

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

<p>SONNY LOW; J. R. EVERETT; JOHN BROWN, on Behalf of Themselves and All Others Similarly Situated; ART COHEN, Individually and on Behalf of All Others Similarly Situated, <i>Plaintiffs-Appellees,</i></p> <p>SHERRI B. SIMPSON, <i>Objector-Appellant,</i></p> <p>v.</p> <p>TRUMP UNIVERSITY, LLC, AKA Trump Entrepreneur Initiative, a New York limited liability company; DONALD J. TRUMP, <i>Defendants-Appellees.</i></p>
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No. 17-55635

D.C. Nos.  
3:10-cv-00940-  
GPC-WVG  
3:13-cv-02519-  
GPC-WVG

OPINION

Appeal from the United States District Court  
for the Southern District of California  
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted November 15, 2017  
Pasadena, California

Filed February 6, 2018

Before: Jacqueline H. Nguyen and Andrew D. Hurwitz,  
Circuit Judges, and Steven Paul Logan,\* District Judge.

Opinion by Judge Nguyen

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### **SUMMARY\*\***

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#### **Objector / Class Settlement**

The panel affirmed the district court's order approving a class settlement between students and Trump University over Sherri Simpson's objections, and rejecting Simpson's request to opt out.

A lone objector, Sherri Simpson, sought to opt out of the class and bring her claims in a separate lawsuit, which would derail the settlement.

The panel held that Simpson had Article III standing because she claimed that the settlement's approval improperly denied her a second, settlement-stage opportunity to remove herself from the class, and therefore, Simpson had an interest in the settlement that created a case or controversy.

The panel rejected Simpson's argument that the class notice language provided a second opt-out right at the

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\* The Honorable Steven Paul Logan, United States District Judge for the District of Arizona, sitting by designation.

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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settlement stage, in addition to one at the class certification stage. The panel also rejected Simpson's argument that even if the class notice did not give her a second opt-out right at the settlement stage, due process required such an opportunity. The panel held that due process required only that class members be given a single opportunity to opt out of a Fed. R. Civ. P. 23(b)(3) class.

The panel held that the district court did not abuse its discretion in approving the settlement.

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### COUNSEL

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Eric T. Schneiderman, Attorney General; Steven C. Wu, Deputy Solicitor General of Counsel; Barbara D. Underwood, Solicitor General; Office of the Attorney General, New York, New York; for Amicus Curiae State of New York.

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### OPINION

NGUYEN, Circuit Judge:

Trump University, now defunct, was a for-profit entity that purported to teach Donald J. Trump's "secrets of success" in the real estate industry. During the 2016 presidential election, Trump University and Trump were defendants in three lawsuits alleging fraud and violations of various state and federal laws: two class actions in the Southern District of California, and a suit by the New York Attorney General in state court. Each suit alleged that Trump University used false advertising to lure prospective students to free investor workshops at which they were sold expensive three-day educational seminars. At these seminars, instead of receiving the promised training, attendees were aggressively encouraged to invest tens of thousands of dollars more in a so-called mentorship program

that included resources, real estate guidance, and a host of other benefits, none of which ever materialized.

In the California cases, the district court certified two classes of over eight thousand disappointed “students,” and scheduled the cases for trial in late November 2016. On November 8, 2016, Trump was elected President of the United States. Within weeks, the parties reached a global settlement on terms highly favorable to class members. Plaintiffs would receive between 80 to 90 percent of what they paid for Trump University programs, totaling \$21 million. The defendants agreed to pay an additional \$4 million in the case brought by the Attorney General of New York.

This appeal involves a lone objector, Sherri Simpson, who seeks to opt out of the class and bring her claims in a separate lawsuit, which would derail the settlement. Simpson does not dispute that she received, at the class certification stage, a court-approved notice of her right to exclude herself from the class and chose not to do so by the deadline. She argues, however, that the class notice promised her a second opportunity to opt out at the settlement stage, or alternatively, that due process requires this second chance. Neither argument is correct. We affirm.

## **I. Background**

### **A. The Lawsuits**

Trump University was “a private, for-profit entity purporting to teach Trump’s ‘insider success secrets’” in the real estate industry. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 258 (9th Cir. 2013). In 2010, Sherri Simpson was wooed to a free “investor workshop” in Florida, which Trump University advertised as a chance to “[l]earn from

Donald Trump’s hand-picked instructor a systematic method for investing in real estate that anyone can use effectively.” At this event, attendees were encouraged to purchase a more comprehensive three-day seminar, called the Apprenticeship Program, at the cost of \$1,495.

