17-55635

United States Court of Appeals for the Ninth Circuit

SONNY LOW; J. R. EVERETT; JOHN BROWN, on Behalf of Themselves and All Others Similarly Situated; ART COHEN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

SHERRI B. SIMPSON,

Objector - Appellant,

v.

TRUMP UNIVERSITY, LLC, a New York limited liability company, AKA Trump Entrepreneur Initiative; DONALD J. TRUMP,

Defendants-Appellees.

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

BRIEF FOR ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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Dated: July 19, 2017

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INTEREST OF AMICUS CURIAE

Eric T. Schneiderman, the Attorney General of the State of New York, files this brief as *amicus curiae* to support the class-action settlement approved by the United States District Court of the Southern District of California (Curiel, J.). Like the plaintiffs in these proceedings, the Attorney General filed a lawsuit against defendants Trump University LLC and Donald J. Trump for fraudulently and illegally operating a business venture that used false promises to lure students into paying for increasingly expensive programs that purported to, but did not in fact, teach students how to invest in real estate. The Attorney General has entered into a separate settlement with defendants that provides millions of dollars of additional relief for the victims of defendants' scheme. That settlement, however, is contingent on final approval of the class-action settlement here. The Attorney General thus has a direct interest in the approval of this settlement and in the substantial relief that the settlement, together with the Attorney General's, would provide to injured students.

The Attorney General also has a broader interest in questions concerning the fairness of class-action settlements. The Attorney General

has strongly supported efforts to preserve and restore consumers' right to bring class actions.[1] And under the Class Action Fairness Act, Attorneys General are specifically empowered to participate in the approval process for class-action settlements like this one. *See* 28 U.S.C. § 1715; *see also* S. Rep. 109-14, at 5 (2005) (anticipating that Attorneys General will "voice concerns if . . . the class action settlement is not in the best interest of their citizens"). In that role, the Attorney General has regularly commented on the fairness of other class-action settlements.[2]

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[1] *See, e.g.*, Letter to Richard Cordray, Director, Consumer Financial Protection Bureau Proposed Rule Regarding Pre-Dispute Arbitration Agreements (Aug. 11, 2016), *at* www.regulations.gov/document?D=FPB-2016-0020-6183; Letter to Richard Cordray, Director, Consumer Financial Protection Bureau Regarding Pre-Dispute Arbitration Agreements (Nov. 19, 2014), *at* http://www.mass.gov/ago/docs/press/2014/cfpb-letter-11-19-2014.pdf

[2] *See, e.g.*, Amicus Br. for States in Support of Objectors, *Pollard v. Frost*, No. 17-1818 (8th Cir.) (filed July 7, 2017); Amicus Br. for States in Support of Appellant, *Day v. Persels & Assocs., LLC*, No. 12-11887 (11th Cir.) (filed June 27, 2012); Amicus Br. for States in Opposition to Proposed Settlement (Dkt. 46), *Wise v. Energy Plus Holdings, LLC*, No. 11-cv-7345 (S.D.N.Y.) (filed June 17, 2013); Amicus Br. for States in Opposition to Proposed Settlement (Dkt. 27), *Vassalle v. Midland Funding, LLC*, No. 11-cv-00096 (N.D. Ohio) (filed June 1, 2011); Amicus Br. for States in Opposition to Proposed Settlement (Dkt. 161), *Wilson v. Direct Buy, Inc.*, No. 09-cv-00590 (D. Conn.) (filed Apr. 12, 2011); Objection to Proposed Settlement (Dkt. 138); *In Re Webloyalty.com, Inc. Mktg. and Sales Practices Litig.*, MDL No. 07-01820 (D. Mass.) (filed June 1, 2009).

The Attorney General thus has an interest in ensuring that the approval of this class-action settlement is consistent with broader consumer-protection principles.

