No. 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 and ART COHEN, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellees,

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

vs.

SHERRI B. SIMPSON
Objector-Appellant.

Appeal from the United States District Court
for the Southern District of California
Nos. 3:10-cv-00940-GPC-WVG and 3:13-cv-02519-GPC-WVG
The Honorable Gonzalo P. Curiel

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

ROBBINS GELLER RUDMAN
& DOWD LLP
PATRICK J. COUGHLIN
STEVEN F. HUBACHEK
JASON A. FORGE
RACHEL L. JENSEN
DANIEL J. PFEFFERBAUM
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

HAEGGQUIST & ECK, LLP
AMBER L. ECK
225 Broadway, Suite 2050
San Diego, CA 92101
Telephone: 619/342-8000
619/342-7878 (fax)

Attorneys for Plaintiffs-Appellees Sonny Low, J.R. Everett, John Brown and Art Cohen

Low, et al. v. Trump University, LLC, et al.
Ninth Circuit No. 17-55635

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellees Sonny Low, J.R. Everett, John Brown, and Art Cohen state that each is not a nongovernmental corporate party.

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I. INTRODUCTION

After six years of hard-fought litigation, including three trips to this Court, Plaintiffs and Defendants Trump University, LLC ("TU") and Donald J. Trump, settled these cases (and the Attorney General of New York's ("NYAG") parallel enforcement action). Plaintiffs currently anticipate that Class Members will receive 90% reimbursement of monies paid to Defendants. Unsurprisingly, the district court found this Settlement was "exceptional" in amount and "extraordinary" due to the risks faced by the Classes, noting also that Class Counsel chose not to seek fees or costs. Excerpts of Record ("ER")8.

Nonetheless, Objector-Appellant Simpson seeks to deprive the Classes of that "extraordinary" Settlement's benefits based on three contentions. First, she claims that a parenthetical in one of three versions of the Notice of Pendency ("Notice") – the long-form notice – rendered the opt-out process unfair by supposedly suggesting a second, settlement-stage opt-out opportunity, which allowed Class Members to defer their opt-out opportunity past the opt-out deadline to the date any settlement was reached. Simpson lacks standing because she did not rely on that parenthetical – she simply chose not to opt out and now asserts a challenge invented by her lawyer long after she filed a claim against the Settlement. She also lacks standing as she suffered no injury-in-fact.

Regardless, no reasonable Class Member would adopt the reading of the Notice that Simpson's attorney suggested to her. As a whole, the notices make clear that only one opt-out opportunity was available, and it expired on November 16, 2015. The then-nonexistent settlement did not guarantee another one.

Simpson also challenges the constitutionality of Fed. R. Civ. P. 23, which permits exactly what happened here: where a class is previously certified under Rule 23(b)(3), and provided an opt-out opportunity, there is no requirement of a second, settlement-stage opt-out under Rule 23(e)(4). Simpson and her *amici*, animated by a policy preference for a second opt-out, effectively ask this Court to declare Rule 23 unconstitutional. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 635 (9th Cir. 1982), forecloses their claim.

Finally, Simpson claims the district court abused its discretion by approving a settlement that fully complies with Rule 23's opt-out rules and represents an "exceptional" recovery. It was no abuse of discretion for the district court to choose not to doom this "exceptional" settlement by putting the policy preferences of Simpson and her *amici* ahead of the interests of the Classes.

II. QUESTIONS PRESENTED

A. Simpson challenges the opt-out process because the long-form notice, which was one of three components of the Notice that all set an opt-out deadline of

November 16, 2015, contained a parenthetical that supposedly guaranteed a second, settlement-stage opt-out opportunity. Simpson's challenge raises two standing issues:

1. Whether Simpson demonstrated an injury-in-fact despite offering no evidence she would have opted out by November 16, 2015, if the long-form notice had not contained the parenthetical.

2. Whether Simpson demonstrated that the parenthetical caused her purported injury-in-fact even though the district court found she did not rely on it in choosing not to opt out by the November 16, 2015 deadline.

B. Whether a parenthetical in the long-form notice stating that a Class Member who does not opt of the Classes may "ask to be excluded" from a later settlement guaranteed that Class Member an unqualified unilateral right both to exclude herself from a later settlement ***and*** opt out of the Classes altogether, even though the Notice stated that any Class Member who, like Simpson, does nothing by November 16, 2015 "give[s] up any rights to sue [the Defendants]." ER106.

C. Whether this Court should declare Fed. R. Civ. P. 23(e)(4) unconstitutional because it does not require that members of classes previously certified under Rule 23(b)(3) be granted a second, settlement-stage opt-out opportunity – an argument foreclosed by *Officers for Justice*, 688 F.2d 615.

D. Whether the district court abused its discretion in approving the Settlement because it does not allow a second, settlement-stage opt-out opportunity – a result permitted by Rule 23.

III. STATEMENT OF THE CASE

A. The Actions

Plaintiffs filed two actions in this case. In *Low*, TU "students" sued Defendants TU and Trump, alleging false promises of access to his real-estate techniques as taught by his "hand-picked" faculty at his elite "university." Plaintiffs alleged violations of consumer-protection, false-advertising, and elder-financial-abuse laws of California, Florida, and New York. In *Cohen*, another TU "student" sued Trump for similar misrepresentations, alleging a federal-law claim.

Plaintiffs vigorously pursued these actions for over six years of hard-fought litigation, including one fully briefed appeal to this Court and two Fed. R. Civ. P. 23(f) petitions.

Even after the district court decertified the damages class in the *Low* action, requiring potentially years of individual damages actions, Plaintiffs vigorously pursued the Classes' claims, and were prepared to begin trial in November 2016. Indeed, Plaintiffs successfully opposed Defendants' several attempts to continue the trial. The matter settled on the eve of the trial.

B. The Class-Certification Notice

On February 21, 2014, the district court certified a class of TU students in *Low*. Low298:35-36.[1] On October 27, 2014, the court certified a nationwide class in *Cohen*. Cohen53:22-23.

On September 18, 2015, the district court decertified the *Low* action as to damages. Supplemental Excerpts of Record ("SER")117. On September 21, 2015, the district court approved a joint notice covering both cases.[2] The order stated "[a]ny Class Member who does not send a completed, signed request for exclusion to the Notice Administrator post-marked on or before the Opt-Out Deadline ***will be deemed to be a Member of the Class for all purposes and bound by all further orders and judgments of the Court***."[3]

The Notice comprised three forms of notice: mailed, publication, and long-form. SER94-95. Each made it clear that a Class Member who did nothing by the deadline would be bound by the judgment entered in the class actions and would give up any right to continue or commence an action against Defendants. ER106-12, 252-53; SER121.

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[1] The record-citation form is Case Name, Docket Number, Page Number.

[2] SER91. Because the *Low* and *Cohen* notices are identical, Plaintiffs cite the *Low* documents.

[3] SER96. Unless otherwise indicated, citations are omitted and emphasis is added.

The mailed notice, which Simpson received, ER89, was two pages long. Its first paragraph notified Class Members that although the lawsuits were unresolved, Class Members' "legal rights are affected, and [they] have ***a choice to make now***." ER252. The second page addressed that choice in a section entitled "What Are Your Options?", explaining that to remain a Class Member – and retain the possibility of a recovery – "you do not need to do anything now." ER253. By remaining a Class Member, "you will be legally bound by all orders and judgments the Court makes." ER253.

There was a second choice:

> If you do not want to be a part of either or both lawsuits, you must take steps to exclude yourself (sometimes called 'opting-out'). If you exclude yourself, you cannot receive money from the lawsuit – if any is won – but you will not be bound by any Court orders or judgments. If you want to start or continue your own lawsuit against Trump University and Trump regarding their Live Events, ***you must exclude yourself***.

ER253. The notice explained how to submit an exclusion request, and that further information was available via the litigation website or a toll-free phone number. ER253.

In short, the mailed notice informed Class Members that they had a "choice to make," it had to made "now," and that only the option of "exclud[ing] yourself" permitted a Class Member "to start or continue [her] own lawsuit against [Defendants]." ER252-53.

The first page of the long-form notice begins with a summary including a prominent boxed display:

- The Court has not decided whether Trump University and Trump did anything wrong. There is no money available now, nor is there any guarantee that there will be. However, your legal rights are affected, and you have a choice to make now:

YOUR LEGAL RIGHTS AND OPTIONS IN THESE LAWSUITS	
DO NOTHING	**Stay in these lawsuits. Await the outcomes. Give up certain rights for the possibility of receiving money at a later time.** By doing nothing, you keep the possibility of getting money or benefits that may come from a trial or settlement. But, you give up any rights to sue Trump University and Trump separately about the same legal claims in these lawsuits.
ASK TO BE EXCLUDED	**Get out of the lawsuits. Get no money from any recovery. Keep rights.** If you ask to be excluded from these lawsuits and money or benefits are later awarded, you will not share in those monies or benefits. But, you keep any rights to sue Trump University and Trump separately about the same legal claims in these lawsuits.

- Your options are explained in this Notice. To ask to be excluded, you must act before November 16, 2015.

ER106. That succinct description of those options is preceded by an admonition to Class Members of a temporal imperative: "your legal rights are affected, and ***you have a choice to make now***." ER106.

The long-form notice, available on the internet, described a binary choice: "do nothing" or "ask to be excluded." ER106. The "do nothing" option allowed the Class Member to retain "the possibility of getting money or benefits that may come from a trial ***or*** settlement," but a Class Member choosing the "do-nothing" option – Simpson's choice – would "give up ***any*** rights to sue Trump University and Trump separately about the same legal claims in these lawsuits." ER106. Thus, the result of exercising the "do-nothing" option is the same regardless of whether there was a trial

or a settlement – a "do-nothing" Class Member would not be permitted to maintain an individual action. ER106.

