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

TARLA MAKAEFF, on Behalf of
Herself and All Others Similarly
Situated,

Plaintiff,

v.

TRUMP UNIVERSITY, LLC, (aka
Trump Entrepreneur Initiative) a New
York Limited Liability Company,
DONALD J. TRUMP, and DOES 1
through 50, inclusive,

Defendants.

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

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

[ECF No. 381]

On February 20, 2015, Plaintiffs filed a Motion for Approval of Class Notice and Directing Class Notice Procedures. (ECF No. 381.) The motion has been fully briefed. (ECF Nos. 408, 411.)

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** Plaintiffs’ motion for approval of class notice and directing class notice procedures.

BACKGROUND

On February 21, 2014, this Court certified a class of Trump University, LLC (“TU”) students. (ECF No. 298.) On March 10, 2014, Defendants TU and Donald

1 Trump (“Defendants”) sought permission to appeal the grant of certification to the
2 Ninth Circuit. (ECF No. 307.) On April 10, 2014, the Ninth Circuit denied permission
3 to appeal the ruling on timeliness grounds. (ECF No. 318). On February 19, 2015,
4 Defendants moved to decertify. (ECF No. 380). On September 18, 2015, this Court
5 granted in part and denied in part Defendants’ motion.¹ (ECF No. 418). The class
6 consists of the following class and subclasses:

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

- 10 (1) a California UCL/CLRA/Misleading Advertisement subclass of
11 purchasers of the Trump University Fulfillment and Elite Seminars who
12 purchased the program in California within the applicable statute of
13 limitations;
14 (2) a California Financial Elder Abuse subclass of purchasers of the
15 Trump University Fulfillment and Elite Seminars who were over the age
16 of 65 years of age when they purchased the program in California within
17 the applicable statute of limitations;
18 (3) a New York General Business Law § 349 subclass of purchasers of the
19 Trump University Fulfillment and Elite Seminars who purchased the
20 program in New York within the applicable statute of limitations;
21 (4) a Florida Deceptive and Unfair Trade Practices Act
(FDUTPA)/Misleading Advertising Law subclass of purchasers of the
22 Trump University Fulfillment and Elite Seminars who purchased the
23 program in Florida within the applicable statute of limitations; and
24 (5) a Florida Financial Elder Abuse subclass of purchasers of the Trump
25 University Fulfillment and Elite Seminars who were over the age of 60
26 years of age when they purchased the program in Florida within the
27 applicable statute of limitations.

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

(*Id.* at 21.)

On October 27, 2014, this Court certified a nationwide class in the related case
of *Cohen v. Trump*, 13cv2519-GPC(WVG). (*See* 13cv2519-GPC(WVG), ECF No. 53.)

That class consists of:

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. (ECF No. 418
at 2).

1 All persons who purchased Live Events from Trump University
2 throughout the United States from January 1, 2007 to the present.
3 Excluded from the Class are Trump University, its affiliates, employees,
4 officers and directors, persons or entities that distribute or sell Trump
University products or programs, the Judge(s) assigned to this case, and
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. (13cv2519-GPC(WVG), ECF
7 No. 59.)

8 On February 20, 2015, Plaintiff in this case and Plaintiffs in the *Cohen* case filed
9 motions in their respective cases seeking permission to serve a single class notice to
10 all putative class members in both cases. (10cv0940-GPC(WVG), ECF No. 381;
11 13cv2519-GPC(WVG), ECF No. 61)

12 LEGAL STANDARD

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

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

19 (i) the nature of the action;

20 (ii) the definition of the class certified;

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

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

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

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

25 (vii) the binding effect of a class judgment on members under Rule 23(c)(3).
26

27 Fed. R. Civ. P. 23(c)(i - vii). Notice provides an opportunity for class members to
28 participate in the litigation, to opt-out of the litigation, to monitor the performance of

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

6 DISCUSSION

7 I. Joint Notice

8 The crux of the parties’ dispute regarding class notice is whether to send a single
9 joint notice that explains both the *Cohen* and *Makaeff* class actions or separate notices
10 for each set of class members.² Plaintiffs contend that sending one notice is the least
11 confusing, most efficient, and most cost effective way to communicate with the class
12 members. (ECF No. 381-1 at 12.)³ First, Plaintiffs argue that the nearly 40% of all
13 putative class members of *Cohen* that are also putative class members in *Makaeff*
14 would otherwise “receive two separate, nearly-identical notices,” which might result
15 in recipients ignoring one or the other notice as a duplicate. (ECF No. 411 at 6).
16 Second, Plaintiffs assert that the class member data provided by Defendant “does not
17 indicate where each individual purchased a Trump University Live Event and thus does
18 not conclusively establish whether any particular Class Member belongs to one or both
19 Classes,” giving rise to the possible need for the *Makaeff* mailing to either also be
20 nationwide, or risk possible under-inclusiveness. (ECF No. 411 at 7-8). Third,
21 Plaintiffs argue that two separate notice plans would also require two separate notice
22 apparatuses, resulting in over \$20,000 in additional costs. (*Id.* at 3).