BACKGROUND

A. The Attorney General's Lawsuit

In August 2013, the Attorney General filed a lawsuit in New York state court against individual respondents Donald J. Trump and Michael Sexton, as well as several corporate entities that they controlled, including Trump University (later renamed as the Trump Entrepreneur Initiative). The Attorney General's petition alleged that, from 2005 to 2011, respondents had engaged in a pattern of fraudulent and unlawful business practices designed to funnel students to Trump University's most expensive programs, without providing those students with any genuine benefit in return. The core of this fraudulent scheme was a bait-and-switch: respondents lured vulnerable individuals into free or low-cost seminars with false promises of sound instruction in real-estate investment, then withheld the promised instruction (sometimes permanently) to induce students to commit to ever more expensive

programs. (Petition ("Pet.") at 9-11, *People ex rel. Schneiderman v. The Trump Entrepreneur Initiative, LLC*, Index No. 451463/2013 (Sup. Ct. N.Y. County Aug. 24, 2013), Dkt. No. 1.[3])

Thousands of people were deceived by respondents' scheme, including more than nine thousand people who paid $1,495 to enroll in Trump University's three-day seminars, and approximately eight hundred students who paid as much as $35,000 to enroll in the purportedly year-long "Trump Elite" mentorship programs. Exploiting Trump's perceived reputation as a successful real-estate investor, respondents promised these individuals that they would learn Trump's own investment techniques from Trump's hand-picked instructors. But at every level, Trump University's students were not given the education, mentorship, or support that they had been promised. (Pet. at 1-2.)

Based on these allegations, the petition asserted several claims. One of the Attorney General's principal claims was for business fraud under N.Y. Executive Law § 63(12) (Pet. at 32-37), which authorizes the Attorney General to obtain an injunction, restitution, damages, and other

[3] This document can be accessed by searching for the Index Number as a guest on https://iapps.courts.state.ny.us/nyscef/CaseSearch.

relief against any person or entity that engages in "repeated fraudulent or illegal acts" or "persistent fraud or illegality" while "carrying on, conducting or transact[ing] business." The Attorney General is not required to establish scienter or reliance to prevail on a claim under § 63(12). *See People ex rel. Cuomo v. Greenberg*, 95 A.D.3d 474, 483 (N.Y. App. 2012).

The petition also asserted claims of illegal conduct in violation of several statutes, including (1) N.Y. General Business Law (GBL) § 349, for deceptive practices in the conduct of a business; (2) GBL § 350, for false advertising; (3) N.Y. Education Law § 224, for misusing the term "university"; and (4) N.Y. Education Law §§ 5001-5010, for failing to obtain proper licensure as an educational institution. As remedies, the petition requested injunctive relief, restitution, disgorgement, damages, and civil penalties. (Pet. at 33-37.)

B. Procedural History of the Attorney General's Lawsuit

In 2014, Supreme Court, New York County (Kern, J.) issued two rulings that, in relevant part, narrowed the Attorney General's fraud claims. First, in January 2014, the court held that the Attorney General's statutory claim for business fraud under N.Y. Executive Law § 63(12)

was subject to a three-year rather than six-year limitations period, thus excluding some of the time in which Trump University had operated. While the court allowed the Attorney General to proceed on a common-law fraud claim, it required the Attorney General to establish various elements—specifically, scienter and reliance—that are not elements of a § 63(12) claim. *See People ex rel. Schneiderman v. Trump Entrepreneur Initiative, LLC*, 2014 N.Y. Slip Op. 30305(U), at 7-10, 2014 WL 344047, at *1 (N.Y. Sup. Ct. 2014).