Conversely, the second option – "ask to be excluded from these lawsuits" – ensured that a Class Member would "not share in" monies or benefits awarded in the lawsuits, but would "***keep any rights to sue*** Trump University and Trump ***separately***." ER106. Immediately below the description of the Class Members' options, they were advised that "[t]o ask to be excluded, ***you must act before November 16, 2015***." ER106.

The lengthier discussion of "Your Rights and Options" in the body of the long-form notice is introduced with a confirmation of the cover page's description of the binary nature of the decision to be made and the temporal imperative that it be made now: "You have to decide whether to stay in the Classes ***or*** ask to be excluded before the trial, ***and you have to decide this now***." ER111. Thus, even before the "do-nothing" and "ask-to-be-excluded" options are discussed, the long-form notice clarifies that there are only two options and one must be chosen now.

Immediately after setting the two-choices, decide-now parameters of the Class Members' options, ¶13 poses the question "What happens if I do nothing?" ER111(¶13). That paragraph reiterates, without qualification, that "[b]y doing nothing, you are staying in one or both of the Classes." ER111(¶13). It also states that "[i]f 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)." ER111(¶13). The long-form notice contains no additional information regarding the disjunctive parenthetical, although it advises that "the two sides have not settled either case," ER109(¶9), and such a settlement "may or may not be reached," ER111(¶14) – thus warning that any future settlement's terms are necessarily unknowable. And nothing in the parenthetical suggests that a nonexistent settlement somehow vitiates the notices' repeated admonitions that a Class Member wishing to be excluded from the Classes – and to retain the right to sue separately – must act "***now***." ER106, 111, 252. Class Members were informed that the exclusion deadline was November 16, 2015. ER106, 111(¶15).

The long-form notice warned that "***if you do nothing now***, regardless of whether the Plaintiffs win or lose the trial, ***you will not be able to sue*** (by way of separate lawsuit) Trump University and Trump." ER111(¶13). The description of the "do-nothing" option concludes by stating, without qualification, that if a Class Member does nothing the Class Member "will also be legally bound by all of the Orders and Judgments the Court makes in these class actions." ER111(¶13).

The section addressing the consequences of exclusion is similarly clear: "If you exclude yourself from one or both Classes – which also means to remove yourself from the Classes, and is sometimes called 'opting-out' of the Classes – you will not get any money or benefits from these lawsuits even if the Plaintiffs obtain them as a

result of the trial or from any settlement (which may or may not be reached)." ER111(¶14). If excluded, the Class Member "may then be able to sue or continue to sue Trump University and Trump." ER111(¶14). The long-form notice also specified that "[t]o ask to be excluded, you must send an 'Exclusion Request' in the form of a letter sent by mail." ER111(¶15).

Ten Class Members timely opted out, and the district court permitted three more post-deadline opt outs. SER78, 85; ER15. Simpson was not among them.

C. The Settlement

In November 2016, over a year after the opt-out deadline, shortly before trial in *Low*, and shortly after Defendant Trump was elected President, the parties reached a global-settlement agreement – including the NYAG action. ER120. TU agreed to pay $25 million without admitting liability. ER125, 132. The Settlement was conservatively estimated to pay Class Members a minimum 50% of what they paid Defendants, less refunds. SER66. The NYAG was to receive $4 million to settle his pending action, and pay notice and administration expenses.[4]

The Settlement recited that Class Members received the Notice the previous year, and had enjoyed an opt-out opportunity until November 16, 2015. ER124.

[4] ER132. Simpson falsely asserts that the district court "recognized" a "promised [opt-out] right" when the Settlement was announced. Opening Brief ("OB")11. The Settlement terms before it did not permit a second opt out. The court merely stated it would "address[]" opt outs, ER207, as required by Fed. R. Civ. P. 23(e)(4).

None of the numerous attorneys involved in these actions, nor a single Class Member, expressed confusion regarding the earlier class notice and opt-out deadline. The Settlement confirmed that individuals who had not opted out before the deadline were deemed Class Members for all purposes, and that no additional opt-out opportunity was permitted. ER143. Success on Simpson's opt-out appeal will contravene that provision, depriving all Class Members of the Settlement's benefits. ER149.

On December 29, 2016, Defendants provided the notice required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1715(b), to all appropriate federal and state officials. ER3. No governmental entity objected. Nor did the NYAG, a Settlement participant.

Pursuant to the Settlement, on January 17, 2017, a TU-successor entity paid $25 million into an escrow account for *pro rata* distribution to Class Members. SER51(¶14). Because Class Counsel acted on a *pro bono* basis, ER144, there will be no attorneys'-fees reduction. Class Counsel expect Class Members will recover 90% of their payments to Defendants if approval of the Settlement is affirmed. ER86.[5]

The Settlement provided for – and the district court approved – a notice plan to advise Class Members of their ability to file claims. ER126-28, 143-44. On January 4, 2017, the settlement administrator sent a long-form notice describing

[5] Simpson's brief misleadingly adheres to the outdated 50%-reimbursement estimate. OB14 n.4.

settlement procedures to 8,253 addresses, seeking to reach potential Class Members. ER170-76; SER56(¶6). The first page of the notice advised Class Members of their options, including submitting a claim, objecting, asking to speak at the fairness hearing, and doing nothing. ER170. The notice informed Class Members how to submit a claim, ER174, and the notice and claim form confirmed that only those who had opted out by the deadline could maintain an individual action against Defendants. ER174, 176; ER182.

The notice explained Class Members' unlimited ability to object: "You can tell the Court that you don't agree with the settlement or some part of it." ER175. "If you're a Class Member, you can object to the settlement ***if you don't like any part of it***." ER175. The notice explained the district court "will consider" the objections at the final approval hearing. ER175.

The deadline for submitting claims was March 6, 2017, over three weeks before the March 30, 2017 Final Approval Hearing. SER3.

D. Simpson's Objection

Simpson submitted a claim on February 1, 2017. SER22, 24-25. The claim states: "I understand that I am bound by the terms of any judgment in these actions and may not bring a separate lawsuit for these claims." SER25.

Nothing in Simpson's claim or her contemporaneous conduct suggested that she believed she had a right to a second opt-out opportunity. Indeed, Simpson spoke with

Class Counsel Amber Eck more than two-dozen times since July 2010, including numerous phone conversations throughout 2015 and 2016, yet never expressed any confusion about the opt-out process or what would happen in the event of a settlement. ER96. Simpson never indicated she wished to opt out of the class action and pursue separate litigation. ER96. Simpson never contacted Ms. Eck after the Settlement was announced regarding the Settlement or opting out, ER96, nor did she contact the claims administrator. SER35.

More than a month after submitting her claim, Simpson, through counsel Gary Friedman, objected to the Settlement, contending that she had a "constitutionally protected right to opt out of the class." Low592:2. Her supporting memorandum argued a due-process right to an additional opt-out opportunity and also requested that the district court exercise its discretion to require a second opt-out opportunity as a condition of approval of the Settlement. Low593. Simpson submitted a declaration, but did not claim that the Notice had misled her into choosing not to opt out before the deadline. ER101.

Plaintiffs opposed her objection, arguing Simpson lacked standing to challenge the Notice as she was not "aggrieved" and that there was no causal link between the Notice and her decision not to opt out by November 16, 2015. Low612:9-13. One day before the fairness hearing, Simpson filed a declaration asserting "I ***believe*** that, shortly after learning a class had been certified, I went online, visited the case website

and reviewed the detailed notice that was posted there." ER89. She offered that it "would have been typical for [her] to review that notice online," ER89, but provided no explanation what "typical" meant in that context. Thus, Simpson never asserted that she actually relied on the long-form notice in choosing not to opt out by the deadline. Simpson's appellate brief misleadingly characterizes her beliefs and surmises as facts, OB10, ignoring the district court's factual finding that she "did not read or understand the [¶]13 parenthetical to guarantee her a second opt-out opportunity." ER17.

Plaintiffs objected that Simpson's eleventh-hour declaration did not establish Simpson's standing. Low616:3-5.

E. Attorney Friedman's Solicitation of Simpson

Plaintiffs offered evidence supporting an inference that, when she chose not to opt out in response to the Notice, Simpson did not actually believe she retained a settlement-stage opt-out right pursuant to a then-nonexistent settlement agreement. Specifically, Plaintiffs pointed out that Simpson, who frequently communicated with Class Counsel, never expressed that view to Class Counsel and she filed a claim to settlement proceeds without any reservation.

Plaintiffs also offered evidence that, on February 23, 2017, a male attorney solicited another Class Member, Robert Guillo, claiming that Guillo "could still opt out of the Trump University class action settlement and that his firm would represent

[Guillo] and other former students of Trump University." SER41. Guillo's "caller ID indicated that the phone call came from Myriam Gilles[']s]" phone number at Cardozo School of Law. SER41. Professor Gilles is Friedman's wife.[6] Plaintiffs contended that Friedman's solicitation of another Class Member supports an inference that he similarly solicited Simpson, even though she had already filed a claim.

F. The Fairness Hearing

At the fairness hearing, Plaintiffs emphasized that rather than the question of the effect of Simpson's submission of a claim affirming her understanding that she had no right to sue individually, the main question was an "objective" one – was the notice that the Classes received reasonable. ER63. Plaintiffs explained that, as a whole, the notices made clear that Class Members were required to decide between opting out and remaining in the Classes when the notices were issued; there was no third option. ER65-66. Simpson never offered evidence that she chose not to opt out based on the long-form notice. ER66.

