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

ART COHEN, Individually and on
Behalf of All Others Similarly
Situating,

Plaintiff,

v.

DONALD J. TRUMP,

Defendant.

CASE NO. 13-cv-2519-GPC-WVG
Related Case: 10-cv-0940-GPC-WVG

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR APPROVAL OF
CLASS NOTICE AND DIRECTING
CLASS NOTICE PROCEDURES**

[ECF No. 61]

On February 20, 2015, Plaintiff Art Cohen filed a Motion for Approval of Class Notice and Directing Class Notice Procedures. (ECF No. 61.) The motion has been fully briefed. (ECF Nos. 68, 71.)

A hearing was held on May 22, 2015. Following careful consideration of the parties' oral arguments, legal briefings and applicable law, and for the reasons set forth below, the Court hereby **GRANTS IN PART AND DENIES IN PART** Plaintiff's motion for approval of class notice and directing class notice procedures.

BACKGROUND

On October 27, 2014, this Court certified a nationwide class in this case. (ECF No. 53.) The class consists of:

All persons who purchased Live Events from Trump University throughout the United States from January 1, 2007 to the present.

1 Excluded from the Class are Trump University, its affiliates, employees,
2 officers and directors, persons or entities that distribute or sell Trump
3 University products or programs, the Judge(s) assigned to this case, and
4 the attorneys of record in the case.

5 (*Id.* at 22-23.) Defendant Donald Trump appealed this ruling to the Ninth Circuit,
6 which denied permission to appeal on February 2, 2015. (ECF No. 59.)

7 On February 21, 2014, this Court had previously certified a class of Trump
8 University, LLC (“TU”) students in the related case of *Makaeff, et al. v. Trump Univ.,*
9 *LLC., et al.*, 10cv0940-GPC(WVG). (*See* 10cv0940-GPC(WVG), ECF No. 298.) On
10 March 10, 2014, Defendants TU and Donald Trump (“Defendants”) sought permission
11 to appeal the grant of certification to the Ninth Circuit. (10cv0940-GPC(WVG), ECF
12 No. 307.) On April 10, 2014, the Ninth Circuit denied permission to appeal the ruling
13 on timeliness grounds. (10cv0940-GPC(WVG), ECF No. 318). On February 19,
14 2015, Defendants moved to decertify. (10cv0940-GPC(WVG), ECF No. 380). On
15 September 18, 2015, this Court granted in part and denied in part Defendants’ motion.¹
16 (10cv0940-GPC(WVG), ECF No. 418). The class consists of the following class and
17 subclasses:

18 All persons who purchased a Trump University three-day live
19 “Fulfillment” workshop and/or a “Elite” program (“Live Events”) in
20 California, New York and Florida, and have not received a full refund,
21 divided into the following five subclasses:

- 22 (1) a California UCL/CLRA/Misleading Advertisement subclass of purchasers of the Trump University Fulfillment and Elite Seminars who purchased the program in California within the applicable statute of limitations;
- 23 (2) a California Financial Elder Abuse subclass of purchasers of the Trump University Fulfillment and Elite Seminars who were over the age of 65 years of age when they purchased the program in California within the applicable statute of limitations;
- 24 (3) a New York General Business Law § 349 subclass of purchasers of the Trump University Fulfillment and Elite Seminars who purchased the program in New York within the applicable statute of limitations;
- 25 (4) a Florida Deceptive and Unfair Trade Practices Act (FDUTPA)/Misleading Advertising Law subclass of purchasers of the Trump University Fulfillment and Elite Seminars who purchased the program in Florida within the applicable statute of limitations; and

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27
28 ¹ The Court denied Defendants’ motion to decertify on liability issues and granted the motion on damages issues, bifurcating the damages issues to follow trial on the liability phase. (10cv0940-GPC(WVG), ECF No. 418 at 2).

1 (5) a Florida Financial Elder Abuse subclass of purchasers of the Trump
2 University Fulfillment and Elite Seminars who were over the age of 60
3 years of age when they purchased the program in Florida within the
4 applicable statute of limitations.

5 Excluded from the class are Defendants, their officers and directors,
6 families and legal representatives, heirs, successors, or assigns and any
7 entity in which Defendants have a controlling interest, any Judge assigned
8 to this case and their immediate families.