23 Defendants counter that a joint notice would, in fact, invite confusion and is
24 inappropriate given that TU is not a defendant in both actions and the claims in the two
25 cases are distinct. (ECF No. 408 at 1.) First, Defendants argue that Plaintiffs’

26 ² Defendants do not object to the general process proposed by Plaintiffs for distributing class
27 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 contention that two separate notices would create confusion is mere “speculation,” and
2 that in fact, confusion is more likely to result if *Cohen* class members “received notice
3 of a class action in which they are not a class member.” (*Id.* at 5.) Second, Defendants
4 argue that sending separate notices is the best way to preserve the “individual identity”
5 of each case, given that there are different claims, class members, and defendants in
6 each. (*Id.* at 6.)

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

24 Here, the Court finds that Defendants’ separate motion proposal does not
25 substantially reduce the likelihood of confusion for recipient class members, and in fact
26 poses some possibility of increasing it. Plaintiffs’ proposed joint notice repeatedly
27 specifies which individuals are members of each class. (*See* ECF No. 411-1 at 3, 5, 7-
28 8). Moreover, Plaintiffs’ proposed joint notice would be largely identical if divided into

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

6 Defendants cite to *In re FedEx* to support their contention that the “individual
7 identity” of each case must be preserved. (ECF No. 408 at 6). But the *In re FedEx*
8 court was referring to the attempts of Plaintiffs in that case to make reference in the
9 notice to other lawsuits in *multi-district* litigation, not to the joint notice of the state-
10 based claims and the national ERISA claims in the Rule 23(b)(3) motion, which the
11 court approved. *See* 2008 WL 927654, at *3-4. The *In re FedEx* court was concerned
12 that a notice referencing all pending MDL cases gave the appearance of some kind of
13 giant, super class action, which was misleading given that the Court had denied several
14 motions to certify class actions in several MDL cases. Those concerns are absent here
15 where there are two cases that are being handled by this Court and certification has
16 been granted on the issue of liability in both cases.

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

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

28 ///

1 **II. Other Objections**

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

3 Defendants object to the proposed pre-paid postcard (“Return Postcard”)
4 Plaintiff seeks to include in all mailed notices. (ECF No. 408 at 6) (referencing the
5 proposed postcard attached as Exhibit 4 to the Declaration of Rachel L. Jensen, ECF
6 No. 381-2, Ex. 4.) Defendants argue that the Return Postcard improperly references
7 the class members’ current ages, as opposed to their ages when they purchased Trump
8 University Live Events. (*Id.* at 7). Plaintiffs do not object to this proposed modification.
9 (ECF No. 411 at 9).

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

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

16 Defendants contend that Plaintiffs’ notice must include “a pre-paid ‘Exclusion
17 Request/Opt-Out’ postcard” in order to eliminate a potential roadblock for individuals
18 who wish to exclude themselves. (ECF No. 408 at 7-8.) Contrary to Defendants’
19 assertion, pre-paid opt-out cards are far from “routine.” In fact, in one of the two cases
20 Defendants cited for this proposition, the court did *not* require enclosure of a pre-paid
21 envelope with the notice. *Compare Tierno v. Rite Aid Corp.*, 2007 WL 4166028, at *2
22 (N.D. Cal. Nov. 19, 2007) (requiring inclusion of prepaid opt-out form with notice)
23 *with Cruz v. Dollar Tree Stores, Inc.*, 2009 WL 1974404, at *2 (N.D. Cal. July 2, 2009)
24 (requiring opt-out form, but not pre-paid envelope), *modified in part*, 270 F.R.D. 499
25 (N.D. Cal. 2010). Rule 23 requires only that the class members receive notice that
26 explains in “plain, easily understood language . . . that the court will exclude from the
27 class any member who requests exclusion.” Fed. R. Civ. P. 23(c)(2)(B). As one court
28 explained,

1 FRCP 23(b)(3) does not explicitly require an opt-out form be included as
2 part of the notice. Reviewing the Advisory Committee Notes included
3 with FRCP 23(c)(2)(B), in 2003 the Committee referred to illustrative
4 clear-notice forms provided by the Federal Judicial Center. *See*
5 Fed.R.Civ.P. 23(c)(2)(B) advisory committee's note. The example notice
6 forms provided by the Federal Judicial Center merely includes language,
7 on the face of the notice, that a class member may decide to be excluded
8 from the class, and if they wish to do so, they may send a letter to a given
9 address. *See* <http://www.fjc.gov/> (Class Action Notices Page). The notice
10 forms do not appear to contemplate the inclusion of an exclusion notice
11 form. Further, the Court finds that on balance, such a separate form will
12 "engender confusion" and may encourage class members to "unwittingly
13 opt out of the class." *Roberts v. Heim*, 130 F.R.D. 416, 423
14 (N.D.Cal.1988).