Simpson raised three issues: she urged a due-process right to a second opt-out opportunity, claimed that she was denied due process because the Notice was constitutionally inadequate based upon the long-form notice's ¶13, and contended the district court should exercise its discretion to allow a second opt-out. ER70, 78-79.

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[6] Low612:10. Professor Gilles is one of the *Amici* Law Professors. Their brief does not mention her connection to Friedman.

She further contended it would violate due process to require her to forfeit her claim to a portion of the Settlement in order to make her opt-out objection. ER77. The district court never held she forfeited her claim.

The district court recognized its discretion to require a second opt-out opportunity and reacted incredulously to the suggestion that the parties could have "divest[ed]" it of its discretion. ER69-70. It stated, "[e]ven as of this moment, I still have that discretion." ER73.

Simpson's response when asked whether she had an objection to the settlement's fairness was unequivocal: "None. None, Your Honor. None." ER80. She termed the Settlement "laudable" and "beneficial." Low593:15.

Simpson has since changed her tune, claiming the Settlement offered "one-seventh" of what she could recover and grossly misstating her likely recovery under the Settlement. OB13-14. She assumes prevailing in a RICO trial for treble damages without a word about the risks she faces (catalogued by the district court, ER6-8), the unique challenges in seeking to try a sitting President, and the time required to resolve multiple trials and appeals. Her reassessment is divorced from reality. She also understates her likely recovery under the Settlement by 44% because she misleadingly assumes a 50% recovery while actually over 90% is expected. ER7.

Simpson's counsel, responding to evidence of solicitation contrary to N.Y. R. Prof. Conduct 7.3(a)(1), effectively admitted soliciting Simpson:

> Mr. Friedman: But in terms of me calling [Simpson], the idea that that violated some ethical rule is absolutely false.
>
> The Court: It's false that you called her, or it's false that that would represent an ethical breach?
>
> Mr. Friedman: It's false that that would represent an ethical breach.

ER80.[7]

When asked whether Friedman's solicitation of Simpson weeks after she had submitted a claim was relevant to the court's analysis of her contention based on ¶13 of the long-form notice, Simpson's counsel conceded that Simpson's complaint was merely general dissatisfaction, unmoored from the Notice's content: it "is not sitting well with her," and "[s]he expected this right to opt out." ER81. The ¶13 parenthetical played no role in her thinking: "***She is not sitting there consciously aware that she knew clause such-and-so and paragraph such-and-so gave her this [opt-out] right***, and she was not aware of the due process path." ER81. Counsel followed up that concession by observing that Simpson filed her claim so that it would be preserved "whether she comes up with a path to sort of put together an objection here or not." ER81. She did not "come up with" something, ER81, until she spoke to

[7] Friedman denied violating ethical rules because he did not act for "his own pecuniary interests." ER80. Nonetheless, Simpson's "go-fund-me" campaign – operated by Friedman – seeks to raise $275,000 for Simpson's legal costs. *See* https://www.generosity.com/fundraising/help-sherri-take-trump-to-trial (last visited July 11, 2017).

Friedman, who spuriously assured the district court that her objection was "not, sort of, rigging something up." ER82.

Plaintiffs objected that Simpson lacked standing because she did not rely on the parenthetical. ER83.

G. The Final Approval Order

The district court granted the parties' joint motion for final approval of the Settlement, finding the Settlement was fair and reasonable and noting its familiarity with the strengths of both parties' cases and the risks generally associated with complex litigation and also the risks specific to this unique litigation. The latter included prevailing at trial in *Low* against the President-Elect (or perhaps the President); "prevailing in thousands of individual damages proceedings, which, by any estimate, would have taken several years to complete; collecting a judgment against TU; and prevailing in a lengthy appeal process." ER6.

In *Cohen*, Plaintiffs faced the risk of decertification of the Class in its entirety, or alternatively, decertification as to damages as in *Low*; a potential stay for the duration of President Trump's tenure; a jury trial against a sitting (or former) President; and the appeal process. ER6. The district court found the amount offered in settlement, estimated by Plaintiffs as "at least 90% of [Class Members'] Net Purchase Amounts," ER7, would "provide[] significant and immediate recovery." ER8. The court lauded the recovery as "exceptional" in amount and "extraordinary"

due to the risks faced by the Classes, noting that Class Counsel chose not to seek fees or costs. ER8.

The court observed that there was only one procedurally valid objection (Simpson's), although 8,253 notices were sent to potential Class Members. ER10.

As to Simpson's objection, the court held both that she lacked standing and that her claims were meritless. As to standing, the court found that Simpson's supposed injury – the denial of a further opt-out opportunity – could not be redressed because she had "affirmed that she 'may not bring a separate lawsuit.'" ER13.

On the merits, the court rejected Simpson's claimed due-process right to a second opt-out opportunity based on *Officers for Justice*, 688 F.2d 615. ER14. Due process was satisfied because the Notice granted Simpson an opportunity to opt out. ER14-15, 19-20.

The court rejected Simpson's due-process notice challenge because it, unlike Simpson and her *Amici*, considered the Notice as a whole, concluding the ¶13 parenthetical could not objectively be read to contradict "the clear language in the rest of the 2015 Class Notice," which made clear that Class Members would not have an unconditional right to opt out if a future settlement was reached. ER16-18. At most, ¶13 suggested a right "to ***ask*** the Court to exclude her from the Settlement." ER17 (emphasis in original).

The court found Simpson did not ***subjectively*** entertain the reading of ¶13 that she advances here:

> [B]y Simpson's counsel's own admission at the final approval hearing, Simpson, who is an attorney, did not read or understand the [¶]13 parenthetical to guarantee her a second opt-out opportunity. Simpson's belief that she is entitled to a settlement-stage opt-out opportunity was not based on an objective reading of the Notice's language. Nor was it based on a subjective misunderstanding of the Notice's language. Rather, Simpson did not identify the [¶]13 parenthetical as important in any way, until she conferred with counsel.

ER17. The court thus held Simpson's failure to read ¶13 as guaranteeing a settlement-stage opt-out opportunity supported the conclusion that the reading originating with Simpson's counsel – *i.e.*, the reading advanced on appeal – was not objectively reasonable. ER17-18.

The court also found that reading ¶13 as guaranteeing an opt-out right in the event that a future settlement was reached was "untenable" in light of Fed. R. Civ. P. 23(e)(4), which gives the trial court discretion to withhold approval from a settlement unless a new opt-out opportunity is granted. ER19. It found that ¶13 did not obviate that discretion, and indeed Simpson asked the court to exercise it. ER19.

Finally, the district court rejected Simpson's argument that it should exercise its discretion to require a second opt-out opportunity as a condition of approving the Settlement. It rejected her argument that an opt-out was required every time a case settles post-certification as contrary to both Rule 23 and *Officers for Justice*. ER20. It

further noted that while Simpson contended that the Notice gave her a right to request an opt-out, the court had entertained that request. ER20.

The district court also supported its exercise of discretion by relying upon the significant risks remaining in the case as described above. ER20. Moreover, the court noted that when the matter settled, it had not yet ruled on the motion to decertify the *Cohen* matter in its entirety. ER20-21.

Lastly, the court rejected Simpson's concerns regarding the releases of claims that the Class could not pursue, observing that "'[t]he weight of authority holds that a federal court may release not only those claims alleged in the complaint, but also a claim "based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented ***and might not have been presentable in the class action***."'" ER21 (quoting *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992)) (emphasis in original).

IV. SUMMARY OF ARGUMENT

Each form of the Notice informed Class Members of the *Low* and *Cohen* class actions and of the decision they were required to make by November 16, 2015: whether to remain in the Classes and surrender any right to bring a separate action against Defendants, or to exclude themselves and retain those rights. Simpson chose to remain in the Classes and surrender any right to sue TU or Trump. This appeal is her effort to be relieved of the consequences of her choice.

Simpson claims that the overall Notice was so misleading as to deny her due process. She lacks standing to raise that claim. Because she offers no evidence that she would have opted out of the Classes by November 16, 2015, had the long-form notice not included the ¶13 parenthetical, she has no injury-in-fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Additionally, the district court's factual finding that Simpson did not rely on the parenthetical in choosing to remain in the Classes demonstrates that she cannot show the requisite "causal connection." *Id.* She lacks standing.

Regardless, Simpson's notice arguments are unavailing. The long-form notice advised Class Members that by doing nothing, "you give up ***any*** rights to sue Trump University and Trump separately." ER106. Nothing in the long-form notice contradicted that unambiguous warning.

Simpson's argument that Class Members would have interpreted a parenthetical referencing an ability to "request to be excluded from any settlement" as guaranteeing them a right to opt out is a non-starter under the average-class-member approach. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 113-14 (2d Cir. 2005). No average Class Member would read "ask to be excluded" – unaccompanied by contextual cues – to mean "compel exclusion." Simpson's contrary arguments make no sense under the average-class-member standard: such Class Members do not consult precedents and notice experts; they rely on the words' plain English meaning.

Simpson also contends that due process compels a settlement-stage opt-out opportunity even though Fed. R. Civ. P. 23 does not in cases certified under Rule 23(b)(3). Simpson's constitutional challenge to Rule 23 is foreclosed by *Officers for Justice*, 688 F.2d 615.

Finally, Simpson argues that the district court abused its discretion by not conditioning approval of the Settlement on affording a settlement-stage opt-out opportunity under Fed. R. Civ. P. 23(e)(4). At bottom, she and *Amici* Law Professors contend that declining to order a second opt-out opportunity is by definition an abuse of discretion. Rule 23(e)(4) precludes that result.