Second, in October 2014, the court dismissed the Attorney General's fraud claim under § 63(12) altogether, stating that the statute does not provide a "standalone cause of action" for fraud. The court further held that, to establish a common-law fraud claim, the Attorney General would be required to prove "individual reliance by each consumer," and accordingly authorized respondents to depose each of the thousands of Trump University students nationwide "on behalf of whom [the Attorney General] is seeking to recover damages based on common law fraud." Finally, the court rejected the Attorney General's request for a summary determination on fraud liability, finding that issues of fact remained to be decided at trial. *People ex rel. Schneiderman v. Trump*

Entrepreneur Initiative, LLC, 2014 N.Y. Slip Op. 32685(U), at 8, 11, 33, 2014 WL 5241483, at *4, *6, *14 (N.Y. Sup. Ct. 2014).

On appeal, the Appellate Division reversed Supreme Court on two grounds, holding that (1) the Attorney General may assert a standalone claim for fraud under § 63(12), and that (2) such a claim is subject to a six-year statute of limitations. *See People by Schneiderman v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417-18 (N.Y. App. 2016). However, the Appellate Division affirmed the trial court's denial of summary determination on the Attorney General's "fraud claims . . . because material issues of fact exist as to those claims." *Id.* at 418-19.

Respondents moved in the Appellate Division for leave to appeal to New York's highest court, the Court of Appeals. In May 2016, the Appellate Division granted that request. *See* 2016 N.Y. Slip Op. 73667(U) (N.Y. App. 2016). Respondents filed their opening brief in the New York Court of Appeals in October 2016, arguing (among other things) for dismissal of the Attorney General's § 63(12) fraud claim altogether, or in the alternative for the application of a three-year rather than six-year limitations period for that claim. Respondents also argued that the Court of Appeals should authorize respondents to conduct extensive discovery,

including document discovery (as opposed to just depositions) into every individual Trump University student. After President Trump's election in November 2016 and the parties' initiation of settlement negotiations, the Court of Appeals suspended the briefing schedule pending further direction from the Court. (Addendum at 1.)

In addition to Court of Appeals briefing, the parties also engaged in further litigation in Supreme Court. On remand from the Appellate Division's ruling, Supreme Court ordered the parties to file motions on all outstanding issues. In September 2016, respondents filed a pretrial omnibus motion: (a) to compel the Attorney General to identify and produce for depositions all consumers for whom the Attorney General sought damages based on common-law fraud; (b) to compel the Attorney General to comply with a demand for a bill of particulars; (c) to conduct a jury trial; and (d) to direct the Attorney General to produce a list of witnesses sixty days before such trial. The Attorney General opposed respondents' omnibus motion and made a cross-motion for a ruling on certain outstanding evidentiary and discovery disputes. The motion and cross-motion are currently stayed by stipulation of the parties and by order of the court and are returnable on October 23, 2017.

C. Settlement of the Attorney General's Lawsuit

Shortly after President Trump's election in November 2016, the parties entered into settlement negotiations to resolve the Attorney General's lawsuit, in parallel with negotiations over the settlement in these class-action proceedings. Those negotiations resulted in a memorandum of agreement under which respondents agreed (1) to pay $4 million to the Attorney General to provide relief for additional victims not necessarily covered by the class-action settlement; and (2) to cease operating any educational programs in New York without obtaining the necessary licenses and complying with all applicable laws, rules, and regulations. In exchange, the Attorney General agreed to discontinue his claims against respondents. (Addendum at 2.)

The settlement was expressly made contingent on final court approval of the settlement in the federal class actions at issue here, including exhaustion of any appeals. (*Id.*)

ARGUMENT

This Court should affirm the district court's carefully reasoned approval of the class-action settlement in these proceedings. A single objector seeks to reverse this approval on the ground that she was improperly denied a further opportunity to opt out after the terms of the settlement were finalized and communicated to class members. Under the specific circumstances of this case—including what the district court accurately described as the "extraordinary amount of recovery" obtained in the class-action settlement (ER 8)—the objector's arguments are insufficient to establish that the district court abused its discretion in approving the settlement.

As a general matter, the Attorney General supports the practice of giving class members a further opportunity to opt out after the terms of a settlement are finalized. Knowing the terms of a settlement allows class members to make a fully informed choice about whether it is worthwhile to compromise their litigation rights. And such an opt-out opportunity incentivizes class counsel to craft favorable settlement terms that class members will be persuaded to adopt.