9 (*Id.* at 21.)

10 On February 20, 2015, Plaintiff in this case and Plaintiffs in the *Makaeff* case
11 filed motions in their respective cases seeking permission to serve a single class notice
12 to all putative class members in both cases. (ECF No. 61, 10cv0940-GPC(WVG), ECF
13 No. 381.)

14 **LEGAL STANDARD**

15 For classes certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure,
16 the court “must direct to class members the best notice that is practicable under the
17 circumstances, including individual notice to all members who can be identified
18 through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). The Federal Rules further
19 provide that:

20 The notice must clearly and concisely state in plain, easily understood language:

21 (i) the nature of the action;

22 (ii) the definition of the class certified;

23 (iii) the class claims, issues, or defenses;

24 (iv) that a class member may enter an appearance through an attorney if
25 the member so desires;

26 (v) that the court will exclude from the class any member who requests exclusion;

27 (vi) the time and manner for requesting exclusion; and

28 (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(i - vii). Notice provides an opportunity for class members to
participate in the litigation, to opt-out of the litigation, to monitor the performance of
class representatives and class counsel, and to ensure that predictions of adequate

1 representation are fulfilled. Manual For Complex Litigation (Fourth) § 21.13 (2004).
2 In the Rule 23(b)3 context, due process is satisfied “where a fully descriptive notice is
3 sent first-class mail to each class member, with an explanation of the right to ‘opt out,’”
4 within a reasonable time. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

5 DISCUSSION

6 I. Joint Notice

7 The crux of the parties’ dispute regarding class notice is whether to send a single
8 joint notice that explains both the *Cohen* and *Makaeff* class actions or separate notices
9 for each set of class members.² Plaintiffs contend that sending one notice is the least
10 confusing, most efficient, and most cost effective way to communicate with the class
11 members. (ECF No. 61-1 at 12.)³ First, Plaintiffs argue that the nearly 40% of all
12 putative class members of *Cohen* that are also putative class members in *Makaeff*
13 would otherwise “receive two separate, nearly-identical notices,” which might result
14 in recipients ignoring one or the other notice as a duplicate. (ECF No. 71 at 6).
15 Second, Plaintiffs assert that the class member data provided by Defendant “does not
16 indicate where each individual purchased a Trump University Live Event and thus does
17 not conclusively establish whether any particular Class Member belongs to one or both
18 Classes,” giving rise to the possible need for the *Makaeff* mailing to either also be
19 nationwide, or risk possible under-inclusiveness. (ECF No. 71 at 7-8). Third,
20 Plaintiffs argue that two separate notice plans would also require two separate notice
21 apparatuses, resulting in over \$20,000 in additional costs. (*Id.* at 3).

22 Defendants counter that a joint notice would, in fact, invite confusion and is
23 inappropriate given that TU is not a defendant in both actions and the claims in the two
24 cases are distinct. (ECF No. 68 at 1.) First, Defendants argue that Plaintiffs’
25 contention that two separate notices would create confusion is mere “speculation,” and

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27 ² Defendants do not object to the general process proposed by Plaintiffs for distributing class
notice, as long as that process is done separately for each case. (ECF No. 408 at 3.)

28 ³ Page number citations such as this one are to the page numbers reflected on the Court’s
CM/ECF system and not to page numbers assigned by the parties.

1 that in fact, confusion is more likely to result if *Cohen* class members “received notice
2 of a class action in which they are not a class member.” (*Id.* at 5.) Second, Defendants
3 argue that sending separate notices is the best way to preserve the “individual identity”
4 of each case, given that there are different claims, class members, and defendants in
5 each. (*Id.* at 6.)