V. ARGUMENT

A. Simpson Lacks Standing to Challenge the Notice

1. Standard of Review

Standing is reviewed *de novo*. *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). This Court "review[s] a district court's fact-finding on standing questions for clear error." *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th Cir. 2014).

2. Simpson Suffered No Injury-in-Fact, Nor Could She Demonstrate Causation if She Had

Simpson argues only that she has standing because she is a Class Member. OB41. But "[s]imply being a member of a class is not enough to establish standing. One must be an aggrieved class member." *In re First Capital Holdings Corp. Fin.*

Prod. Sec. Litig., 33 F.3d 29, 30 (9th Cir. 1994). Simpson "'must independently satisfy Article III'—that is, [s]he must demonstrate standing to appeal independent of h[er] ability to object before the district court." *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016).

An objector must "present an actual case or controversy for the court to resolve." *Knisley v. Network Assocs.*, 312 F.3d 1123, 1126 (9th Cir. 2002). "A party must satisfy three conditions to have constitutional standing to [appeal]: It must allege some concrete injury in fact; that injury must be fairly traceable to the defendant's actions; ***and*** … it must be likely, and not merely speculative, that a favorable decision will provide redress." *Id.* She "'must demonstrate standing separately for each form of relief sought,'" including her purported due process claim. *Id.* at 1127. As "the party invoking federal jurisdiction," Simpson "bears the burden of establishing these elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Simpson claimed she was denied her due-process rights under *Phillips Petroleum Co. v. Shutts*, which holds "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. 797, 812 (1985). The mailed notice – received by Simpson – provided that opportunity. ER89, 253. Nonetheless, Simpson contends the long-form notice contained language promising a second, settlement-stage opt-out opportunity.

Simpson lacks Article III standing to advance that claim because she suffered no injury-in-fact: there is no record evidence that Simpson would have chosen to opt out by the November 16, 2015 deadline had the Notice not contained the ¶13 parenthetical about which she complains. Moreover, even if Simpson suffered an injury-in-fact due to not opting out, it would not be "fairly traceable to [¶13]," *Knisley*, 312 F.3d at 1126, because she did not rely on that portion of the long-term notice in choosing not to opt out.[8]

a. Simpson Has Not Demonstrated an Injury-in-Fact

Simpson must demonstrate "some concrete injury in fact." *Knisley*, 312 F.3d at 1126. An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized, … and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan*, 504 U.S. at 560. "[P]articularized … mean[s] that the injury must affect the [appellant] in a personal and individual way." *Id.*, n.1.

Simpson's primary issue on appeal turns on whether the overall Notice was so defective as to deny her the due-process right to fair notice of her right to opt out.

[8] ER17. In addition to the fact that Simpson did not rely on ¶13 in deciding not to opt out by the deadline, ER17, Simpson submitted her objection long after she filed a claim and only after Friedman solicited her. The district court addressed the standing issues raised by Simpson's uniquely attorney-manufactured objection under the rubric of redressability, ER13, but Plaintiffs address those facts as implicating injury-in-fact and causation. Such constitutional issues "are jurisdictional: they cannot be waived by any party, and there is no question that a court can, and indeed must, resolve any doubts about this constitutional issue *sua sponte*." *City of L.A. v. Cty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009).

ER78. There can be no dispute that Simpson – and the other Class Members – were, as required by *Shutts*, offered an opt-out opportunity by the Notice which explained Class Members' options to enable them to decide, by November 16, 2015, whether they would opt out of the class actions or stay in. ER106. Ten Class Members timely opted out pursuant to that Notice, and the district court permitted three more to do so after the deadline expired. SER78, 85; ER15. Simpson chose to remain in the Classes.

Simpson seeks to be relieved of the consequences of that decision, claiming that the overall Notice was so defective as to deny due process:

> [The Court:] So, as I understand your argument, it is that you are saying, essentially, that first opt-out opportunity was denied because of the form, the lack of clarity in the 2015 notice? Is that what you are saying?
>
> Mr. Friedman: Yes. That's what I am saying. I am saying two things, but I think that that's a good way to put it. That is right.

ER78.[9] Having challenged the denial of the "first opt-out opportunity," Simpson must assert "a personal and individual" injury, *Lujan*, 504 U.S. at 560 n.1, in connection with that deprivation.

That purported notice imperfection existed, if at all, when the Notice was issued. As the district court ordered, the Notice was to convey that "[a]ny Class

[9] Simpson previously explained that her fallback argument was to invoke the district court's discretion to withhold approval of the Settlement unless a second opt-out opportunity was offered. ER70.

Member who does not send a completed, signed request for exclusion to the Notice Administrator post-marked on or before the Opt-Out Deadline will be deemed a Member of the Class ***for all purposes*** and bound by ***all*** further orders and judgments of the Court." SER96. Simpson contends that the Notice did not convey that message, creating at least an ambiguity about whether there might be a second opt-out opportunity in the future under a then-nonexistent settlement agreement. Thus, Simpson contended the "first opt-out opportunity was denied because of … the lack of clarity in the 2015 notice." ER78.

The Notice was intended to explain a binary choice to the Class Members: they needed to opt out or remain in the Classes "for all purposes" as of November 16, 2015. SER96. Because Simpson chose to remain in the Classes, she can only claim to have suffered "a personal and individual" injury, *Lujan*, 504 U.S. at 560 n.1, if she would have chosen instead to opt out ***as of the deadline*** if the Notice had not supposedly guaranteed a second opt-out opportunity. In other words, for that supposed notice defect to have actually injured Simpson, she must demonstrate that if the long-form notice had omitted the ¶13 parenthetical, she would have chosen to opt-out by November 16, 2015.

Simpson made no such showing. The only evidence she offered was her March 29, 2017 declaration, filed the day before the fairness hearing, stating: "If given the opportunity, ***I will*** opt out of the class actions and pursue individual litigation."

ER93. That declaration, which contemplates future action based on the assumption that a second opt-out opportunity will be granted in the future, says nothing about what she would have done as of November 16, 2015. Because she therefore has not shown any injury arising from the denial of the "first opt-out opportunity," ER78, Simpson failed to "bear[] the burden" of demonstrating an injury-in-fact. *Spokeo*, 136 S. Ct. at 1547.

Simpson's failure is analogous to that in *Brody v. Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003). In *Brody*, the appellant was not given notice of a July 6, 1999 public use meeting regarding the possible condemnation of his property. *Id.* at 106. Brody filed an action in federal court claiming a due-process injury based on that denial of notice, but the defendant argued he suffered no injury-in-fact. *Id.* at 108-11.

The *Brody* court agreed, holding that nothing in the record demonstrated "what [Brody] would have said or responded to had he attended the July 6 meeting; indeed, he has not alleged that he would have said anything at all at the July 6 meeting." *Id.* at 111. Consequently, it "conclude[d] that Brody lacks standing to challenge the lack of individual notice of the second hearing." *Id.*

Just as Brody failed to meet his burden to demonstrate what he would have said at the July 6 meeting, Simpson has failed to offer evidence of what she would have done on the November 16, 2015 deadline. She therefore has not demonstrated an injury-in-fact.

Nor can she claim that some other Class Member might have timely chosen to opt out. "[A] litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties." *See Coalition of Clergy v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). Simpson may only assert third-party standing if she meets three criteria: "(1) injury-in-fact; (2) close relationship to the third party; and (3) hindrance to the third party." *Id.* She cannot meet any of them and, in any event, because she made no argument that she is entitled to assert third-party standing, here or below, she waived it. *See Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013); *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005).

b. Simpson's Injury, if Any, Is Not "Fairly Traceable" to the Notice

In addition to injury-in-fact, to demonstrate standing "there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly ... trace[able] to the challenged action of the defendant.'" *Lujan*, 504 U.S. at 560. This "component[] of the constitutional standing inquiry … examines the causal connection between the assertedly unlawful conduct and the alleged injury." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). Thus, Simpson must demonstrate that the purported defect in the Notice provided somehow caused the denial of her "first opt-out opportunity." ER78. She cannot.

(1) Simpson Must Demonstrate Reliance

Simpson's claim boils down to an assertion that she was denied her "first opt-out opportunity" because she was somehow misled by the Notice, particularly by the long-form notice's ¶13 parenthetical. But she must demonstrate a "causal connection" between the supposedly misleading notice and her decision not to opt-out by November 16, 2015. *See Lujan*, 504 U.S. at 560. A showing of a causal connection between a misrepresentation and the damage suffered by the victim of the misrepresentation requires a showing of reliance.

This point is well-illustrated in fraud cases. *See, e.g., Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 939 (9th Cir. 2009) ("Reliance establishes the causal connection between the alleged fraud and the securities transaction."); *Jimenez-Nieves v. United States*, 682 F.2d 1, 4 (1st Cir. 1982) ("one essential element of misrepresentation remains reliance by the plaintiff himself upon the false information"). The same standard logically applies to Simpson's claim that she was denied the opportunity to opt out because she was misled by the ¶13 parenthetical. Thus, Simpson must show that she relied upon the supposedly misleading content of the long-form notice in choosing not to opt out before the deadline. She cannot.