Simpson succumbed to the pitch and attended the seminar. Those attending were aggressively pressed to invest further in their Trump University “education” by enrolling in the Gold Elite mentorship program. The Gold Elite program promised access to “financing, counseling, information databases, and numerous other resources” of Trump University, including a year-long match with a designated “mentor,” all meant to help enrollees launch successful careers in real estate investing. Simpson signed up for a shared membership, at the cost of almost \$17,500.

Simpson believed that Trump University failed to provide her with the promised personal mentoring and real estate expertise. Her assigned mentor quickly disappeared and never returned her calls and emails. Simpson was not alone in her negative experience, as “students” throughout the country demanded refunds, complained to government agencies, and eventually sued Trump University and its founder for allegedly deceptive business practices. *See Makaeff*, 715 F.3d at 260.

Ultimately, two class actions were filed: *Low v. Trump University, LLC*, No. 3:10-cv-00940 (S.D. Cal. filed Apr. 30, 2010), which alleged violations of California, Florida, and New York law by the organization and its founder, and *Cohen v. Donald J. Trump*, No. 3:13-cv-02519 (S.D. Cal. filed Oct. 18, 2013), which alleged violations of federal law

by Trump as an individual.<sup>1</sup> Plaintiffs in both cases alleged that Trump University made material misrepresentations in its advertising and promotions, including claims that Trump University was an accredited university; that students would be taught by real estate experts who were handpicked by Trump; and that students would receive a year of support and mentoring. The Attorney General of New York also sued Trump, Trump University, and related corporate entities, alleging fraud and other unlawful business practices under New York law. *See People ex rel. Schneiderman v. The Trump Entrepreneur Initiative, LLC*, Index No. 451463/2013 (N.Y. Sup. Ct. Aug. 24, 2013).

In *Low*, the district court certified a class of plaintiffs who purchased Trump University programs in California, Florida, and New York, but later decertified the class as to damages. A nationwide class was certified in *Cohen*. In September 2015, the court approved a joint class certification notice to class members in both cases.

### **B. Class Certification Notice**

Both of the *Low* and *Cohen* classes were certified under Federal Rule of Civil Procedure 23(b)(3), which requires the court to provide class members “the best notice that is practicable under the circumstances,” including, in part, a “clear[] and concise[] state[ment] in plain, easily understood language . . . that the court will exclude from the class any member who requests exclusion.” Fed. R. Civ. P. 23(c)(2)(B)(v). The district court approved a joint two-page mailed notice for the two classes. The mailed notice directed

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<sup>1</sup> The *Low* case was initially captioned as *Makaeff v. Trump University*. Sonny Low became the lead plaintiff after the court permitted Tarla Makaeff to withdraw as a class representative.

recipients to a website, which contained a long-form notice of seven pages. The notices conformed, almost verbatim, to model class action notices developed by the Federal Judicial Center. *See* Federal Judicial Center, *Illustrative Forms of Class Action Notices: Employment Discrimination Notices* (2002), <https://www.fjc.gov/sites/default/files/2016/ClaAct11.pdf>.

Both notices explained the basis of the lawsuit and presented prospective class members with a binary choice: remain in the class, or opt out. The long-form notice explained these two options in more detail. It provided that class members could “Do Nothing,” which would result in inclusion in the lawsuit and potentially sharing in “money or benefits that may come from a trial or settlement.” Class members were expressly advised that as a consequence of such inaction, they would “give up any rights to sue Trump University and Trump separately about the same legal claims.” Alternatively, class members could “Ask To Be Excluded,” which would mean getting out of the lawsuit and keeping the right to sue separately, but “[g]et[ting] no money from any recovery” in the class action. The long-form notice later emphasized that the recipient must decide between the two options—staying in the class or asking to be excluded—and reiterated the consequences of each course of action.

Ten people opted out of the class by the deadline, which was November 16, 2015.<sup>2</sup> Simpson, who received the notice and was frequently in contact with class counsel throughout 2015 and 2016, chose not to opt out.

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<sup>2</sup> The court later allowed three additional class members to opt out after the court-imposed deadline but before the cases settled.



### **C. The Settlement**

On December 19, 2016, the parties reached a settlement. No defendant admitted wrongdoing, but a successor entity of Trump University agreed to pay \$21 million to class members. As part of the settlement, the defendants also agreed to pay the New York Attorney General \$4 million. In part due to class counsel's admirable agreement to serve pro bono, the district court estimated that the settlement would provide class members with recovery of 80 to 90 percent of the monies they paid to Trump University. The settlement expressly prohibited any late opt outs.