6 In the Rule 23(b)(3) context, “courts retain considerable discretion to tailor
7 notice to the relevant circumstances.” *See Lee v. Enter. Leasing Co. W.*, 2014 WL
8 4801828, at *2 (D. Nev. Sept. 22, 2014) (citations omitted); *see also Cohorst v. BRE*
9 *Properties, Inc.*, 2011 WL 7061923, at *6 (S.D. Cal. 2011) (noting that it is for the
10 court “to determine what amounts to reasonable efforts under the circumstances of each
11 case, the available information to the parties and possible methods of identification of
12 potential class members,” and that “[t]he hallmark of the notice inquiry . . . is
13 reasonableness”). Plaintiffs cite several cases where courts have approved joint notices
14 in varying contexts. *Cf. Negrete v. Allianz Life Ins. Co. of N. Am.*, CV 05-6868 CAS,
15 ECF No. 167, slip op. (C.D. Cal. Feb. 7, 2007) (approving joint notice after certifying
16 a RICO nationwide class in two related cases and a California subclass in one of the
17 cases); *In re FedEx Ground Package Sys.*, 2008 WL 927654 (N.D. Ind. Apr. 4, 2008)
18 (ordering joint notice to state-based class of state-based and national ERISA claims in
19 a single case). While neither case is squarely on all fours with the instant set of cases,
20 the Court finds that they provide support for the proposition that joint notices may be
21 approved where they are the most practicable vehicle for effecting notice upon the class
22 members.

23 Here, the Court finds that Defendants’ separate motion proposal does not
24 substantially reduce the likelihood of confusion for recipient class members, and in fact
25 poses some possibility of increasing it. Plaintiffs’ proposed joint notice repeatedly
26 specifies which individuals are members of each class. (*See* ECF No. 71-1 at 3, 5, 7-8).
27 Moreover, Plaintiffs’ proposed joint notice would be largely identical if divided into
28 separate notices for each case, giving rise to the possibility that the *Makaeff* class

1 members might ignore or be confused by one or other of the notices. *See In re FedEx*
2 *Ground Package Sys.*, 2008 WL 927654, at *3 (noting that “if absent class members
3 receive . . . two notices that are nearly identical, there is a strong possibility many
4 absent class members may ignore one notice or the other as a duplicate”).

5 Defendants cite to *In re FedEx* to support their contention that the “individual
6 identity” of each case must be preserved. (ECF No. 68 at 6). But the *In re FedEx* court
7 was referring to the attempts of Plaintiffs in that case to make reference in the notice
8 to other lawsuits in *multi-district* litigation, not to the joint notice of the state-based
9 claims and the national ERISA claims in the Rule 23(b)(3) motion, which the court
10 approved. *See* 2008 WL 927654, at *3-4. The *In re FedEx* court was concerned that
11 a notice referencing all pending MDL cases gave the appearance of some kind of giant,
12 super class action, which was misleading given that the Court had denied several
13 motions to certify class actions in several MDL cases. Those concerns are absent here
14 where there are two cases that are being handled by this Court and certification has
15 been granted on the issue of liability in both cases.

16 In addition, by alerting class members of the existence of both class actions in
17 one notice, the proposed notice increases the ability of class members to monitor both
18 cases to ensure that class counsel and class representatives are providing adequate
19 representation to the members of the classes.

20 For these reasons, the Court finds that the proposed notice provides an
21 opportunity for class members in both cases to participate in the litigation, to opt-out
22 of the litigation, to monitor the performance of class representatives and class counsel,
23 and to ensure that predictions of adequate representation are fulfilled. It does this with
24 reduced administrative burdens and costs that would be imposed upon Plaintiffs. The
25 Court **GRANTS** Plaintiffs’ motion to send a joint notice covering both cases and
26 orders Plaintiffs to serve a joint notice, pursuant to the terms set forth below.

27 **II. Other Objections**

28 **a. Proposed Pre-paid Postcard**

1 Defendants object to the proposed pre-paid postcard (“Return Postcard”)
2 Plaintiff seeks to include in all mailed notices. (ECF No. 68 at 6) (referencing the
3 proposed postcard attached as Exhibit 4 to the Declaration of Rachel L. Jensen, ECF
4 No. 61-2, Ex. 4.) Defendants argue that the Return Postcard improperly references the
5 class members’ current ages, as opposed to their ages when they purchased Trump
6 University Live Events. (*Id.* at 7). Plaintiffs do not object to this proposed modification.
7 (ECF No. 71 at 9).