In evaluating the effect of a misleading notice in another context, each court to consider the issue has held that in order to demonstrate Article III standing, the party urging a due-process violation must demonstrate reliance on the defective notice. *See*

Loudermilk v. Barnhart, 290 F.3d 1265, 1269-70 (11th Cir. 2002); *Torres v. Shalala*, 48 F.3d 887, 893 (5th Cir. 1995); *Gilbert v. Shalala*, 45 F.3d 1391, 1393-94 (10th Cir. 1995); *Day v. Shalala*, 23 F.3d 1052, 1066 (6th Cir. 1994); *Burks-Marshall v. Shalala*, 7 F.3d 1346, 1349-50 (8th Cir. 1993); *accord Gilbert v. Sullivan*, 48 F.3d 1211, 1995 U.S. App. LEXIS 4373, at *8-*9 (1st Cir. Mar. 6, 1995) (per curiam) (unpublished). In this line of cases, the Social Security Administration Commissioner provided a denial notice to unsuccessful applicants for benefits that advised them that if they did not challenge their adverse determination within the specified time period, they maintained "the right to file another application at any time." *Day*, 23 F.3d at 1065. But future review under a new application would be limited by the *res judicata* effect of the previous determination. *See Loudermilk*, 290 F.3d at 1269. Thus, just as Simpson claims that the supposedly misleading notice denied her an opt-out, benefits applicants were induced to forego their appeals, settling only for the limited relief available in subsequent applications.

The Sixth Circuit held that the notice violated due process but "the only claimants who could have been injured by the inadequacy are those who ***detrimentally relied on the inadequate denial notice***." *Day*, 23 F.3d at 1066. The Tenth Circuit similarly reasoned that the "argument that mere receipt of an allegedly defective denial notice is sufficient to establish standing is without merit. ***We believe that in order to satisfy the causal connection requirement set forth by Lujan, Plaintiffs***

must show that they relied on the challenged language in the denial notices." *Gilbert*, 45 F.3d at 1394. *Burks-Marshall* held there was no standing to raise a due-process challenge because the applicant "does not say that after reading the notice she understood it to mean that she could apply again at any time for benefits for the periods involved in her denied claims, and that, for that reason, she decided to forego further review at the time." 7 F.3d at 1350.

While it is true that this Court reversed in a case involving the same notice, *see Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990), *Gonzalez*, which predated the solid wall of authority described above, did not address the standing issue. *See id.* Whether that was because the applicant in *Gonzalez* had established standing or because the issue was overlooked is unknown. But no matter – *Gonzalez* is no authority for the proposition that Simpson need not demonstrate standing as required in *Loudermilk*, *Torres*, *Gilbert*, *Day*, and *Burks-Marshall* because "[c]ourts 'are not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.'" *Minority TV Project, Inc. v. FCC*, 736 F.3d 1192, 1211 (9th Cir. 2013) (en banc).[10]

[10] *Loudermilk* erroneously stated *Gonzalez* decided the standing issue that *Gonzalez* did not address. 290 F.3d at 1269. Regardless, *Minority TV* establishes *Gonzalez* has no precedential value on the standing issue. *See Minority TV*, 736 F.3d at 1211; *see also Sullivan*, 1995 U.S. App. LEXIS 4373, at *8 ("[t]he question [of reliance] was not discussed in *Gonzalez*").

Thus, whether Simpson frames her due process claim as based upon notice or some other theory, she lacks standing unless she can demonstrate a causal connection between the Notice's content and her injury as *Lujan* requires.[11]

(2) The District Court Properly Found that Simpson Did Not Rely on ¶13

The district court found, as a matter of fact, that Simpson did not rely on the ¶13 parenthetical in choosing not to opt out before the November 16, 2015 deadline. ER17. It found Simpson's counsel conceded that "Simpson, who is an attorney, did not read or understand the [¶]13 parenthetical to guarantee her a second opt-out opportunity." ER17. That was not clear error. *See Ollier*, 768 F.3d at 865 (clear error standard).

"A finding of fact is clearly erroneous 'if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *United States v. Pineda-Doval*, 692 F.3d 942, 944 (9th Cir. 2012). Under any standard, the district court's finding that Simpson did not rely on the ¶13 parenthetical is unassailable.

[11] In addition to her notice argument, Simpson (for the first time) claims some unidentified due process violation based on authority requiring the government to comply with its regulations. OB33. The Social Security Administration is presumably obligated to provide a review process, but due process was violated only when review was denied because an applicant relied on the defective notice. *See, e.g.*, *Gilbert*, 45 F.3d at 1394 ("Without such reliance, the injury is not fairly traceable to the challenged action."). The same is true for Simpson's purported due-process violation.

First, Simpson's counsel's concessions alone demonstrate that the district court is correct. He admitted that Simpson was not "consciously aware that she knew clause such-and-so and paragraph such-and-so gave her this [settlement-stage opt-out] right." ER81. She could not have chosen ***not*** to opt out by November 16, 2015 based on a purported right of which she was not "consciously aware." Similarly, he explained that Simpson originally filed a claim as a protective measure "whether she comes up with a path to sort of put together an objection here or not." ER81. She would not have to worry about "com[ing] up with" something if she had actually relied upon the Notice.

Second, Attorney Friedman did not deny that he solicited Simpson, which supports an inference that the supposed lack of clarity in ¶13 originated with Friedman – not with Simpson when she made her choice not to opt out. ER80. As the court found, Simpson, who was in constant contact with Class Counsel, "did not identify the [¶]13 parenthetical as important in any way, until she conferred with counsel." ER17.

Finally, Simpson's second declaration avers, at most, her receipt of the mailed notice – not challenged here. ER89. The declaration contains no evidence of reliance on the ¶13 parenthetical, asserting only that she "believe[d]" that she read the long-form notice and it would be "typical" for her to do so, whatever that means. ER89. Information-and-belief statements are traditionally insufficient to create a triable issue, *see Cermetek, Inc. v. Butler Avpak, Inc.*, 573 F.2d 1370, 1377 (9th Cir. 1978), and

Simpson's declaration is even more suspect – she cannot provide direct evidence of her own state-of-mind. But even if her second declaration had any probative value, it was certainly not " illogical," "implausible," or " without support in … the record," *Pineda-Doval*, 692 F.3d at 944, to reject it based on her attorney's admissions and the corroborating evidence.

B. The Notice Was Not Defective

1. Standard of Review

Simpson's notice challenge is reviewed *de novo*. *Silber v. Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994). But Simpson overlooks the fact that while due process requires constitutionally adequate notice, Rule 23 "accords a wide discretion to the District Court as to the form and content of the notice." *Mendoza v. United States*, 623 F.2d 1338, 1350-51 (9th Cir. 1980); *accord Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1336-37 (1st Cir. 1991); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979).

2. The Notice Was Not Misleading

The "notice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). But *Mullane*'s prescription comes with a dose of common sense: "if with due regard for the practicalities and peculiarities of the case these conditions are

reasonably met, the constitutional requirements are satisfied." *Id.* at 314-15. Thus, "'[t]he criterion is not the possibility of conceivable injury.'" *Id.* at 315. The flexibility inherent in *Mullane*'s common-sense approach is reflected in *Mendoza*'s recognition of the district court's "wide discretion … as to the form and content of the notice." *See* 623 F.2d at 1350-51.

This Court recognizes that notice in a class action case need not be "perfect." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015); *accord Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (district court was obligated to "provide minimal due process") *cert. dismissed*, 511 U.S. 117 (1994). Numerous authorities confirm that understanding. *See, e.g., Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 423-24 (6th Cir. 2012) (approving a notice that "might influence a person's decision about whether to opt out of the class" but "was not so misleading that it failed to apprise potential class members of their rights and deprived them of 'minimal procedural due process protection'"); *In re Deepwater Horizon*, 739 F.3d 790, 819-20 (5th Cir. 2014) (a "minor legal ambiguity would not be enough to render the class notice deficient").

In short, "[t]he yardstick against which [courts] measure the sufficiency of notices in class action proceedings is one of reasonableness." *Bank of Am. Corp. v. Pub. Pension Funds*, 772 F.3d 125, 132 (2d Cir. 2014). "[N]otice is 'adequate if it may be understood by the average class member.'" *Wal-Mart*, 396 F.3d at 113-14;

accord Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1227 (11th Cir. 1998); *In re Corrugated Container Antitrust Litig.*, 611 F.2d 86, 88 (5th Cir. 1980). Thus, the question here is whether, based upon the entire Notice, the average Class Member could have reasonably believed she was guaranteed a settlement-stage opt-out opportunity under a nonexistent settlement agreement.

The Notice was required to comply with the dictates of due process. "The [class] notice should describe the action and the plaintiffs' rights in it," and "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 811-12. Fed. R. Civ. P. 23 requires, *inter alia*, "[t]he notice must clearly and concisely state in plain easily understood language" the following: "(v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2). The Notice here sufficed.

a. There Is No Evidence Any Class Member Was Misled

The notice here was "reasonably calculated, under all the circumstances, to apprise interested parties[, *i.e.*, the class members] of the pendency of the action and afford them an opportunity to present their objections," *Mullane*, 339 U.S. at 314, particularly given the Supreme Court's admonition that "'[t]he criterion is not the

possibility of conceivable injury.'" *Id.* at 315. *Mullane*'s admonition is apt here, ***where there is no record evidence that the Notice misled even a single Class Member***. Simpson, the only Class Member who objected on this ground, "did not read or understand the [¶]13 parenthetical to guarantee her a second opt-out opportunity." ER17. Her purported post-hoc confusion arose long after the expiration of the opt-out deadline after being solicited by her attorney. ER17. Thus, Simpson's own evidence demonstrates, at most, only "'the possibility of conceivable injury,'" 339 U.S. at 315, which is insufficient under *Mullane*.