On January 4, 2017, settlement administrators mailed a court-approved settlement notice to the 8,253 class members, including Simpson. The settlement notice explained the four options available to class members at the settlement stage: 1) submit a claim by March 6, 2017; 2) object to the settlement by March 6, 2017; 3) ask to speak about the fairness of the settlement in court; or 4) do nothing. The first three options were not mutually exclusive, in that a class member could both submit a claim and object to the settlement's terms. Class members who did nothing would receive no payment and give up all rights to the settlement.

Simpson submitted her claim on February 1, 2017, over a month before the claims deadline. As part of the claims submission process, she affirmed, by typing "I AFFIRM" on an online form, the following statement: "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." On March 6, 2017, now represented by counsel, Simpson filed an objection to the settlement, arguing that she had a due process right to opt out of the settlement and alternatively requesting that the district court allow her to opt out pursuant to its discretionary authority under Rule 23(e)(4).

On March 29, 2017, in a supplemental declaration in response to class counsel’s opposition to her objection, Simpson argued for the first time that the long-form class action notice gave her the impression that she would have a second opportunity to opt out of the class if the case settled. Simpson did not attest to reading the long-form notice in full when she received it, only stating that she “believe[d]” she did since it “would have been typical” of her to do so. Simpson did not claim that she would have opted out at the class certification stage absent this supposed promise of a second opt-out opportunity. However, she noted that she “would at the very least have investigated all [her] options and contacted a lawyer familiar with class action practice.”

The district court approved the settlement over Simpson’s objection and refused to allow her to opt out. This timely appeal followed.

## II. Standard of Review

We review the sufficiency of the class notice *de novo*. *Silber v. Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994); *see also DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 942 (10th Cir. 2005) (“The underlying question of whether a particular class action notice program satisfies the requirements of [Rule] 23 and the Due Process Clause is a legal determination we review *de novo*.”).

## III. Discussion

### A. Standing

We must first address the “threshold question of whether [Simpson] has standing (and the court has jurisdiction).” *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). “Standing under Article III of the Constitution requires a

showing that: (1) the plaintiff has suffered an injury-in-fact, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) the injury is likely to be redressed by a favorable decision.” *Loritz v. U.S. Ct. of Appeals for the Ninth Cir.*, 382 F.3d 990, 991–92 (9th Cir. 2004) (citing *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 863 (9th Cir. 2003)).

Plaintiffs contend that Simpson lacks standing because she has not alleged an injury-in-fact traceable to the supposedly defective opt-out notice. Because Simpson decided to remain in the class after receiving the class action notice, Plaintiffs argue that she failed to show reliance on any purported inadequacy in the notice’s description of her opt-out rights. This misconstrues Simpson’s argument. She does not argue that the opt-out notice deprived her of the *first* opportunity to opt out. Rather, she claims that the settlement’s approval improperly denied her a *second*, settlement-stage opportunity to remove herself from the class. Simpson therefore “has an interest in the settlement that creates a ‘case or controversy’ sufficient to satisfy the constitutional requirements of injury, causation, and redressability.” *See Devlin v. Scardelletti*, 536 U.S. 1, 6–7 (2002) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)).<sup>3</sup> Because Simpson has standing, we consider the merits of her arguments.

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<sup>3</sup> The district court concluded that Simpson lacked standing because any purported injury she suffered is not redressable, a ground not relied upon by Plaintiffs on appeal. Central to the district court’s analysis was its view that Simpson had waived her right to bring a separate lawsuit when she submitted a settlement claim. We disagree. First, the injury she alleges—the deprivation of another opt-out chance—is redressable by a favorable decision in this case. *See Loritz*, 382 F.3d at 992. Second, Simpson waived her right to a separate suit only if she is bound by the

**B. The Class Notice Does Not Allow a Second Opt-Out Opportunity**

Simpson’s main argument is that the class notice promised a second opt-out right at the settlement stage, in addition to one at the class certification stage. She points to a single sentence in the long-form notice, which states that if “the Plaintiffs obtain money or benefits, either as a result of the trial or a settlement, [class members] will be notified about how to obtain a share (or how to ask to be excluded from any settlement).” Simpson reads the ten-word parenthetical to promise her a second opt-out right at the settlement stage.

Rule 23(b)(3) entitles “class members [to] the best notice that is practicable under the circumstances.” Fed. R. Civ. P. 23(c)(2)(B). “The yardstick against which we measure the sufficiency of notices in class action proceedings is one of reasonableness.” *In re Bank of Am. Corp.*, 772 F.3d 125, 132 (2d Cir. 2014).