8 As certified, the age of the class members at the time of purchase is the relevant
9 criteria under the California and Florida elder abuse laws. (10cv940, ECF No. 418).
10 Accordingly, the Court **ORDERS** the Plaintiffs to amend the Return Postcard to refer
11 to the ages of the class members at the time that they purchased Trump University Live
12 Events.

13 **b. Proposed Pre-paid “Exclusion Request/Opt-Out” Postcard**

14 Defendants contend that Plaintiffs’ notice must include “a pre-paid ‘Exclusion
15 Request/Opt-Out’ postcard” in order to eliminate a potential roadblock for individuals
16 who wish to exclude themselves. (ECF No. 68 at 7-8.) Contrary to Defendants’
17 assertion, pre-paid opt-out cards are far from “routine.” In fact, in one of the two cases
18 Defendants cited for this proposition, the court did *not* require enclosure of a pre-paid
19 envelope with the notice. *Compare Tierno v. Rite Aid Corp.*, 2007 WL 4166028, at *2
20 (N.D. Cal. Nov. 19, 2007) (requiring inclusion of prepaid opt-out form with notice)
21 *with Cruz v. Dollar Tree Stores, Inc.*, 2009 WL 1974404, at *2 (N.D. Cal. July 2, 2009)
22 (requiring opt-out form, but not pre-paid envelope), *modified in part*, 270 F.R.D. 499
23 (N.D. Cal. 2010). Rule 23 requires only that the class members receive notice that
24 explains in “plain, easily understood language . . . that the court will exclude from the
25 class any member who requests exclusion.” Fed. R. Civ. P. 23(c)(2)(B). As one court
26 explained,

27 FRCP 23(b)(3) does not explicitly require an opt-out form be included as
28 part of the notice. Reviewing the Advisory Committee Notes included
with FRCP 23(c)(2)(B), in 2003 the Committee referred to illustrative
clear-notice forms provided by the Federal Judicial Center. *See*

1 Fed.R.Civ.P. 23(c)(2)(B) advisory committee's note. The example notice
2 forms provided by the Federal Judicial Center merely includes language,
3 on the face of the notice, that a class member may decide to be excluded
4 from the class, and if they wish to do so, they may send a letter to a given
5 address. *See* <http://www.fjc.gov/> (Class Action Notices Page). The notice
6 forms do not appear to contemplate the inclusion of an exclusion notice
7 form. Further, the Court finds that on balance, such a separate form will
8 “engender confusion” and may encourage class members to “unwittingly
9 opt out of the class.” *Roberts v. Heim*, 130 F.R.D. 416, 423
10 (N.D.Cal.1988).

11 *Krzesniak v. Cendant Corp.*, No. C 05-05156 MEJ, 2007 WL 4468678, at *3 (N.D. Cal.
12 Dec. 17, 2007). The Advisory Committee Notes also contain no discussion of
13 requiring pre-paid opt-out forms.

14 On balance, this Court finds that Plaintiffs are not required to include a pre-paid
15 opt-out card. The notice Plaintiffs propose to mail clearly explains that (1) if a class
16 member does not wish to be included in the class, he or she must take affirmative steps
17 in order to be excluded, (2) the class member must opt out in writing (Plaintiff provides
18 the address to be used for exclusion requests), (3) the written request must contain the
19 class member’s name, address, and signature, and (4) an exclusion request form is
20 available at www.trumpuniversitylitigation.com. (ECF No. 61-2, Ex. 2). This satisfies
21 Rule 23's requirement of setting forth the class members’ rights in clear language and
22 the option of downloading an exclusion request form from the website eliminates the
23 burden of drafting a letter. Moreover, as the *Krzesniak* court highlighted, an opt-out
24 card included with the notice could very well be construed by many class members as
25 an opt-*in* card, resulting in class members unwittingly excluding themselves from the
26 litigation.

27 **c. Defendants’ Request for Ten (10) Days Review of Class**
28 **Member List**

29 Defendants request that the Court prescribe a ten (10) business day period from
30 receipt of the Class Notice Administrator (“Administrator”) of the compiled list of
31 names and addresses Plaintiffs are intending to use for class period, so as to ensure that
32 the Administrator’s list of potential class members is as complete and accurate as

1 possible. (ECF No. 68 at 7). Plaintiffs reply that this period is no longer necessary,
2 since the Administrator sent the compiled list to Defendants as of May 1, 2015. (ECF
3 No. 71 at 9. Since Defendants have had several months to review Plaintiffs' compiled
4 list, the Court will not adjust the class notice schedule to prescribe an additional review
5 period.