The *Amici* Law Professors would have this Court ignore Simpson's utter failure to offer evidence of confusion by speculating that the claim form somehow cowed Class Members – but not Simpson – into foregoing objections to the lack of a settlement-stage opt-out opportunity. Law Professors ("LP")13 & n.23. Nonsense. The notice of settlement stated: "If you're a Class Member, you can object to the settlement ***if you don't like any part of it***." ER175. The settlement notice thus conveyed an unlimited objection right, including the ability to object to the preclusion of further opt outs.

The claim form did not say otherwise. It reiterates that Class Members cannot pursue individual actions, ER182, but in doing so it merely confirms, but does not create, a prohibition caused by the choice not to opt out by November 16, 2015. Nothing in it limits objections.

Moreover, Defendants complied with CAFA, notifying all appropriate federal and state officials. "CAFA's notification requirement … safeguards the State's ability to participate, comment, or object during the Rule 23 class action settlement approval process, fulfilling CAFA's purpose to 'provide a check against inequitable settlements.'" *Cal. v. IntelliGender, LLC*, 771 F.3d 1169, 1182 (9th Cir. 2014). No governmental entity objected to the Notice or the lack of a second opt-out opportunity. The same is true of the NYAG, an actual participant in the Settlement, whose clients were subject to the same prohibition on a second opt-out opportunity.

b. The Notices Refute Simpson's Interpretation

The average Class Member would not have understood the notices to guarantee a second, settlement-stage opt-out opportunity as a term of a nonexistent settlement agreement. The first paragraph of the mailed notice notified Class Members their "legal rights are affected, and [they] have ***a choice to make now***." ER252. Class Members thus understood the time frame in which they needed to decide, *i.e.*, "now," not at some future date when a then-nonexistent settlement might be achieved.

The mailed notice's "Options" section explained that choosing to remain a Class Member by doing nothing meant retaining the "possib[ility] of get[ting] money in the cases." ER253. But the decision to remain in the Classes was consequential: "If you remain in either or both Classes, you ***will*** be legally bound by ***all*** orders and judgments the Court makes." ER253. Contrary to Simpson's post-hoc reading, Class

Members "will be" – not might be – bound by "all" – not some – "orders and judgments." ER253.

The alternative to remaining in the Classes – which means a Class Member "will be legally bound by all orders and judgments" – was "tak[ing] steps to exclude yourself," which would allow the Class Member "to start or continue" individual litigation. ER253. The notice gave explicit instructions on how to "exclude yourself," including a deadline and address to which to send the "Exclusion Request." ER253. Nothing in the mailed notice suggested anything other than a binary choice that had to be made "now" – opting out later pursuant to a then-nonexistent settlement was not on the menu.

The mailed notice referenced additional information on the case website, and the long-form notice available there – the one challenged here – confirmed the binary choice described in the mailed notice. Its cover page introduces the description of the Class Members' options by stating "your legal rights are affected, and ***you have a choice to make now***," ER106, not some future date when a settlement might be reached:

- The Court has not decided whether Trump University and Trump did anything wrong. There is no money available now, nor is there any guarantee that there will be. However, your legal rights are affected, and you have a choice to make now:

YOUR LEGAL RIGHTS AND OPTIONS IN THESE LAWSUITS	
DO NOTHING	**Stay in these lawsuits. Await the outcomes. Give up certain rights for the possibility of receiving money at a later time.** By doing nothing, you keep the possibility of getting money or benefits that may come from a trial or settlement. But, you give up any rights to sue Trump University and Trump separately about the same legal claims in these lawsuits.
ASK TO BE EXCLUDED	**Get out of the lawsuits. Get no money from any recovery. Keep rights.** If you ask to be excluded from these lawsuits and money or benefits are later awarded, you will not share in those monies or benefits. But, you keep any rights to sue Trump University and Trump separately about the same legal claims in these lawsuits.

- Your options are explained in this Notice. To ask to be excluded, you must act before November 16, 2015.

ER106.

The two – not three as Simpson contends – choices are thus succinctly described, leaving no doubt that doing nothing, and staying in the Classes, means that the Class Member "[g]ive[s] up certain rights for the possibility of receiving money at a later time." ER106. What are the "certain rights" that are given up? By doing nothing, "you give up ***any*** rights to sue Trump University and Trump separately." ER106. ***Any***. No ambiguity there.

Nor is there any trial/settlement dichotomy: a "do-nothing" Class Member retains "the possibility of getting money or benefits that may come from a trial ***or*** settlement," but loses "any rights" to file an individual action. ER106. The consequences of doing nothing are pellucid.

The opt-out option is explained as well, informing Class Members that if they "ask to be excluded" from the Classes, they "will not share in [the] monies or

benefits" gained in the litigation, if any. ER106. But the Class Member "keep[s] any rights to sue Trump University and Trump separately." ER106. These explanations, included as part of a binary menu of options and employing unconditional language such as "you will not share" and "you keep any rights to sue," convey to the Class Members that they will be excluded from the Classes if they ask.

The term "any rights" is used twice. Doing nothing means the Class Member loses "any rights" to sue; being excluded means the Class Member keeps them. ER106. Simpson ***chose*** to do nothing and give up "any rights to sue Trump University and Trump separately." ER106.

Simpson, however, contends that this explicit language was somehow stripped of meaning by a single parenthetical phrase in the long-form notice's ¶13. She is wrong.

¶13 is immediately preceded by a confirmation of the binary nature of the Class Members' choices: "You have to decide whether to stay in the Classes ***or*** ask to be excluded before the trial, ***and you have to decide this now***." ER111(¶13). ¶13 then addresses the question "What happens if I do nothing?" ER111(¶13). It reiterates that "[b]y doing nothing, you are staying in one or both of the Classes," ER111(¶13), the consequence of which is already known: "you give up ***any*** rights to sue Trump

University and Trump separately." ER106.[12] Indeed, not one word of ¶13 contradicts the unqualified statement that "any rights" to sue are relinquished by doing nothing.

The statement on which Simpson now fixates, the assertion that "[i]f 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)," ER111(¶13), says nothing about restoring rights to sue, yet both the mailed, ER253, and long-form notices, ER106, explicitly associate exclusion from the Classes with the right to sue. ¶13 does not. Thus, the unambiguous waiver of the right to sue described in the "do-nothing" section of the long-form-notice-cover page is uncontradicted, ER106, leaving nothing to lead a reasonable Class Member to believe that the right might be magically restored someday by ¶13, as the district court correctly held. ER16-18.

Similarly, Simpson's view that ¶13 created a future right to a settlement-stage opt-out opportunity – presumably as a term of a nonexistent settlement agreement or required by a nonexistent judicial order – is also undercut by the structure of the notices as a whole. The notices uniformly describe a binary – not ternary – choice that must be made "now," not in some hazy future. ER106, 252-53. No reasonable Class Member would assume that "pick one of these two now" really means "pick one of these two now or maybe choose a third option someday."

[12] Simpson ignores this language.

The disjunctive parenthetical – "or how to ask to be excluded from any settlement" – does not replicate the references to the "lawsuits" in the language creating the binary choice. The mailed notice states that "[i]f you do not want to be a part of either or both lawsuits, you must take steps to exclude yourself," ER253, while the long-form notice also addresses "exclu[sion] from these lawsuits." ER106. "Lawsuit" covers trials ***and*** settlements.

¶13's reference to "exclu[sion] from any settlement," ER111, rather than "from these lawsuits," ER106, suggests a more narrow meaning than exclusion from the Classes altogether and supports Class Counsel's contention, ER64-65, that the parenthetical addressed Class Members who might wish to refuse a direct settlement payment and thus might want "to ask to be excluded from any settlement." ER111(¶13). Some Class Members made similar requests. SER15. Simpson rejects this interpretation, accusing Class Counsel of lying about it. OB30-31. But the Federal Judicial Center ("FJC") recommends that "claims should be paid directly without requiring claims forms." *See Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0 at 6 (last visited July 11, 2017). Therefore, Class Counsel was obliged prepare for that possibility. As it turned out, the Settlement permitted, and the district court approved, a claims-submission process, so Class Members could exclude themselves from the

settlement by simply not submitting a claim (although this would not restore Class Members' long-passed opt-out opportunity; it meant they would not receive a payment. (SER15)).

Simpson complains that Class Counsel's intent is irrelevant – what matters is how Class Members would read the Notice. OB30-31. Plaintiffs agree that the average-class-member focus is proper. *See Wal-Mart*, 396 F.3d at 113-14. Simpson's concession demonstrates the irrelevance of the self-styled Plain-Language Notice Experts' ("PLNE") implausible account – without citing contemporaneous materials – of their drafting of the FJC's model notices (they are virtually identical to the long-form notice). They claim their model notice was intended to make a settlement-stage opt-out opportunity ***mandatory***. PLNE9-10. It is certainly strange that supposedly *pro bono* academics would (without revealing their agenda) slip their policy preference for a mandatory second opt-out into a model supposedly based on Rule 23, which addresses the issue by granting discretion to trial courts. *See* Fed. R. Civ. P. 23(e)(4). Regardless, the experts' intent is irrelevant; for all the foregoing reasons, an average Class Member would understand that doing nothing by the deadline, as Simpson did, surrendered "***any*** rights to sue [Defendants]." ER106.

The district court concluded that "[a]t most, the plain language of [¶]13 confers on Simpson a right to be notified of how to ***ask*** the Court to exclude her from the Settlement." ER17 (emphasis in original). The word "ask" – in the phrase "or how to

ask to be excluded from any settlement" – does not imply a *fait accompli*; no person speaking regular English would read it that way. As demonstrated above, the mailed notice and the long-form notice provided context by making exclusion part of a binary choice that must be made now and by accompanying the ask-to-be-excluded phrase with unconditional language such as "you will not share" and "you keep any rights to sue." ER106. That context assures Class Members that those exclusion requests will be honored.