Contrary to the objector's arguments, however, the absence of such a further opt-out opportunity is not automatically fatal to a class-action settlement. As both this Court and the Second Circuit have squarely held, neither due process nor Rule 23 *mandates* that class members be given a further opportunity to opt out after the terms of a settlement are finalized. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) ("Neither due process nor Rule 23(e)(3) requires . . . a second opt-out period whenever the final terms change after the initial opt-out period."); *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982) ("no authority of any kind suggest[s] that due process requires that members of a Rule 23(b)(3) class be given a second chance to opt out"). There is a robust debate over whether the law should be changed to require such a late opt-out opportunity, and valid policy arguments would support such a reform. *See* Rhonda Wasserman, *The Curious Complications with Back-End Opt-Out Rights*, 49 Wm. & Mary L. Rev. 373, 377-78 & nn.8-11 (2007) (describing reform proposals). But current law imposes no such requirement.

The district court thus correctly recognized here (ER 18-19) that it was not *obligated* to deny approval to this class-action settlement solely due to the absence of a further opt-out opportunity. *See Denney*, 443 F.3d at 271. Instead, as the federal rules expressly provide, a district court "*may* refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." Fed. R. Civ. P. 23(e)(4) (emphasis added). As this language demonstrates, "[t]he decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion." Fed. R. Civ. P. 23(e)(3) advisory comm. note to 2003 amendment. The presence or absence of a further opt-out opportunity is thus one factor among many that a district court should consider in determining whether a particular settlement is fair, adequate, and reasonable.

Here, the district court did not abuse its discretion in approving the class-action settlement after weighing all of the relevant factors. While several factors support the district court's approval, *see Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (identifying factors), this amicus brief focuses on three in particular.

First, as the district court correctly noted, the settlement here gives class members an "extraordinary amount of recovery"—between eighty to ninety percent of the amounts they paid for Trump University courses. (ER 7-8.) And class counsel have declined to seek fees or costs (ER 8, 23-24), thus ensuring that the full amount of the settlement will go to class members. Indeed, the objector herself acknowledged at the fairness hearing that she had no objection to the amount of recovery. (ER 80; *see* Pls. Br. at 16.)

The Attorney General's experience with class actions confirms the district court's finding (ER 8) that the monetary recovery provided by this settlement is exceptional. Class-action settlements rarely make class members nearly financially whole. *See Stull v. Baker*, 410 F. Supp. 1326, 1332 (S.D.N.Y. 1976) ("It is the intrinsic nature of a settlement that no party will completely fulfill its absolute goals."). To the contrary, courts regularly approve settlements that provide class members only "a fraction of the potential recovery," *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), or that provide no cash recovery at all but only coupons, price reductions, or other similar

benefits, *see Schwab v. Philip Morris USA, Inc.*, No. 04-cv-1945, 2005 WL 3032556, at *1-*3 (E.D.N.Y. Nov. 14, 2005) (describing such settlements); 28 U.S.C. § 1712(e) (recognizing judicial authority to approve coupon settlements). The settlement in this case, by contrast, will return to class members nearly the full amount that they paid to defendants for Trump University courses. That exceptional recovery supports the district court's approval of the class-action settlement.