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

18 On balance, this Court finds that Plaintiffs are not required to include a pre-paid
19 opt-out card. The notice Plaintiffs propose to mail clearly explains that (1) if a class
20 member does not wish to be included in the class, he or she must take affirmative steps
21 in order to be excluded, (2) the class member must opt out in writing (Plaintiff provides
22 the address to be used for exclusion requests), (3) the written request must contain the
23 class member's name, address, and signature, and (4) an exclusion request form is
24 available at www.trumpuniversitylitigation.com. (ECF No. 381-2, Ex. 2). This
25 satisfies Rule 23's requirement of setting forth the class members' rights in clear
26 language and the option of downloading an exclusion request form from the website
27 eliminates the burden of drafting a letter. Moreover, as the *Krzesniak* court
28 highlighted, an opt-out card included with the notice could very well be construed by
many class members as an opt-in card, resulting in class members unwittingly
excluding themselves from the litigation.

29 **c. Defendants' Request for Ten (10) Days Review of Class**
30 **Member List**

31 Defendants request that the Court prescribe a ten (10) business day period from
32 receipt of the Class Notice Administrator ("Administrator") of the compiled list of

1 names and addresses Plaintiffs are intending to use for class period, so as to ensure that
2 the Administrator's list of potential class members is as complete and accurate as
3 possible. (ECF No. 408 at 7). Plaintiffs reply that this period is no longer necessary,
4 since the Administrator sent the compiled list to Defendants as of May 1, 2015. (ECF
5 No. 411 at 9.) Since Defendants have had several months to review Plaintiffs'
6 compiled list, the Court will not adjust the class notice schedule to prescribe an
7 additional review period.

8 CONCLUSION

9 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN**
10 **PART** Plaintiffs' motion for approval of class notice and directing class notice
11 procedures (ECF No. 381). Accordingly, **IT IS HEREBY ORDERED** that:

- 12 1. The Proposed Class Notices (attached as ECF No. 411-1, Ex. A; ECF No.
13 381-2, Ex. 2, and ECF No. 381-2, Ex. 3) are approved for dissemination
14 of class notice. The parties are authorized to make non-substantive
15 changes to the notice, as long as they are acceptable to both parties, to
16 reflect deadlines, mailing addresses, and similar information or to format
17 the notice for printing.
- 18 2. Plaintiffs will submit an amended Return Postcard (attached as ECF No.
19 381-2, Ex. 4) that is consistent with this Order within **seven (7) days of**
20 **the Order**.
- 21 3. Epiq Systems, Inc. is approved as "Notice Administrator" to supervise and
22 carry out the notice procedure.
- 23 4. The Notice Administrator is directed to compile a list of names and
24 addresses of purchasers of "Trump University" programs as they appear
25 in defendants' records, and Defendants are directed to cooperate in
26 ensuring the list of potential Class Members is as complete and accurate
27 as possible.
- 28 5. The Notice Administrator is directed to establish and monitor a website

1 (www.trumpuniversitylitigation.com), making available copies of the
2 Long-Form Notice, this Court’s class certification orders, an address for
3 mailing requests for exclusion or providing contact or age information,
4 and other helpful information.

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

8 7. The Notice Administrator is ordered to send through U.S. first-class mail,
9 within **ten (10) days of the Order** (the “Notice Date”), the Mailed Notice,
10 substantially in the form attached as ECF No. 381-2, Ex. 3, to each
11 purchaser identified on the list informing them of both class actions.
12 Among other things, the Mailed Notice shall provide a website, address
13 and phone number, information as to how Class Members can obtain a
14 Long-Form Notice, substantially in the form attached as ECF No. 411-1,
15 Ex. A, which includes: (i) more detail about the litigation and answers to
16 frequently-asked questions; (ii) an address for sending requests for
17 exclusion from one or both of the Classes; and (iii) information as to how
18 Class Members can update their information and senior citizens to
19 indicate they may be members of an elder financial abuse subclass.
20 Provided that the amended Return Postcard has been subsequently
21 approved by the Court, the Notice Administrator is authorized to include
22 it in the Mailed Notice.

23 8. The Notice Administrator is ordered to publish on one occasion in the
24 national edition of USA Today the Summary Notice, substantially in the
25 form attached as ECF No. 381-2, Ex. 3, not later than **ten (10) days after**
26 **the Notice Date**, which will give those who did not receive the notice by
27 mail an opportunity to request it and to protect any rights they may have.
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9. The deadline for exclusion from the Class shall be **forty-five (45) days after the Notice Date** (“Opt-Out Deadline”). Any Class Member who does not send a completed, signed request for exclusion to the Notice Administrator post-marked on or before the Opt-Out Deadline will be deemed to be a Member of the Class for all purposes and bound by all further orders and judgments of the Court. 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