

1 DANIEL M. PETROCELLI (S.B. #97802)  
2 dpetrocelli@omm.com  
3 DAVID L. KIRMAN (S.B. #235175)  
4 dkirman@omm.com  
5 O'MELVENY & MYERS LLP  
6 1999 Avenue of the Stars  
7 Los Angeles, California 90067-6035  
8 Telephone: (310) 553-6700  
9 Facsimile: (310) 246-6779

7 JILL A. MARTIN (S.B. #245626)  
8 jmartin@trumpnational.com  
9 TRUMP NATIONAL GOLF CLUB  
10 One Trump National Drive  
11 Rancho Palos Verdes, CA 90275  
12 Telephone: (310) 202-3225  
13 Facsimile: (310) 265-5522

11 Attorneys for Defendants Trump University,  
12 LLC and Donald J. Trump

13 **UNITED STATES DISTRICT COURT**  
14 **SOUTHERN DISTRICT OF CALIFORNIA**

16 SONNY LOW, J.R. EVERETT and  
17 JOHN BROWN, on Behalf of  
18 Themselves and All Others Similarly  
19 Situated,

20 Plaintiffs,

21 vs.

22 TRUMP UNIVERSITY, LLC, a New  
23 York Limited Liability Company and  
24 DONALD J. TRUMP,

25 Defendants.  
26

Case No. 3:10-CV-0940-GPC-WVG  
Judge: Hon. Gonzalo P. Curiel

**[CLASS ACTION]**

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO  
EXCLUDE CERTAIN  
STATEMENTS BY OR ABOUT  
DONALD TRUMP**

**MOTION *IN LIMINE* NO. 2**

Hearing: November 10, 2016  
Time: 1:30 p.m.  
Courtroom: 2d  
Judge: Hon. Gonzalo P. Curiel

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**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 10, 2016 at 1:30 p.m., Defendants Trump University, LLC and Donald J. Trump (“Defendants”) will and hereby do move for the exclusion of evidence based on Federal Rules of Evidence 401 and 403.<sup>1</sup> Defendants believe in good faith that class representative plaintiffs Sonny Low, Joann Everett, and John Brown (“Plaintiffs”) intend to offer during Phase One of the trial set to begin on November 28, 2016 evidence and argument concerning statements by and about Mr. Trump made in the political process during the course of the presidential campaign.

This Motion is made on the grounds that such statements are both irrelevant to the issues in this case and highly prejudicial to Defendants. It is based on the Notice of Motion, the Memorandum of Points and Authorities thereto, the files in this action, and additional submissions and argument as may be presented at or before the hearing on this Motion.

Dated: October 20, 2016

O’MELVENY & MYERS LLP  
DANIEL M. PETROCELLI  
DAVID L. KIRMAN

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

Attorneys for Defendants  
TRUMP UNIVERSITY, LLC and  
DONALD J. TRUMP

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<sup>1</sup> All Rule references are to the Federal Rules of Evidence unless otherwise noted.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants Trump University (“TU”) and Donald J. Trump move *in limine*  
3 to exclude from trial all evidence and argument relating to the events of the  
4 Presidential primaries and general election and campaign, including statements by  
5 or about Mr. Trump made or publicized while he was running for President of the  
6 United States.

7 **I. INTRODUCTION**

8 Throughout the election process, candidates for the most powerful office in  
9 the world are subject to an extraordinary level of scrutiny, commentary, and debate.  
10 Their statements and actions are headline news every day. During the current  
11 Presidential campaign, Mr. Trump has been the focus of perhaps unprecedented  
12 media coverage and public interest. His politics, policies, opinions, and views have  
13 been reported virtually every day in every form of media over the past year. One  
14 hundred million people watched Mr. Trump in the Presidential debates. The media  
15 have reported on every aspect of Mr. Trump’s life from his long background and  
16 history in business and his work in television, to his wife, daughters and sons,  
17 charitable foundation, taxes, and even the Miss Universe pageant.

18 Before trial begins in this case, prospective members of the jury will have the  
19 opportunity to cast their vote for President. It is in the ballot box where they are  
20 free to judge Mr. Trump based on all this and more. But it is in the jury box where  
21 they must judge him and this case *only* on evidence and argument relevant to the  
22 issues at hand. Plaintiffs have no right to cross those lines in an attempt to inflame  
23 and prejudice the jury, and it is the Court’s duty to protect the integrity of the  
24 judicial process and defendants’ right to a fair trial. That can only happen if  
25 extraneous, irrelevant, and prejudicial matters are excluded from the courtroom.