6 CONCLUSION

7 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN**
8 **PART** Plaintiffs' motion for approval of class notice and directing class notice
9 procedures (ECF No. 61). Accordingly, **IT IS HEREBY ORDERED** that:

- 10 1. The Proposed Class Notices (attached as ECF No. 71-1, Ex. A; ECF No.
11 61-2, Ex. 2, and ECF No. 61-2, Ex. 3) are approved for dissemination of
12 class notice. The parties are authorized to make non-substantive changes
13 to the notice, as long as they are acceptable to both parties, to reflect
14 deadlines, mailing addresses, and similar information or to format the
15 notice for printing.
- 16 2. Plaintiffs will submit an amended Return Postcard (attached as ECF No.
17 61-2, Ex. 4) that is consistent with this Order within **seven (7) days of the**
18 **Order.**
- 19 3. Epiq Systems, Inc. is approved as "Notice Administrator" to supervise and
20 carry out the notice procedure.
- 21 4. The Notice Administrator is directed to compile a list of names and
22 addresses of purchasers of "Trump University" programs as they appear
23 in defendants' records, and Defendants are directed to cooperate in
24 ensuring the list of potential Class Members is as complete and accurate
25 as possible.
- 26 5. The Notice Administrator is directed to establish and monitor a website
27 (www.trumpuniversitylitigation.com), making available copies of the
28 Long-Form Notice, this Court's class certification orders, an address for

1 mailing requests for exclusion or providing contact or age information,
2 and other helpful information.

3 6. The Notice Administrator is directed to establish a toll-free telephone
4 number, (866) 841-7311, where Class Members may call for additional
5 information.

6 7. The Notice Administrator is ordered to send through U.S. first-class mail,
7 within **ten (10) days of the Order** (the “Notice Date”), the Mailed Notice,
8 substantially in the form attached as ECF No. 61-2, Ex. 3, to each
9 purchaser identified on the list informing them of both class actions.
10 Among other things, the Mailed Notice shall provide a website, address
11 and phone number, information as to how Class Members can obtain a
12 Long-Form Notice, substantially in the form attached as ECF No. 71-1,
13 Ex. A, which includes: (i) more detail about the litigation and answers to
14 frequently-asked questions; (ii) an address for sending requests for
15 exclusion from one or both of the Classes; and (iii) information as to how
16 Class Members can update their information and senior citizens to
17 indicate they may be members of an elder financial abuse subclass.
18 Provided that the amended Return Postcard has been subsequently
19 approved by the Court, the Notice Administrator is authorized to include
20 it in the Mailed Notice.

21 8. The Notice Administrator is ordered to publish on one occasion in the
22 national edition of USA Today the Summary Notice, substantially in the
23 form attached as ECF No. 61-2, Ex. 3, not later than **ten (10) days after**
24 **the Notice Date**, which will give those who did not receive the notice by
25 mail an opportunity to request it and to protect any rights they may have.

26 9. The deadline for exclusion from the Class shall be **forty-five (45) days**
27 **after the Notice Date** (“Opt-Out Deadline”). Any Class Member who
28 does not send a completed, signed request for exclusion to the Notice

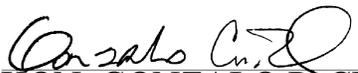
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Administrator post-marked on or before the Opt-Out Deadline will be deemed to be a Member of the Class for all purposes and bound by all further orders and judgments of the Court. All opt outs shall not be so bound, but also barred from sharing in any recovery.

10. The Notice Administrator is ordered to provide counsel for both parties with a list of all timely requests for exclusion within **seven (7) business days after the Opt-Out Deadline**. Plaintiffs are ordered to file such list with the Court within **three (3) days thereafter**.

IT IS SO ORDERED.

DATED: September 21, 2015


HON. GONZALO P. CURIEL
United States District Judge