, it would be misleading for Trump University to promise that it would "explain how dissatisfied students can get their money back at the end of the course," and then after the course was over to say "Here's

how to get your money back: You can't." The district court's reading renders the class notice just as misleading. Such a legalistic interpretation could only have been conceived by lawyers, and to adopt it subverts the notice's purpose of conveying ideas in a way that average members of the class will understand. Moreover, even if the district court's reading were a plausible one, reasonable class members would still likely have interpreted the notice to mean what the most straightforward reading of its language suggests—that they would have the right to exclude themselves at the time of settlement. The notice would thus still be misleading.

If the district court really wished to deny the class a second opportunity to opt out, it could have modified the class-certification notice to reflect that decision. The FJC's model notices are designed to be "illustrative" only. FJC, *Illustrative Forms of Class Action Notices: Notes for Use by Attorneys and Judges*, https://www.fjc.gov/content/notes-use-attorneys-and-judges. "[I]n an actual case, attorneys and judges can adapt the illustrative notice to the unique factual, legal, and procedural circumstances of their case." *Id.* The court thus could have deleted the model-notice language promising a second chance to opt out *before* approving the certification notice for distribution to the class. But having left the language in the notice and thus promised the class another chance to opt out, the court erred in failing to honor that promise.

II. A Reasonable Class Member Could Have Chosen to Opt Out After Learning the Settlement's Terms.

The final settlement approved by the district court provides students, in Mr. Trump's own words, with only "a small fraction of the potential award."

https://twitter.com/realdonaldtrump/status/799969130237542400. Under the settlement, class members will receive just half of what they paid to Trump University. They will, in other words, not even receive a full refund of their out-of-pocket expenses, much less the treble damages authorized by RICO. *See* 18 U.S.C. § 1964(c). For that reason alone, it would have been entirely reasonable for a class member to regard the settlement as inadequate and to request exclusion.

By denying class members the opportunity to seek recovery of treble damages, the settlement also undermines the deterrent effect that treble damages were designed to create. *See Russello v. United States*, 464 U.S. 16, 27-28 (1983); *see also* G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages*, 60 Law & Contemp. Probs. 97, 119-21 (1997) (noting that RICO's treble-damages provision serves important public interests by deterring fraudulent conduct). The risk of being held liable for actual damages alone is not sufficient to deter those who stand to profit from committing fraud; there is always a chance that the perpetrator will get away with the fraud, or that it will escape liability even if detected. *See id.* at 116. Where the perpetrator faces only the possibility that its ill-gotten gains will have to be refunded to its victims, the opportunity to profit from fraud will thus typically outweigh the risk of detection and successful prosecution. *See id.* And if a perpetrator believes that a lawsuit, even if brought, will likely settle for *less* than actual damages, the incentive to violate the statute is even stronger. Trump University here, for example, after taking about $50 million from enrollees, settled the case for just half that amount (and without making any ad-

mission of wrongdoing). *See Low* Dkt. 583 at 5. That kind of return is hardly a deterrent. Indeed, by allowing the defendants to keep much of their fraudulently obtained fees, the settlement, if anything, serves as an encouragement to other predatory schools to continue or expand their fraudulent activities. Again, that is reason enough for a reasonable class member to opt out.

That is not to say that the district court necessarily abused its discretion in approving the settlement's substantive terms—an issue not raised in this appeal. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026-27 (9th Cir. 1998) (holding that district courts have broad discretion in evaluating a proposed settlement's fairness). Given the "inherent risks of litigation," *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993), it may well be reasonable for some class members to accept a partial refund as a compromise to their claims. But class members could at least as reasonably choose to *forgo*, and not to be bound by, a settlement under which the recovery is just a fraction of the damages that could be recovered in a successful trial—an outcome they had no way to predict when they received the class-certification notice. The district court's refusal to allow class members to opt out after receiving notice of the settlement's terms denies them the opportunity to make that choice.