26 **II. EVIDENCE AND ARGUMENT AT ISSUE IN THIS MOTION**

27 Defendants respectfully move to exclude evidence and argument relating to  
28 statements made by or about Mr. Trump outside of the adjudicative process,

1 including the following:

- 2 • Campaign speeches
- 3 • Statements at political rallies, including statements about this case
- 4 • Statements at debates
- 5 • Statements about individuals or entities unrelated to this litigation
- 6 • Campaign advertisements
- 7 • Tweets
- 8 • Statements by campaign surrogates
- 9 • Audio and video recordings made or publicized during the campaign
- 10 • Tax issues
- 11 • Comments about this case or the Court
- 12 • Donald J. Trump Foundation or other businesses owned or managed by Mr.
- 13 Trump not part of this litigation, including Trump Organization
- 14 • Personal conduct accusations
- 15 • Other politicians, state attorneys general, or public servants
- 16 • Beauty pageants, casinos, and corporate bankruptcies
- 17 • Other litigation

### 18 **III. ARGUMENT**

19 Evidence and argument relating to matters publicized during the presidential  
20 campaign, including statements by and about Mr. Trump, have no relevance to the  
21 issues before the jury and are otherwise inadmissible. Their intrusion into the trial  
22 carries an immediate and irreparable danger of extreme and irreparable prejudice  
23 to defendants, confusion of issues, and waste of time. The Court should exclude all  
24 such matters.

#### 25 **A. Irrelevant (FRE 401)**

26 Under the Federal Rules, evidence is relevant only if it tends to make a fact  
27 more or less probable, and that fact is of consequence in determining the action.  
28

1 Rule 401. Neither criterion exists here. Statements by or about Mr. Trump made or  
2 publicized during the campaign or otherwise outside of the adjudicative process are  
3 not probative on any issue in this case and are inadmissible as evidence. *See id.*

4 Courts routinely exclude distracting and irrelevant evidence about public  
5 figures as lacking probative value. For example, in *Apple v. Samsung*, No. C-11-  
6 01846 LHK, 2012 U.S. Dist. LEXIS 99945 (N.D. Cal. July 18, 2012), in a case  
7 involving competing patent claims, the court excluded evidence and argument  
8 about personal and professional information about Apple founder Steve Jobs,  
9 noting: “I don’t see how this is relevant. Under a 403 analysis, I don’t think it  
10 comes in. *I really don’t think this is a trial about Steve Jobs either way.*” Kirman  
11 Decl., Ex. 84 at 134:7-11 (emphasis added).<sup>2</sup> Similarly, in *The Saturday Team, Inc.*  
12 *v. Thien Thanh Thi Nguyen*, No. 2:07-cv-01794, (C.D. Cal. June 26, 2008), the  
13 Court held that evidence and argument relating to the defendant’s controversial  
14 past, including her sexually suggestive photographs in men’s magazines and reality  
15 TV shows, were not “relevant to the specific claims at issue.” Ex. 82 at 4. The  
16 Court further held that, “to the extent that Defendant’s public image is relevant,  
17 Plaintiffs can establish that she was famous without, for example, showing the jury”  
18 the controversial elements of her celebrity. *Id.*

19 Here, the evidence and argument subject to this motion have no probative  
20 value to the specific alleged misrepresentations during the class period—years  
21 before Mr. Trump’s candidacy for President. Such evidence and argument should  
22 be excluded.

### 23 **B. Improper Character Evidence (FRE 404)**

24 Rule 404(a) prohibits the introduction of a civil defendant’s character  
25 evidence to prove an act in conformity with the defendant’s character. Rule  
26 404(a)(1); *see also United States v. Lynch*, 437 F.3d 902, 913–915 (9th Cir. 2006).  
27 Likewise, evidence of other wrongs or acts is inadmissible “to prove a person’s

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28 <sup>2</sup> Unless noted, “Ex.” refer to exhibits attached to the Kirman Declaration.

1 character in order to show that on a particular occasion the person acted in  
2 accordance with the character.” Rule 404(b)(1); *United States v. Curtin*, 489 F.3d  
3 935, 944, (9th Cir. 2007).

4 Plaintiffs cannot articulate any relevant purposes for offering statements by  
5 or about Mr. Trump or other matters publicized during his campaign for the  
6 Presidency. *See Curtin*, 489 F.3d at 957–958; *United States v. Arambula-Ruiz*, 987  
7 F.2d 599, 602–603, (9th Cir. 1993). Courts are required to ensure that the purpose  
8 for which the evidence is offered is more than just a sham for using it as proof of  
9 character. *See, e.g., United States v. Merriweather*, 78 F.3d 1070, 1074–1079 (6th  
10 Cir. 1996) (emphasizing the need for a cautious analysis of evidence of uncharged  
11 misconduct).