Here, reading the notice as a whole and in context, we conclude that it promised only one opportunity to opt out. The mailed notice stated repeatedly that class members’ “legal rights are affected” and that they had “a choice to make now” about their class membership. Under the bolded header “What Are Your Options?”, the notice explained:

If you wish to remain a member of one or both Classes and possibly get money in the cases, you do not need to do anything now. If you remain in either or both Classes, you will

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settlement and, of course, if she prevails here, the settlement is necessarily undone.

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be legally bound by all orders and judgments the Court makes. 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.

The next paragraph provided instructions on how to send an “Exclusion Request” form, with a deadline of November 16, 2015.

The long-form notice provided additional information about the litigation. The first page, headed with the bolded language “If you purchased a ‘Trump University’ program, two class action lawsuits may affect your rights,” contained this conspicuous advisory:

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THESE LAWSUITS</b>	
<b>DO NOTHING</b>	<p><b>Stay in these lawsuits. Await the outcomes. Give up certain rights for the possibility of receiving money at a later time.</b></p> <p>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.</p>
<b>ASK TO BE EXCLUDED</b>	<p><b>Get out of the lawsuits. Get no money from any recovery. Keep rights.</b></p> <p>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.</p>

Immediately underneath, the notice warned recipients that “[t]o ask to be excluded, you must act before November 16, 2015.”

The remaining pages described, in a question-and-answer format, prospective class members’ rights. Specifically, under the header “Your Rights and Options,” Question 13 stated the following:

**YOUR RIGHTS AND OPTIONS**

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.

**13. What happens if I do nothing?**

You don't have to do anything now if you want to keep the possibility of getting money or benefits from these lawsuits. By doing nothing, you are staying in one or both of the Classes. If you stay in, and the Plaintiffs obtain money or benefits, either as a result of the trial or a settlement, you will be notified about how to obtain a share (or how to ask to be excluded from any settlement). Keep in mind 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 about the same legal claims that are the subject of these lawsuits. You will also be legally bound by all of the Orders and Judgments the Court makes in these class actions.

On the same page, the notice instructed class members how to ask to be excluded, and again noted that they must request exclusion by November 16, 2015: “To ask to be excluded, you must send an “Exclusion Request” . . . . You must mail your Exclusion Request postmarked by November 16, 2015”.

Read as a whole, the mailed and long-form notices informed class members that they faced a binary choice—to stay in the lawsuit, or to opt out—and that they needed to make that choice by November 16, 2015. The most reasonable reading of the notice suggests that class members

had a single opt-out opportunity that expired if not exercised by the deadline. Indeed, the header immediately preceding the language Simpson relies upon advised class members that they “have to decide whether to stay in the Classes or ask to be excluded before the trial, and [they] *have to decide this now.*” (Emphasis added). This pervasive language in both class notices supports the district court’s conclusion that class members were “clearly apprised . . . that if they wished to bring a separate lawsuit against Defendants, they had to elect to opt out immediately.”

Simpson argues that Question 13’s assurance that class members would be notified of “how to ask to be excluded from any settlement” was intended to give class members a second opt-out opportunity in the case of settlement, but not trial. Looking at the cited sentence in isolation, her reading is not wholly unreasonable. But Simpson’s argument depends on the success of two additional inferences. First, “ask to be excluded” must mean the *right* to exclusion. Second, “exclusion” must entitle her to exclusion from class membership, not just from the settlement’s benefits.

The first inference is more plausible than the second. Though, in plain language, an opportunity to “ask” does not implicitly contain a corresponding right to *receive* what one asks for, in the context of the rest of the notice, “ask to be excluded” could connote the right to exclusion. But the second required inference—that exclusion from the settlement means exclusion from the class and resurrection of an individual right to litigate—is not at all plausible. The notice contains no other language supporting Simpson’s theory that exclusion from the settlement would resurrect a class member’s right to litigate separately. On the contrary, the notice clearly states that by failing to act by November 16, 2015, class members would “give up *any rights* to sue



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Trump University and Trump separately about the same legal claims.” (Emphasis added).

Plaintiffs urge reading the phrase “how to ask to be excluded from any settlement” to mean the opportunity to refuse receipt of the settlement’s benefits. Although the language could have been clearer, Plaintiffs’ interpretation is more consistent with the notice as a whole. It may be unusual to refuse money awarded as part of a class action settlement, but at least one class member did so in this case. Simpson challenges this reading as illogical because class members had to request a share of the settlement by submitting a claims form, and could therefore refuse benefits through mere inaction. But at the time the class notice was mailed, the logistics of a possible settlement distribution were unknown, and a direct distribution scenario without the need of claims forms remained feasible.