But none of that context is included in ¶13. It just says "ask." And the word "ask," shorn of the context just described, does not guarantee an affirmative response. No reasonable Class Member would read it otherwise, and the shifting contexts and differing language belie Simpson's complaints about multiple meanings of the term "ask." OB25-26.

That conclusion is confirmed by the Notice Experts' risible prevarication regarding ¶13's "ask to be excluded" phrase: they say it was "worded (out of respect for the district court) as a ***request***." PLNE10 (emphasis in original). Apparently, the Notice Experts think average Class Members believe the phrase "ask to excluded" really means "compel exclusion," saying to themselves, "it looks like a mere request, but I know it's really more like a command but the notice experts are too respectful to say it that way." It is hardly "hyperliteral," OB25, to conclude that the average Class Member would read the word "ask" to bear its normal, everyday meaning.

Even if a reasonable reading of the Notice supported Simpson's challenge, the average Class Member would not read the disjunctive parenthetical as granting rights contradicting the remainder of the Notice because there was no existing settlement. The Notice advised that "the two sides have not settled either case" and a settlement "may or may not be reached." ER109(¶9), 111(¶14). The parenthetical could not have granted rights pursuant to a nonexistent settlement agreement.

Simpson contends that the district court's reading of the Notice is contrary to *Officers for Justice* and *Shutts*. OB26-27. Her argument is frivolous. The district court recognized it was charged with determining how the average Class Member would read the Notice, ER73-74, and the average Class Member is not likely to consult *Officers for Justice* and *Shutts* to guide her interpretation of the Notice. But if she did, she would quickly realize that those cases are irrelevant because they do not address the issue of how an average Class Member would read the language in context, as the district court did.

Although Simpson apparently believes average Class Members read cases, OB26-27, she criticizes the district court for a "lawyerly" reading of the notice as consistent with Rule 23. OB27. But there is nothing more "lawyerly" – or more unjustified – than refusing to read the word "ask" in the normal English sense in a notice intended for average people.

Simpson also claims the unpublished district-court matters that she cites demonstrate that "courts and class-action litigators have interpreted the exact same language, used in the exact same way, to confer a right to opt out at the settlement stage." OB28. While the cited cases include the disputed phrase, nothing in those documents suggests an "interpret[ation]" of that language by "courts and class-action litigators" to "confer" anything.

Finally, Simpson complains that she was not actually told how to ask to be excluded and that the district court could not grant that relief in any event. OB29-30. She is wrong on both counts. The notice of settlement stated: "If you're a Class Member, you can object to the settlement if you don't like ***any part of it***." ER118. As the district court found, ER20, the settlement notice provided a vehicle through which Simpson could place her "request" before the court. She thus received the most that ¶13 could be read to provide.

Moreover, the district court had discretion to allow Simpson to opt out despite the opt-out period's expiration. *See Silber v. Mabon*, 957 F.2d 697, 700 (9th Cir. 1992). Additionally, the court recognized its Rule 23(e)(4) discretion to require a second opt-out opportunity, ER73, and chose not exercise it. ER20-21. The long-form notice promised nothing more.

And even if there were some ambiguity in the long-form notice, "'[t]he criterion is not the possibility of conceivable injury.'" *Mullane*, 339 U.S. at 314. Any

supposed ambiguity in the Notice does not aid Simpson's challenge; the "'average class member,'" *Wal-Mart*, 396 F.3d at 113-14, would understand the long-form notice's unambiguous language: "[b]y doing nothing, you are staying in one or both of the Classes," ER111(¶13), the consequence of which is that "you give up ***any*** rights to sue Trump University and Trump separately." ER106. Simpson did nothing, and she gave up "any rights to sue [Defendants]." ER106. Thus, contrary to Simpson's claim, she ***was*** specifically told "there would be no turning back." OB32. Consequently, Simpson's due-process notice challenge is unavailing, even if she has standing to raise it (and she does not, *supra* at 23-35), because nothing in the Notice could have misled her when she chose not to opt out by November 16, 2015.

Simpson also appears to claim that even if there was no notice defect, there is some other mysterious due process violation arising from the mere presence of the parenthetical in the long-form notice and the failure to grant a second opt-out opportunity. She offers no relevant authority, citing only a case saying that the government must comply with procedures set out in its regulations and a case about procedural violations in parole revocation proceedings. OB33. Again, Simpson lacks standing to raise whatever issue this is, nothing in the Notice misled her, and she did not rely on ¶13 in choosing not to opt out in any event. Because there is no evidence that ***any*** Class Member lost the right to opt out based on this language, there is no due process violation. That is not the argument she raised below, ER78-79, which failure,

along with her cursory briefing, waives the issue. *See Rivera*, 735 F.3d at 902; *Maldonado v. Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009).

C. Fed. R. Civ. P. 23(e)(4) Does Not Violate Due Process

1. Standard of Review

Simpson's constitutional challenge to Rule 23 is "reviewed *de novo*." *United States v. Laursen*, 847 F.3d 1026, 1031 (9th Cir. 2017).

2. *Officers for Justice* Forecloses Simpson's Claim

Simpson claims that independent of her notice claim, she enjoys a constitutional right to a second, settlement-stage opt-out opportunity. *Officers for Justice* forecloses that argument: due process does not "require[] that members of a Rule 23(b)(3) class be given a second chance to opt out." 688 F.2d at 635. Although Simpson claims it was "outstripped" by subsequent Supreme Court decisions, OB36-37, this panel is bound by *Officers for Justice* unless it is "clearly irreconcilable" with "intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Simpson has not attempted to meet that standard. Nor could she: she does not cite a single case holding that due process requires a ***second*** opt-out opportunity; *Shutts*, 472 U.S. at 812, and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011), address only a single opt-out opportunity. She agrees, OB34, and thus concedes *Officers for Justice* forecloses her challenge.

a. Simpson Asks This Court to Declare Rule 23 Unconstitutional

In cases such as this one – a class action seeking damages under Rule 23(b)(3) – Rule 23 contemplates notice and an opt-out opportunity if there is a class certification without a settlement (as occurred here). *See* Fed. R. Civ. P. 23(c)(2)(B). The Rule prescribes procedures for the settlement of such a case: "If the class action was previously certified under Rule 23(b)(3), the 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). The Rule thus establishes that parties ***can*** reach settlement agreements that do not permit a second opt-out opportunity – as they did here – subject to the safety valve of the district court's ***discretion*** to withhold approval. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006); *accord Moulton v. United States Steel Corp.*, 581 F.3d 344, 354 (6th Cir. 2009). Rule 23(e)(4) permits exactly what occurred here.

Simpson's contention that a settlement-stage opt-out opportunity is mandatory thus cannot be reconciled with Rule 23(e)(4). Indeed, Simpson and her *amici* devote many pages of briefing to a naked policy preference for a settlement-stage opt-out opportunity, decrying the result that the Rule explicitly authorizes. While Simpson denies seeking a "'blanket rule,'" OB36, she argues the Rule should not apply "where the claims are as valuable as [Simpson's] might be." OB34. Under her approach,

Rule 23(e)(4) applies ***only*** so long as no class member has a claim that "might" be as valuable as Simpson's (her loss was approximately $19,000). She would thus gut the Rule.

This Court should not be misled by Simpson's disavowal of a "blanket rule." Nor should it sustain her challenge; Rule 23(e)(4) permits settlements without a second opt-out opportunity but functions within the overall Rule 23 scheme which guarantees an opt-out opportunity in every case, just as *Shutts* requires.

b. *Officers for Justice* Is Binding Authority

Even if Simpson had argued that *Officers for Justice* was "clearly irreconcilable" with subsequent Supreme Court authority, such a contention would be meritless.

Officers for Justice addressed a class action challenging allegedly discriminatory employment practices. The district court certified the class under Fed. R. Civ. P. 23(a) and (b)(2) for injunctive and declaratory relief – and allowed an opt-out opportunity – but deferred certification under Rule 23(c) on damages claims until liability was determined. 688 F.2d at 621. The case later settled pursuant to a consent decree that included damages but did not permit a second opt-out opportunity, and an objector argued because "the class was [now] certified under Rule 23(b)(3), he must be permitted to exclude himself from th[e] class." *Id.* at 633.

This Court carefully examined the previous certification, and the notice provided, and concluded that "[g]iven the breadth and nature of the claims asserted, the class action allegations in plaintiffs' complaint, and the procedures adopted by the district court, it appears clear that this case was in essence a Rule 23(b)(3) class action." *Id.* at 634. The procedures that were followed conformed to Rule 23(b)(3), and "[a]ll named plaintiffs and class members were given the opportunity to exclude themselves from the class. [The objector] did not." *Id.* at 634-35.

This Court therefore concluded that the objector's "argument amounts to a request to now exercise that option once passed over [, *i.e.*, the opt-out option], and after being fully informed of the terms of the settlement." *Id.* at 635. Thus, like Simpson, the objector sought a do-over on his choice not to opt out.

Officer for Justice rejected the argument that due process required a second opt-out opportunity: "Although some class action settlements have provided such an opt-out feature, they are unusual and probably result from the bargaining strength of the class negotiators. Nevertheless, we have found no authority of any kind suggesting that due process requires that members of a Rule 23(b)(3) class be given a second chance to opt out. ***We think it does not***." *Id.* Policy reasons supported that determination: "to hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law." *Id.* Indeed, "'[a]llowing objectors to opt

out would discourage settlements because class action defendants would not be inclined to settle,'" *id.*, which is precisely the situation here, where success for Simpson will deprive the remaining Class Members of an "extraordinary" settlement's benefits. ER8.