Second, the district court correctly recognized that the risks and delay inherent in further litigation also weighed in favor of the more immediate monetary recovery provided by this class-action settlement. (ER 6.) While the district court did not (and was not required to) consider the New York Attorney General's separate litigation in making this determination, the hurdles that the Attorney General would face in his lawsuit reinforce the court's findings about "the risks, expense, complexity, and likely duration of further litigation" in these class-action proceedings. (*Id.*)

As explained above, the Attorney General would have to surmount several obstacles before obtaining a final judgment in his lawsuit. In the pending appeal before the New York Court of Appeals, the Attorney

General faces the risk that the Court would either dismiss his statutory fraud claim under N.Y. Executive Law § 63(12) or shorten the statute of limitations for this claim. An adverse ruling on either front could limit the amount of recovery that the Attorney General could obtain on behalf of injured students. Meanwhile, at the trial level, Supreme Court has yet to resolve several ongoing disputes that could prolong the length of the trial—including respondents' demand to depose thousands of students, and the risk that the state trial court could "stay the proceedings during President Trump's tenure," as the district court here considered doing (ER 6). Proceeding with litigation would thus risk further delays and adverse rulings, potentially jeopardizing and at the very least deferring the substantial relief that is promptly provided by the Attorney General's settlement.

Finally, while class members were not given a further opt-out opportunity after the settlement was reached, the district court appropriately recognized that class members benefited from multiple procedural protections that, taken together, made it fair to bind them to the final settlement. As the district court found (ER 16), the 2015 class notice provided multiple, explicit warnings that prospective class

members would have to opt out promptly in order to preserve their right to separately sue defendants, and that class members who failed to opt out would be "bound by all further orders and judgments of the Court"—language that would encompass any order approving a settlement. (*See also* Pfs. Br. at 5-10 (discussing notice terms ordered by court).) Furthermore, class members had a full and fair opportunity to object to the terms of the settlement and to participate in the fairness hearing—as the objector here did—and the district court carefully considered and responded to all objections in its final-approval order. (ER 10-21.) These procedures ensured that all interested class members would be heard and that the district court's approval would be fully informed by their concerns.

The district court appropriately recognized that these factors, among others, weighed in favor of approval, and that the absence of a further opt-out opportunity standing alone was not enough to deprive thousands of victims of nearly complete monetary recovery. Under the specific circumstances of this case, the district court's determination represented a proper exercise of its discretion. This Court should accordingly affirm the approval of the settlement.

CONCLUSION

The district court's order of final approval of the class-action settlement should be affirmed.

Dated: New York, NY
July 19, 2017

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
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By: */s/Barbara D. Underwood*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,135 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

s/ Oren L. Zeve
Oren L. Zeve

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State of New York
Court of Appeals

John P. Asiello
Chief Clerk and
Legal Counsel to the Court

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20 Eagle Street
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May 8, 2017

Hon. Eric T. Schneiderman
Attorney General of the State of New York
Attn: Steven C. Wu, Esq.
120 Broadway, 25th Floor
New York, NY 10271-0002

Re: Matter of the People by Schneiderman v Trump Entrepreneur

Dear Mr. Wu:

This is in reply to your letter dated May 5, 2017, requesting adjournment of briefing of the above appeal, and providing a copy of the "Time Schedule Order" of the United States Court of Appeals for the Ninth Circuit, filed May 3, 2017. It is noted that the appellant's brief on the appeal in this Court was filed October 21, 2016.

The request to adjourn the briefing schedule to a date on or after September 29, 2017 is denied. In the absence of the filing of a stipulation withdrawing the appeal, additional briefing on the appeal is suspended pending further direction to counsel from this office. Counsel are directed to keep this office continually advised of the progress of the appeal in the Ninth Circuit, including in particular verification of timely compliance with each requirement of the "Time Schedule Order." If the appeal in the Ninth Circuit is terminated by any reason, counsel must notify this office immediately.

The New York Court of Appeals, through this office, may at any time upon notice to counsel lift the temporary suspension of the obligation to complete briefing on the pending appeal. Failure to comply with the directives of this letter may result in the immediate resumption of the briefing schedule.

Questions may be directed to Susan Dautel at 518-455-7701 or Margaret Wood at 518-455-7702.

Very truly yours,

John P. Asiello

JPA/MNW/ni
cc: Jeffrey L. Goldman, Esq.
Charles T. Spada, Esq.