12 Rule 404(a) excludes this type of evidence for good reason:

13 Character evidence is of slight probative value and may be very  
14 prejudicial. It tends to distract the trier of fact from the main question  
15 of what actually happened on the particular occasion. It subtly permits  
16 the trier of fact to reward the good man and to punish the bad man  
17 because of their respective characters despite what the evidence in the  
case shows actually happened.

18 *Cohn v. Papke*, 655 F.2d 191, 194 (9th Cir. 1981) (quoting Rule 404,  
19 Advisory Committee Notes on Proposed Rule). Excluding character evidence  
20 prevents the risk that the jury will punish defendants “despite what the evidence in  
21 the case shows actually happened.” *Id.*; *see also United States v. Whittington*, 26  
22 F.3d 456, 466 (4th Cir. 1994) (testimony that defendant had conducted her affairs  
23 “like a rat or a snake” was improperly admitted character evidence).

### 24 **C. Unduly Prejudicial (FRE 403)**

25 During the pretrial conference in this case, the Court recognized the  
26 significant risk of prejudice facing defendants as a result of the election campaign  
27 process:  
28

1 And we have seen that there have been some events that have  
2 coincided with the election campaign process, and I am sensitive to the  
3 fact that there could be events that the jury would learn about entering  
4 the courthouse or some other way that could unduly influence them  
and could prevent a fair trial from being delivered to all the parties.”

5 Ex. 83 at 14:20–15:3. In view of the intensified media coverage and political  
6 events since then, this risk of prejudice is far greater today.

7 It is well established that evidence and argument focusing on character or  
8 controversial behavior is prejudicial and ought to be excluded from trial when it  
9 does not directly bear on the claims and defenses asserted. *See, e.g. U.S. v.*  
10 *McDermott*, 245 F.3d 133, 141–142 (2d Cir. 2001) (reversing defendant’s  
11 conviction for criminal conspiracy on grounds that evidence that controversial and  
12 unflattering information about the defendant's girlfriend was prejudicial and should  
13 have been excluded at trial); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128,  
14 1141–42 (7th Cir. 1985) (slide show of controversial photographs published in a  
15 men’s magazine and presented to the jury at trial required reversal since the  
16 prejudicial effect “so clearly outweighed its probative value” as to require exclusion  
17 under Rule 403 of the Federal Rules of Evidence”).

18 Courts have excluded evidence about another well-known entrepreneur’s  
19 background and character on the grounds that it is prejudicial and plainly intended  
20 to cast a bad light on the defendant based on prior, unrelated publicity. *See, e.g.,*  
21 Ex. 84 at 134:7-11 (excluding evidence and testimony about Mr. Jobs under Rules  
22 402 and 403). Courts also have excluded evidence and argument about a  
23 defendants’ affiliations and political views, where the danger of prejudice  
24 outweighs any probative value. *See Lewis v. Sch. Dist. No. 70*, 05-CV-776-WDS,  
25 2009 WL 928874, at \*5 (S.D. Ill. Apr. 6, 2009) (excluding evidence and argument  
26 regarding any political party or political party affiliation of any litigant); *Richman v.*  
27 *Burgeson*, 98 C 7350, 2008 WL 2567132, at \*8 (N.D. Ill. June 24, 2008) (excluding  
28 “hot button” issue of political patronage in Chicago on the grounds that any such

1 evidence has a high likelihood of being unfairly prejudicial); *cf. Reza v. Pearce*,  
2 806 F.3d 497, 508 (9th Cir. 2015) (in racial discrimination case, affirming decision  
3 that evidence of a politician-defendant’s friendship with a purported racist would be  
4 excluded under Rule 403, even if arguably probative).

5 Here, there is a grave danger—if not certainty—that the evidence and  
6 argument subject to this motion, if admitted, would cause irreparable prejudice  
7 and confusion. The Court must exercise extreme vigilance to prevent the passions  
8 and prejudices from a partisan political process from impairing the integrity of the  
9 trial.

10 **IV. CONCLUSION**

11 For the foregoing reasons, defendants respectfully request that the Court  
12 exclude all evidence and arguments relating to statements by or about Mr. Trump  
13 and other matters outside of this case.

14 Dated: October 20, 2016

Respectfully submitted,

15 O’MELVENY & MYERS LLP  
16 DANIEL M. PETROCELLI  
17 DAVID L. KIRMAN

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

20 Attorneys for Defendants  
21 TRUMP UNIVERSITY, LLC and  
22 DONALD J. TRUMP  
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