Appeal No. 17-55635

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SONNY LOW, J. R. EVERETT, JOHN BROWN, and ART COHEN,
Plaintiffs-Appellees,

SHERRI B. SIMPSON,
Objector-Appellant,

v.

TRUMP UNIVERSITY, LLC, a New York limited liability company,
AKA Trump Entrepreneur Initiative and DONALD J. TRUMP,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
THE HONORABLE GONZALO P. CURIEL, DISTRICT JUDGE
CASE NOS. 3:10-CV-00940-GPC-WVG, 3:13-CV-02519-GPC-WVG

ANSWERING BRIEF OF DEFENDANT-APPELLEES TRUMP UNIVERSITY, LLC AND DONALD J. TRUMP

O'MELVENY & MYERS LLP
DANIEL M. PETROCELLI
DAVID L. KIRMAN
1999 AVENUE OF THE STARS, 8th FLOOR
LOS ANGELES, CALIFORNIA 90067-6035
TELEPHONE: +1 310 553 6700
FACSIMILE: +1 310 246 6779

Attorneys for Defendants-Appellees Trump University, LLC and Donald J. Trump

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Counsel for Defendant-Appellee Trump University, LLC (named changed to "The Trump Entrepreneur Initiative LLC" pursuant to the Certificate of Amendment of the Articles of Organization filed on May 21, 2010) ("Trump University") hereby certifies that no publicly held company owns more than 10% of Trump University's stock. DJT Entrepreneur Member LLC holds a controlling interest in Trump University.

Dated: July 12, 2017

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli

Attorneys for Defendants-Appellees
Trump University, LLC
and Donald J. Trump

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Defendants-Appellees Trump University, LLC and Donald J. Trump (collectively, "TU") submit this answering brief to the opening brief of Objector-Appellant Sherri B. Simpson ("Simpson") and the briefs submitted by Amicus Curiae Plain-Language Notice Experts and Civil Procedure Professors.

SUMMARY OF ARGUMENT

The Court should affirm the decision on appeal for the reasons stated in Plaintiffs-Appellees' answering brief.

ARGUMENT

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, TU incorporates by reference the arguments in the answering brief submitted by Plaintiffs-Appellees and requests that the Court affirm the decision on appeal for the reasons set forth therein. TU also briefly addresses the following two points.

First, in addition to the arguments set for the in Sections V.C and V.D of Plaintiffs-Appellees' answering brief, TU notes that, if the district court were required to provide a second opt-out opportunity at the time of settlement, it would have foreclosed settlement in this case and would likely foreclose settlement in many other class actions. Here, as in many other cases, TU negotiated the terms of the settlement agreement based on its understanding that the settlement, if approved by the district court, would achieve a global resolution of the subject matter of the litigation. *See* ER 123 (stipulation that "these Actions shall be fully

resolved, settled and compromised" upon the terms of the settlement). Such a global resolution would not be possible without first understanding the composition of the certified class and opt outs. *See id.*; *see also*, *e.g.*, *Klein v. O'Neal, Inc.*, No. 7:03-cv-102-D, 2009 WL 1174638, at *3 (N.D. Tex. Apr. 29, 2009) (denying request to opt out because "[i]n a class action settlement setting, defendants seek and pay for global peace—i.e., the resolution of as many claims as possible" and "allowing plaintiffs to opt out of a class action after the deadline . . . can make settlement less valuable to defendants and less likely to occur"); *In re Charles Schwab Corp. Sec. Litig.*, No. 3:08-cv-1510-WHA, 2010 WL 2178937, at *1 (N.D. Cal. May 27, 2010) (denying late opt-out request "since the settlement was negotiated with the current class membership in mind"); *In re Lloyd's Am. Trust Fund Litig.*, No. 1:96-cv-1262-RWS, 2002 WL 31663577, at *12 (S.D.N.Y. Nov. 26, 2002) (denying request to opt out because "the integrity of the Class as constituted was an essential element to the Settlement"), *aff'd sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) (unpublished).

While TU believes it would have prevailed if the case went to trial, its objective in settling was to avoid the expense of multiple jury trials, avoid protracted post-trial proceedings, and put the case behind it. *See* ER 123, 210 (describing the purpose of the settlement as "put[ting] the history behind us and moving forward"). Permitting even a single class member to opt out of the class

would have frustrated these objectives and would have foreclosed the entire settlement. *See*, *e.g.*, *Bowman v. UBS Fin. Servs., Inc.*, No. 3:04-cv-3525-MMC, 2007 WL 1456037, at *3 (N.D. Cal. May 17, 2007) (holding a late opt-out would require defendant to "expend resources defending against claims that it reasonably understood were foreclosed" by the settlement). The class member's earlier opportunity to opt out, coupled with the district court's discretion to approve or deny a settlement, guards against any fairness issue. *See* 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1797.5 (3d ed. 2017) ("Since plaintiff was given notice and an opportunity to opt out at an earlier stage, due process does not require that a second opportunity be given after the settlement terms are disclosed. At that point the parties' interests are protected by the Rule 23(e) requirements of court approval of the settlement with notice and a fairness hearing at which the dissenters can voice their objections.").

Second, Objector-Appellant Sherri B. Simpson ("Simpson") and her *amici* included pages of inflammatory, gratuitous, and untested facts and assertions in their opening briefs that relate only to the underlying subject matter of the litigation. *See, e.g.*, AOB 1, 4–8, 14; Plain-Language Experts' Br. 8–9, 13–18. TU disputes these facts. None of them has been found by a factfinder and the settlement was made explicitly without any admission of liability. ER 145, 209. TU does not address those alleged facts here because are unnecessary to resolve

the issues raised in this appeal. *See* Fed. R. App. P. 28(a)(6) (limiting statement of the case to "the facts relevant to the issues submitted for review").

CONCLUSION

The Court should affirm the district court's decision on appeal.

Dated: July 12, 2017

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli

Attorneys for Defendants-Appellees
Trump University, LLC
and Donald J. Trump

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Answering Brief of Defendants-Appellees Trump University, LLC and Donald J. Trump is proportionally spaced, has a typeface of 14 points or more, and contains 749 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: July 12, 2017

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli

Attorneys for Defendants-Appellees
Trump University, LLC
and Donald J. Trump

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees Trump University, LLC and Donald J. Trump certify that they are aware of no related cases currently pending before this Court.

Dated: July 12, 2017

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli

Attorneys for Defendants-Appellees
Trump University, LLC
and Donald J. Trump

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2017, I caused to be electronically filed the Answering Brief of Defendants-Appellees Trump University, LLC and Donald J. Trump with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on July 12, 2017, at Century City, California.

/s/ Daniel M. Petrocelli
Daniel M. Petrocelli