This is not a case where—as in many consumer class actions—the value of claims is so small that they would be "uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); s*ee Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("[O]nly a lunatic or a fanatic sues for $30."). Like other predatory, for-profit schools, Trump University charged exorbitant

rates, for which it encouraged participants to borrow heavily—instructors pressured participants to increase their credit-card limits to pay up to $35,000 for the "Gold Elite" program. ER 34, 101. Ms. Simpson, for example, lost about $19,000—itself more than enough to justify taking her case to court on an individual basis. ER 101; Simpson Br. 5-6 & 6 n.1. Moreover, an individual suit is made much more attractive by RICO's generous damages provisions. Treble damages are mandatory under the statute once liability has been established. *See* 18 U.S.C. § 1964(c) ("Any person injured … *shall* recover threefold the damages he sustains … ." (emphasis added)); *Genty v. Resolution Tr. Corp.*, 937 F.2d 899, 914 (3d Cir. 1991). And RICO's fee-shifting provision, *see* 18 U.S.C. § 1964(c), ensures that those damages will not be eroded by attorneys' fees, while serving as a strong incentive for lawyers to take on the claims of individual plaintiffs. *See Sedima v. Imrex Co.*, 473 U.S. 479, 493 (1979). Indeed, RICO's damages provisions are *designed* to encourage plaintiffs and lawyers to take on the risk and expense of litigating a RICO claim, thus "bring[ing] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150-51 (1987). It thus should not be surprising that some class members would choose to do so.

Nor is this a case where the claims are highly speculative or untested, as is often the case when a settlement is reached at an early stage of the litigation. *See, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 947, 959 (9th Cir. 2003). Here, the plaintiffs have

already borne the expense of litigating the case through multiple motions to dismiss, motions for summary judgment, and motions for reconsideration. ER 5. At each stage, they prevailed.

And the evidence on which the class relies is strong. Like the worst of predatory schools, Trump University relied heavily on false claims to aggressively market itself to consumers. It sold itself as a "real university" offering an "Ivy League quality" education that was better than business school, with "expert" "professors and adjunct professors" "hand-picked" by Mr. Trump to teach his real-estate "secrets" and "the Trump process for investing." ER 33-34, 101, 223. In fact, those claims were false. The "university" was just a series of seminars, while the "professors" were independent contractors—neither chosen by Mr. Trump nor privy to any of his real-estate strategies—paid on commission to pressure participants into more and more expensive programs. ER 245-47.

In non-class-action RICO cases, no one is prohibited from considering the available damages or the strength of the case in deciding whether to settle. Plaintiffs typically compare the value of a proposed settlement with what they believe a case is worth, considering the possible recovery of treble damages and what they perceive is the likelihood of prevailing. Members of a class are entitled to do no less. As the Supreme Court has observed, class members have an important property interest in their claims, *see Shutts*, 472 U.S. at 807, and retain a "substantial stake in making individual decisions on whether and when to settle," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997). The opt-out right is designed to protect those interests, which arise from "our deep-rooted historic tradition that

everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

To be sure, the class was given notice and an opportunity to opt out following class certification. At that time, however, there was no proposed settlement, and class members were thus told only that the class was pursuing a claim for treble damages. The final settlement, in contrast, does not even fully compensate class members for their *actual* damages. A reasonable class member could not have made an informed choice about whether to opt out of the settlement before learning that essential fact. The decision below thus denied class members the opportunity to make a *reasoned* decision about their rights. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (due process rights hinge on meaningful opportunity to exercise those rights).

The opportunity to make that reasoned decision is especially critical in a fraud case like this one, where some class members are on the hook for more than $35,000. Those kinds of damages could easily have wiped out some class members' savings—or even more than that in cases where class members paid on credit, as they were encouraged to do. ER 101. With so much of their money at stake, class members have the right to expect a say in the disposition of their claims. A reasonable class member may choose to settle or to opt out, but the decision should be the class member's to make.

CONCLUSION

The district court's judgment should be reversed, and the case remanded with instructions to allow class members an opportunity to opt out after notice of the proposed settlement's terms.

Respectfully submitted,
/s/Gregory A. Beck

Gregory A. Beck
1250 Connecticut Ave.
Suite 200
Washington DC 20036
(202) 684-6339
greg@beck.legal

Christopher L. Peterson
University of Utah
S.J. Quinney College of Law
383 South University St.
Salt Lake City, UT 84112
(801) 581-6655
christopher.peterson@law.utah.edu

Counsel for Amici Curiae

June 19, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,876 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Minion Pro font.

/s/Gregory A. Beck
Gregory A. Beck

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2017, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/Gregory A. Beck
Gregory A. Beck