The correct inquiry here is what an average class member would have understood the notice to guarantee, *see Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113–14 (2d Cir. 2005), and the actions of the class members in this case bolster our conclusion that a reasonable reading of the notice precludes Simpson’s interpretation. Among over eight thousand class members, Simpson is the only one advancing this understanding of the notice. Indeed, Simpson did not even raise this argument until the final settlement approval hearing.<sup>4</sup> The absence of more voices to corroborate Simpson’s reading supports our conclusion that no reasonable class member would have understood the

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<sup>4</sup> Plaintiffs repeatedly characterize Simpson’s argument as “attorney-manufactured.” The timeline and evolution of her objection support that assertion, but our court would have little work to do without creative arguments “manufactured” by zealous attorney advocates.

notice to guarantee a second opt-out opportunity at the settlement stage.

We agree with Simpson that the language in Question 13 could have been clearer as to the meaning of the phrase “ask to be excluded from any settlement.” But even if “[t]he notice in this case was not perfect,” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015), we conclude it was “of such nature as reasonably to convey the required information” regarding the window for class members to opt out of or remain in the class, *see Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The standard is not whether the notice could be written to avoid any “possibility of conceivable injury” or misunderstanding, but is one of reasonableness. *Id.* at 315 (citation omitted). We hold that the class notice language did not provide a second, settlement-stage opportunity to opt-out of the class.<sup>5</sup>

### **C. Due Process Does Not Compel a Second Opt-Out Opportunity**

Simpson next argues that even if the class notice did not give her a second opt-out right at the settlement stage, due process requires such an opportunity. Our precedent squarely forecloses this argument. In *Officers for Justice v.*

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<sup>5</sup> Simpson cites several cases in which class members were allowed to opt out at the settlement stage after receiving initial class notices that included Question 13’s exact parenthetical language. *See, e.g., Hoffman v. Blattner Energy, Inc.*, No. 14-cv-2195, ECF No. 94-1 at 5 (C.D. Cal. Sept. 1, 2016) *and id.* ECF No. 109 at 5-6. But she does not show that the later opt-out period arose from a guarantee in the initial class notice, as opposed to the parties’ negotiation of the settlement’s terms. *See Officers for Justice v. Civil Serv. Comm’n of S.F.*, 688 F.2d 615, 634 (9th Cir. 1982).

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*Civil Service Commission of San Francisco*, Jesse Byrd, a named plaintiff and class representative, objected to several terms of a Rule 23(b) class action settlement. 688 F.2d 615, 622–23 (9th Cir. 1982). Byrd received a class notice similar to the one here, which advised potential class members that they would be “included in the plaintiff class,” unless they requested exclusion in writing by the deadline, extinguishing their right to “bring any further action against” the defendants. *Id.* at 634. Byrd did not opt out of the class, but argued that due process guaranteed him a second opt-out opportunity at the settlement stage that would revive his ability to litigate separately. *Id.* at 634–35.

We rejected this argument and held that Byrd, having failed to exclude himself at the class certification stage, was not entitled to exercise that option at the settlement stage. *Id.* at 635. We recognized that while some class action settlements allow a second opt-out opportunity, “they are unusual and probably result from the bargaining strength of the class negotiators[.]” rather than any due process concerns. *Id.* As we explained:

[There is] 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. Byrd’s rights are protected by the mechanism provided in the rule: approval by the district court after notice to the class and a fairness hearing at which dissenters can voice their objections, and the availability of review on appeal. Moreover, 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.*

Simpson is incorrect that intervening Supreme Court precedent has implicitly overruled *Officers for Justice*. To the contrary, the cases she cites simply support the case's holding that due process requires that class members be given a single opportunity to opt out of a Rule 23(b)(3) class. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (“[D]ue 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 . . . [T]he procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to ‘opt out,’ satisfies due process.”); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Shutts*, 472 U.S. at 812) (“In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.”). We are bound by *Officers for Justice* unless it is “clearly irreconcilable” with an intervening Supreme Court decision. See *Rodriguez v. AT & T Mobility Servs., LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). “This is a high standard” that has not been met here. See *id.* (quoting *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012)).