MEMORANDUM OF AGREEMENT

1. This is a Memorandum of Agreement by and between the People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York ("NYAG") and Trump Entrepreneur Initiative, LLC f/k/a Trump University LLC, DJT Entrepreneur Member LLC f/k/a DJT University Member LLC, DJT Entrepreneur Managing Member LLC f/k/a DJT University Managing Member LLC, The Trump Organization, Inc., Trump Organization LLC, Donald J. Trump and Michael Sexton ("Respondents"), Index No. 451463/13 (the "NYAG Proceeding").

2. Pursuant to the Settlement Term Sheet ("Term Sheet") entered into by the parties in *Low v. Trump University LLC and Donald J. Trump*, No 10-cv-0940 GPC-WVG (S.D. Cal.), *and Cohen v. Donald J. Trump*, No. 13-cv-2519-GPC-WVG (S.D. Cal.) (the "Actions"), the parties in the NYAG Proceeding hereto agree to compromise and settle as follows:

3. Upon final court approval of the settlement of the Actions (including the funding of the Settlement Fund and exhaustion of any appeals in the Actions), the NYAG shall file a notice of voluntary discontinuance of the NYAG Proceeding within five (5) court days in its entirety as to all Respondents with prejudice, with each party thereto to bear its own fees and costs, and Respondents shall withdraw any appeals in the NYAG Proceeding contemporaneously with the NYAG filing.

4. Until such time as the NYAG Proceeding is dismissed, the parties hereto agree to seek a stay of all pending proceedings, including appellate proceedings, in the NYAG Proceeding.

5. Respondents acknowledge and affirm that neither Trump University LLC nor Trump Entrepreneur Initiative LLC is currently conducting business in the State of New York. Respondents will not operate or have any ownership interest above 10% in any educational institution, real estate or personal investment companies that offer seminars, classes, courses, mentorships, or other similar programs to consumers, without obtaining any necessary license(s) from the New York State Education Department ("NYSED") and complying with all applicable laws, rules, and regulations of the State of New York and any other applicable jurisdiction.

6. The Settlement Fund obtained in the Actions shall include $4,000,000 payable to the NYAG to be used for administration of monetary relief, monetary relief for non-Plaintiffs, and those non-class members of the Action who were students of Trump Entrepreneur Initiative, LLC. and, if funds remain, for the students of Trump University, costs and/or penalties in a sum not to exceed $1,000,000 for Trump University's failure to obtain a NYSED license.

7. The NYAG acknowledges that Respondents are entering into this Agreement without any admission of liability or fault. Respondents acknowledge that the NYAG's claims were brought and litigated at all times in good faith. Respondents represent and warrant, through the signatures below, that the terms and conditions of this Agreement are duly approved, and execution of this Agreement is duly authorized.

8. Except for the obligations contained herein and in the Term Sheet, the parties agree to mutually release any and all manner of claims, actions, causes of action, crossclaims, counter-claims, charges, demands, judgments, executions, suits, obligations, dues, debts or liabilities of

any kind, nature or description whatsoever, whether direct, derivative or brought in any other capacity, known or unknown, suspected or unsuspected, asserted or unasserted, accrued or unaccrued related to or in connection with the Actions and/or the NYAG Proceeding. Nothing in this Agreement shall be deemed to preclude the NYAG's review of acts, practices or courses of conduct that occur after the execution of this Agreement.

9. This Agreement is enforceable in the Courts of the State of New York.

DATED: November 18, 2016

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any kind, nature or description whatsoever, whether direct, derivative or brought in any other capacity, known or unknown, suspected or unsuspected, asserted or unasserted, accrued or unaccrued related to or in connection with the Actions and/or the NYAG Proceeding. Nothing in this Agreement shall be deemed to preclude the NYAG's review of acts, practices or courses of conduct that occur after the execution of this Agreement.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on July 19, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 19, 2017
New York, NY

/s/ Barbara D. Underwood
BARBARA D. UNDERWOOD