Simpson quarrels with *Officer for Justice*'s finding that the first opt-out opportunity satisfied due process on the specific facts of that case. OB36-37. But that has no logical effect on this Court's analysis of the claim to a second opt-out; the question faced there was whether, assuming a first, constitutional opt-out opportunity, did due process require another. Simpson observes that "due process demands an opportunity to opt out," OB37, but the portion of *Officers for Justice* she complains about does not speak to that issue; it holds only that ***a second*** such opportunity is not required. Nothing in *Shutts* or *Dukes* undercuts that conclusion, as Simpson concedes. OB34. At most, Simpson's arguments go to whether *Officers for Justice* is wrong on whether the first opt-out opportunity satisfied due process, ***not*** to whether due process requires such an opportunity twice.[13] *Officers for Justice* forecloses her constitutional claim.

[13] *Officers for Justice*'s second opt-out holding would be binding even if it were dicta – the "panel confront[ed] an issue germane to the eventual resolution of the case, and resolve[d] it after reasoned consideration in a published opinion." *de Garcia v. Holder*, 621 F.3d 906, 911 (9th Cir. 2010).

D. The District Court Did Not Abuse Its Discretion in Approving the Settlement

1. Standard of Review

The district court's refusal to withhold approval of the settlement absent a second opt-out opportunity is reviewed for abuse of discretion. *Denney*, 443 F.3d at 271; *accord Moulton*, 581 F.3d at 354. Because the district court correctly identified its discretionary authority, ER73, this Court will affirm unless the district court's application of the rule to the facts "is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

2. Rejection of Simpson's Attorney-Manufactured Challenge Is No Abuse of Discretion

a. Simpson's Arguments Are Meritless

The district court did not abuse its discretion in approving a settlement that is "exceptional" in amount and "extraordinary" due to the risks faced by the Classes, noting also that Class Counsel acted *pro bono*, and that Class Members had a previous opportunity to opt out. ER8, 14-15, 23. Simpson's (and the Law Professors') contrary argument is simply another iteration of Simpson's constitutional challenge; they seek to define as an abuse of discretion every failure to withhold approval from a settlement that does exactly what Rule 23 permits – a negotiated settlement in a previously certified case that does not include a second, settlement-stage opt-out opportunity.

The district court explained in detail the risks Plaintiffs face in a potentially years-long trial against the President-Elect (or the President), as well as the risk of decertification in the *Cohen* matter. ER6-8. It also cited the "extraordinary" nature of the Settlement under which Class Members will recover over 90% of their monies paid to Defendants if the Settlement becomes final. ER7-8. Not even Simpson objected to the Settlement's fairness. ER80. The court could also properly consider that if Simpson prevails in her appeal, the remaining Class Members will be deprived of that "extraordinary" benefit – there will be no settlement.

Simpson, however, sought an exercise of discretion based on her post-hoc, attorney-manufactured complaint that the Notice was misleading – a claim urged even though when she chose not to exercise her right to opt out, Simpson herself "did not read or understand the [¶]13 parenthetical to guarantee her a second opt-out opportunity." ER17. The district court's rejection of Simpson's ploy is certainly not "illogical, implausible, or without support in inferences that may be drawn from the record." *See Hinkson*, 585 F.3d at 1263. While Simpson recycles her notice contentions in support of her abuse-of-discretion argument, OB39, she has no response to the district court's factual finding that she did not rely on the purportedly misleading parenthetical. Indeed, there is no evidence that ***any*** Class Member was misled, and thus no reason to scuttle the Settlement.

Simpson argues that a second opt-out opportunity would provide Class Members with helpful information regarding a settlement that they would not have had at a first opt-out opportunity and even advocates a presumption in favor of second opt-outs. OB38-39. But those are arguments in favor of amending Rule 23; the Rule permits settlements without a second opt-out, and a result specifically contemplated by the Rule cannot be transformed into an abuse by nothing more than a cadre of disgruntled academics.

b. The Law Professors' Arguments Are Waived and, in Any Event, Meritless

(1) Waiver

The Law Professors' brief boils down to an assertion that both *pro bono* Class Counsel and the class representatives should have been disqualified and the Settlement is therefore invalid. LP4, 20-21. Those issues were not raised below or in Simpson's brief. This Court "do[es] not review issues raised only by an *amicus curiae*," *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998), especially when the issue "is raised for the first time on appeal, and not by any party." *Id.* at 1141 n.1. Moreover, because Simpson "did not adopt [the Law Professors'] argument in [her] brief[,] the issue has been waived." *Id.*

(2) The Law Professors' Quarrel Is with Rule 23

Amici Law Professors' contention that Class Counsel and the class representatives should be disqualified, LP20-21, misstates the record and the law.

They contend that "when class counsel negotiates a settlement that prevents class members from opting out and then designs a claims-submission system to withhold settlement benefits from class members who wish to object to the settlement on this basis," it is an abuse of discretion to approve the settlement. LP18. While the settlement does not permit opt-outs – as Rule 23 allows – it does not withhold benefits from objectors. The ***only*** reason that Simpson has not received a distribution is the same reason the deserving Classes of plaintiffs have been deprived – Simpson's appeal.

Nor is it true that Class Counsel "deprive[d] class members … of any effective means to speak out against the settlement's ban on the exercise of their right under Rule 23(e)(4) to request an opportunity to opt out." LP13-14. The settlement notice advised Class Members of the widest possible opportunity to object: "you can object to the settlement ***if you don't like any part of it***." ER175. And nothing stopped Class Members from making a Rule 23(e)(4) request. In fact, Simpson made one.

To be sure, Simpson herself lacks standing to challenge the Notice. But that is not, as made clear in this brief, because no Class Member could have standing. Her lack of standing is based on her personal failure to prove she would have opted out in 2015 and the fact – found by the district court – that she did not rely on the ¶13 in choosing to remain in the Classes. ER17. Neither of those Simpson-specific details suggests that the Classes could not object because of the claim form (as the Professors

suggest, LP16), which merely reiterates what was clear after the November 16, 2015 deadline: "non-opt-out" Class Members had no right to file a separate action. ER106.

The Professors' argument that the parties somehow usurped the district court's Rule 23(e)(4) discretion is strange. The Law Professors state: "class counsel gave away something that was not in its power to give" in agreeing to a no-opt-out settlement and that "[t]he court, and not counsel, is charged with the decision to permit time-of-settlement opt-outs." LP19. First, the Law Professors don't explain why Class Counsel lacks that "power;" Rule 23 authorizes the Settlement the parties reached. Second, Class Counsel did not strip the district court of discretion. The court confirmed it had that discretion at the fairness hearing. ER73. Third, the Law Professors misread Rule 23(e)(4), which does not "charge[]" the district court "with the decision to permit time-of-settlement opt-outs." LP19. Rather, a "court ***may refuse to approve*** a settlement unless it affords" a second opt-out. Fed. R. Civ. P. 23(e)(4). The parties retain the ultimate decision whether to bargain for that term in the first instance and on whether to abandon the Settlement if faced with such a refusal to approve.

But ultimately, the Law Professors' brief is just another backdoor challenge to Rule 23. They claim Class Counsel created a conflict between Class Members who wish to enjoy the benefits of the Settlement and those who wish to undo the Settlement by opting out. LP19-20. But that supposed conflict is a necessary incident

of the policy determination, embodied by Rule 23, to authorize settlements that do not permit a settlement-stage opt-out opportunity. It will always be possible that some class member might, as Simpson did, experience buyer's remorse after foregoing her time-of-certification opt-out opportunity. And structural considerations in such cases incentivize no-opt-out settlements: "Prof. Silver[, *amicus* here,] testified that ***non-opt out settlements often benefit plaintiffs classes*** … because the promise of obtaining global peace provides an incentive for defendants to offer a more generous settlement than they otherwise would." *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 665 (N.D. Tex. 2010); *see also Cal. Pub. Employees' Ret. Sys. v. ANZ Secs., Inc.*, No. 16-373, __ U.S. __, 2017 U.S. LEXIS 4062, at *24 (June 26, 2017) ("separate individual suits [by opt outs] may … increase a defendant's practical burdens"). If this Court finds a conflict here, it will find a conflict in every settlement that does not offer a settlement-stage opt-out opportunity, thus rendering Rule 23(e)(4) a dead letter, because the structural considerations identified by Professor Silver will inhere in every such case.

VI. CONCLUSION

This Court should affirm the judgment.

DATED: July 12, 2017

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
PATRICK J. COUGHLIN
STEVEN F. HUBACHEK
JASON A. FORGE
RACHEL L. JENSEN
DANIEL J. PFEFFERBAUM

s/ PATRICK J. COUGHLIN
PATRICK J. COUGHLIN

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

HAEGGQUIST & ECK, LLP
AMBER L. ECK
225 Broadway, Suite 2050
San Diego, CA 92101
Telephone: 619/342-8000
619/342-7878 (fax)

Attorneys for Plaintiffs-Appellees Sonny Low, J.R. Everett, John Brown and Art Cohen

STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6)

Plaintiffs-Appellees' counsel is not aware of any related cases pending before this Court.

s/ PATRICK J. COUGHLIN
PATRICK J. COUGHLIN

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that **PLAINTIFFS-APPELLEES' ANSWERING BRIEF** uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 14,000 words according to the word count provided by Microsoft Word 2010 word processing software.

s/ PATRICK J. COUGHLIN
PATRICK J. COUGHLIN

9th Circuit Case Number(s) 17-55635

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****

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