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

Finally, Simpson argues that the district court abused its discretion in approving the settlement. We may reverse only if the district court's decision was “illogical, implausible, or

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without support in inferences that may be drawn from facts in the record.” *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

Here, we easily conclude that the district court properly exercised its discretion. The district court considered the “risks, expense, complexity, and likely duration of further litigation” and had ample reasons to approve the settlement despite its prohibition on additional opt-outs. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Both classes of plaintiffs would have faced significant hurdles had they proceeded to trial, including the difficulty of prevailing in a jury trial against either the President Elect (if the trial had proceeded as scheduled) or the sitting President (if the trial had been postponed, as Defendants requested). The *Low* class would have had to litigate thousands of individual damage claims, while the *Cohen* class faced possible decertification. Weighed against this was the fairness of the settlement as a whole, which the court estimated would provide class members with almost a full recovery. Under these challenging circumstances, the district court acted well within its discretion by approving the settlement.<sup>6</sup>

**AFFIRMED.**

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<sup>6</sup> Simpson also urges us to clarify the “outer boundaries of a district court’s discretion under Rule 23(e)(4)” and impose a per se rule mandating a settlement-stage opt-out opportunity in any case where members of a previously-certified class later learn of a settlement’s actual value. We lack the authority to rewrite the Federal Rules to accommodate Simpson’s policy concerns. Moreover, the Rule’s language anticipates that parties can reach a settlement agreement that does not permit an additional opt-out opportunity. *See* Fed. R. Civ. P. 23(e)(4). The court’s discretionary authority to reject a settlement in such cases provides the protection Simpson seeks.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF STATE

# If you are a woman and are or were employed by MNO, a class action lawsuit may affect your rights.

*A court authorized this notice. This is not a solicitation from a lawyer.*

- Female employees have sued MNO, Inc., alleging discrimination against women.
- The Court has allowed the lawsuit to be a class action on behalf of all women employed by MNO as account executives at any time from June 6, 1996, through July 15, 2003.
- The Court has not decided whether MNO did anything wrong. There is no money available now, and no guarantee there will be. However, your legal rights are affected, and you have a choice to make now:

YOUR LEGAL RIGHTS AND OPTIONS IN THIS LAWSUIT	
<b>DO NOTHING</b>	<p><b>Stay in this lawsuit. Await the outcome. Give up certain rights.</b></p> <p>By doing nothing, you keep the possibility of getting money or benefits that may come from a trial or a settlement. But, you give up any rights to sue MNO separately about the same legal claims in this lawsuit.</p>
<b>ASK TO BE EXCLUDED</b>	<p><b>Get out of this lawsuit. Get no benefits from it. Keep rights.</b></p> <p>If you ask to be excluded and money or benefits are later awarded, you won't share in those. But, you keep any rights to sue MNO separately about the same legal claims in this lawsuit.</p>

*cited in Simpson v. Trump University, LLC  
No. 17-55635 archived on February 1, 2018*

- Your options are explained in this notice. To ask to be excluded, you must act before **Month 00, 0000**.
- Lawyers must prove the claims against MNO at a trial set to start Month 00, 0000. If money or benefits are obtained from MNO, you will be notified about how to ask for a share.
- **Any questions? Read on and visit [www.mnoclassaction.com](http://www.mnoclassaction.com).**

**WHAT THIS NOTICE CONTAINS**

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*Filed in Simpson v. Trump University, LLC  
No. 17-55635 archived on February 1, 2018*

## BASIC INFORMATION

### 1. Why did I get this notice?

MNO's records show that you currently work, or previously worked, for MNO, Inc. This notice explains that the Court has allowed, or "certified," a class action lawsuit that may affect you. You have legal rights and options that you may exercise before the Court holds a trial. The trial is to decide whether the claims being made against MNO, on your behalf, are correct. Judge Jane Jones of the United States District Court for the District of State is overseeing this class action. The lawsuit is known as *Johnson, et al., v. MNO, Inc.*, Civil Action No. CV-00-1234.

### 2. What is this lawsuit about?

This lawsuit is about whether MNO discriminated against female account executives based on their gender, by making it harder for them to advance in their careers. More information about federal laws prohibiting job discrimination can be found at the website of the [U.S. Equal Employment Opportunity Commission](http://www.eeoc.gov), [www.eeoc.gov](http://www.eeoc.gov).

### 3. What is a class action and who is involved?

In a class action lawsuit, one or more people called "Class Representatives" (in this case Mary Johnson and Louise Smith) sue on behalf of other people who have similar claims. The people together are a "Class" or "Class Members." The women who sued—and all the Class Members like them—are called the Plaintiffs. The company they sued (in this case MNO, Inc.) is called the Defendant. One court resolves the issues for everyone in the Class—except for those people who choose to exclude themselves from the Class.

### 4. Why is this lawsuit a class action?

The Court decided that this lawsuit can be a class action and move towards a trial because it meets the requirements of Federal Rule of Civil Procedure 23, which governs class actions in federal courts. Specifically, the Court found that:

- There are more than 90,000 women who are or were employed by MNO as account executives;
- There are legal questions and facts that are common to each of them;
- Mary Johnson's and Louise Smith's claims are typical of the claims of the rest of the Class;
- Ms. Johnson, Ms. Smith, and the lawyers representing the Class will fairly and adequately represent the Class' interests;
- The common legal questions and facts are more important than questions that affect only individuals; and
- This class action will be more efficient than having many individual lawsuits.

More information about why the Court is allowing this lawsuit to be a class action is in the [Court's Order Certifying the Class](#), which is available at [www.mnoclassaction.com](http://www.mnoclassaction.com).



## THE CLAIMS IN THE LAWSUIT

### 5. What does the lawsuit complain about?

In the lawsuit, the Plaintiffs say that MNO discriminated against women account executives. They claim that these women received less pay than men in similar jobs. They also say that MNO made promotions to account supervisor positions more difficult for women because they had to demonstrate greater achievements than men. You can read the Plaintiffs' [Class Action Complaint](#) at [www.mnoclassaction.com](http://www.mnoclassaction.com).

### 6. How does MNO answer?

MNO denies that it did anything wrong and says that opportunities for hiring and promotion are equally available to women and men. MNO says that its policies are clear and that they neither allow, nor condone, discrimination against women. MNO says that women advanced as often as men, and that greater achievements are not necessary for women to qualify for a promotion. MNO's [Answer to the Complaint](#) is also at the website.

### 7. Has the Court decided who is right?

The Court hasn't decided whether MNO or the Plaintiffs are correct. By establishing the Class and issuing this Notice, the Court is not suggesting that the Plaintiffs will win or lose this case. The Plaintiffs must prove their claims at a trial starting Month 00, 0000. (See "The Trial" below on page 7.)

### 8. What are the Plaintiffs asking for?

The Plaintiffs are asking for changes in MNO's policies to ensure that women are treated fairly and equally in the workplace. They want MNO's policies to say that discrimination based on gender is banned. The Plaintiffs also want lost wages and money for emotional distress for Class Members.

### 9. Is there any money available now?

No money or benefits are available now because the Court has not yet decided whether MNO did anything wrong, and the two sides have not settled the case. There is no guarantee that money or benefits ever will be obtained. If they are, you will be notified about how to ask for a share.

## WHO IS IN THE CLASS

You need to decide whether you are affected by this lawsuit.

### 10. Am I part of this Class?

Judge Jones decided that all women who were employed by MNO, Inc. as account executives (full time or part time) at any time from June 6, 1996, through July 15, 2003, are Class Members. She also specified that “temp” employees and independent contractors are *not* part of the class. See question 12 below.

### 11. Which current and former employees are included?

Former employees are in the Class as long as they were employed by MNO any time from June 6, 1996, through July 15, 2003. If you were hired after July 15, 2003—even if you are a current employee—you are not included. In other words, these women are included:

- **Women account executives currently employed by MNO who were hired on or before July 15, 2003.**
- **Women account executives no longer employed by MNO but who were employed by MNO any time from June 6, 1996, through July 15, 2003.**

### 12. Are any women who worked at MNO not included in the Class?

If you *worked at MNO* during the time period in question 10, but you were not directly *employed by MNO*, you are NOT a Class Member. Think about whether you were paid for your work at MNO by a temporary staffing service or an independent contractor for MNO. If so, you were not employed by MNO. If you were later hired by MNO after a temporary period, you may be part of the Class as long as MNO hired you on or before July 15, 2003.

### 13. I’m still not sure if I am included.

If you are still not sure whether you are included, you can get free help at [www.mnoclassaction.com](http://www.mnoclassaction.com), or by calling or writing to the lawyers in this case, at the phone number or address listed in question 23.

## YOUR RIGHTS AND OPTIONS

You have to decide whether to stay in the Class or ask to be excluded before the trial, and you have to decide this now.

### 14. What happens if I do nothing at all?

You don't have to do anything now if you want to keep the possibility of getting money or benefits from this lawsuit. By doing nothing you are staying in the Class. If you stay in and the Plaintiffs obtain money or benefits, either as a result of the trial or a settlement, you will be notified about how to apply for a share (or how to ask to be excluded from any settlement). Keep in mind that if you do nothing now, regardless of whether the Plaintiffs win or lose the trial, you will not be able to sue, or continue to sue, MNO—as part of any other lawsuit—about the same legal claims that are the subject of this lawsuit. This means that if you do nothing, you may only be able to sue for gender discrimination that occurred *before* June 6, 1996 or occurs *after* July 15, 2003 only. You will also be legally bound by all of the Orders the Court issues and judgments the Court makes in this class action.

### 15. Why would I ask to be excluded?

If you already have your own gender discrimination lawsuit against MNO and want to continue with it, you need to ask to be excluded from the Class. If you exclude yourself from the Class—which also means to remove yourself from the Class, and is sometimes called “opting-out” of the Class—you won't get any money or benefits from this lawsuit even if the Plaintiffs obtain them as a result of the trial or from any settlement (that may or may not be reached) between MNO and the Plaintiffs. However, you may then be able to sue or continue to sue MNO for employment discrimination that occurred or occurs at any time. If you exclude yourself, you will not be legally bound by the Court's judgments in this class action.

If you start your own lawsuit against MNO after you exclude yourself, you'll have to hire and pay your own lawyer for that lawsuit, and you'll have to prove your claims. If you do exclude yourself so you can start or continue your own lawsuit against MNO, you should talk to your own lawyer soon, because your claims may be subject to a statute of limitations.

Note that if you exclude yourself from this lawsuit and you are currently employed by MNO, any changes made to MNO's policies about the treatment of women would still apply to you.

### 16. How do I ask the Court to exclude me from the Class?

To ask to be excluded, you must send an “Exclusion Request” in the form of a letter sent by mail, stating that you want to be excluded from *Johnson v. MNO*. Be sure to include your name and address, and sign the letter. You must mail your Exclusion Request postmarked by **Month 00, 0000**, to: Johnson v. MNO Exclusions, P.O. Box 0000, City, ST 00000-0000. You may also get an [Exclusion Request](#) form at the website, [www.mnoclassaction.com](http://www.mnoclassaction.com).

## THE LAWYERS REPRESENTING YOU

### 17. Do I have a lawyer in this case?

The Court decided that the law firms of Lawfirm One, LLP, of City, ST, and Lawfirm Two, P.C., of City, ST, are qualified to represent you and all Class Members. Together the law firms are called “Class Counsel.” They are experienced in handling similar cases against other employers. More information about these law firms, their practices, and their lawyers’ experience is available at [www.lawfirmone.com](http://www.lawfirmone.com) and [www.lawfirmtwo.com](http://www.lawfirmtwo.com).

### 18. Should I get my own lawyer?

You do not need to hire your own lawyer because Class Counsel is working on your behalf. But, if you want your own lawyer, you will have to pay that lawyer. For example, you can ask him or her to appear in Court for you if you want someone other than Class Counsel to speak for you.

### 19. How will the lawyers be paid?

If Class Counsel get money or benefits for the Class, they may ask the Court for fees and expenses. You won’t have to pay these fees and expenses. If the Court grants Class Counsel’s request, the fees and expenses would be either deducted from any money obtained for the Class or paid separately by MNO.

*cited in Simpson v. Trump University, LLC  
No. 17-55635 archived on February 1, 2018*

## THE TRIAL

The Court has scheduled a trial to decide who is right in this case.

### 20. How and when will the Court decide who is right?

As long as the case isn’t resolved by a settlement or otherwise, Class Counsel will have to prove the Plaintiffs’ claims at a trial. The trial is set to start on Tuesday, Month 00, 0000, in the United States District Court for the District of State, 100 Court Street, City, State, in Courtroom 1. During the trial, a Jury or the Judge will hear all of the evidence to help them reach a decision about whether the Plaintiffs or Defendant are right about the claims in the lawsuit. There is no guarantee that the Plaintiffs will win, or that they will get any money for the Class.

### 21. Do I have to come to the trial?

You do not need to attend the trial. Class Counsel will present the case for the Plaintiffs, and MNO will present the defenses. You or your own lawyer are welcome to come at your own expense.

**22. Will I get money after the trial?**

If the Plaintiffs obtain money or benefits as a result of the trial or a settlement, you will be notified about how to participate. We do not know how long this will take.

**GETTING MORE INFORMATION****23. Are more details available?**

Visit the website, [www.mnoclassaction.com](http://www.mnoclassaction.com), where you will find the Court's [Order Certifying the Class](#), the [Complaint](#) that the Plaintiffs submitted, the Defendant's [Answer to the Complaint](#), as well as an [Exclusion Request](#) form. You may also speak to one of the lawyers by calling 1-000-000-0000, or by writing to: MNO Class Action, P.O. Box 000, City, ST 00000-0000.

DATE: MONTH 00, 0000.

*cited in Simpson v. Trump University, LLC  
No. 17-55635 archived on February 1, 2018*

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.



### United States Court of Appeals for the Ninth Circuit

### BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
<b>Excerpt of Record</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>Opening Brief</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>Answering Brief</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>Reply Brief</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>Other**</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>TOTAL:</b>				\$ <input type="text"/>	<b>TOTAL:</b> \$ <input type="text"/>			

\* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page*

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

*(To Be Completed by the Clerk)*

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk