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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TARLA MAKAEFF, SONNY LOW, J.R. EVERETT, AND JOHN BROWN, on behalf of themselves and all others similarly situated, ED OBERKROM, and BRANDON KELLER, individually,

Plaintiffs,

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-00940 GPC (WVG)

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DONALD J. TRUMP'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

DATE: **April 10, 2015**
TIME: **1:30 p.m.**
CRTM: **2D (2nd Floor – Schwartz)**

JUDGE: **Hon. Gonzalo P. Curiel**

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Defendant, Donald J. Trump, hereby submits this Memorandum of Points and Authorities in Support of his Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment.

I. SUMMARY OF REASONS SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DONALD TRUMP

Since Plaintiffs filed their Second Amended Complaint over four years ago, adding Mr. Trump as a deep pocket defendant in this case, they have tirelessly sought to blur the lines between Mr. Trump and Trump University, LLC ("TU").[1] However, after four years of discovery one thing is clear: Plaintiffs' claims against Mr. Trump—who they never met, never spoke to, and never entered into a contract with—all indisputably fail.

The Court certified the classes based solely on three alleged "core" misrepresentations. However when the allegations against Mr. Trump are analyzed against these misrepresentations, the flaws in Plaintiffs' claims become clear. The inescapable result is that Mr. Trump's Motion for Summary Judgment should be granted for at least five reasons: (1) Mr. Trump did not make the "core" misrepresentations; (2) Mr. Trump did not make the "core" misrepresentations to the class representatives; (3) the class representatives did not rely on the "core" misrepresentations from Mr. Trump; (4) there is no causal connection between Mr. Trump's conduct and any alleged injury; and (5) the class representatives have no admissible evidence to support a claim for restitution or damages. These fatal flaws and Plaintiffs' stark lack of admissible evidence on essential elements of their claims warrant summary judgment in Mr. Trump's favor.

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[1] Plaintiffs' operative pleading, the Third Amended Complaint ("TAC"), is void of any allegations of liability against Mr. Trump based on theories of vicarious liability, alter ego liability, or piercing the corporate veil. See TAC, *passim*.

II. STATEMENT OF FACTS

A. Donald Trump's Involvement With Trump University

TU was formed in 2004, and began operations in 2005. It was the idea of educational entrepreneur Michael Sexton, who wanted to sell an on-line real estate education program using the Trump brand, and using "the best of the best" real estate faculty. (DEx. 1 ¶¶3-6 & DEx. 2 at 75:17-76:15.)[2] When becoming involved with TU, Mr. Trump made clear that his intent and the purpose for forming the LLC was to help people by providing them with real estate investing education and knowledge to make their lives better. (Separate Statement of Undisputed Facts ISO Donald J. Trump's Motion for Summary Judgment ("SOF") 1.) Trump University was selected as the name for the business because it "just sounded good." (SOF 2.)

Mr. Trump met with Mr. Sexton to discuss overall methods and goals, to approve the TU business plan, and to select the original instructors. (SOF 3.) The instructors included Prof. Gary Eldred of Stanford and the University of Virginia, and Profs. Don Sexton and Jack Kaplan of Columbia University Business School. (SOF 4.) Although courses were originally delivered on-line, in 2007 TU introduced live seminars, followed by a mentor program involving individualized one-on-one training. (SOF 5.) As the TU faculty grew, Mr. Trump continued to meet many of the instructors, and he approved their resumes. (SOF 6.) It was important to Mr. Trump that TU have good instructors to provide a positive experience and a good education. (SOF 7.) Mr. Trump testified that there was no targeted population for TU's seminars and he had no knowledge regarding the number of TU students who were senior citizens, rather Mr. Trump was looking to educate people who wanted to learn. (SOF 8.)

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[2] All references to "DEx." are to the exhibits to the Declaration of Nancy L. Stagg in Support of Donald Trump's Motion for Summary Judgment, filed concurrently herewith.

B. The Three "Core" Alleged Misrepresentations

The Court certified the California, Florida, and New York subclasses only after Plaintiffs narrowed their claims to certain common "core" misrepresentations. Dkt. No. 298 at 4, fn. 6. As the Court noted in its February 21, 2014 certification order:

> Plaintiffs allege TU and Donald Trump made the following common misrepresentations in invitations, advertisements, and at the free program and fulfillment seminar: (1) Trump University was an accredited university; (2) students would be taught by real estate experts, professors and mentors hand-selected by Mr. Trump; and (3) students would receive one year of expert support and mentoring.

Dkt. No. 298 at 4. Plaintiffs' practice of blurring the line between the conduct of each Defendant, Mr. Trump and TU, in pleadings and prior motions ends here. Plaintiffs cannot meet their evidentiary burden to establish that Mr. Trump made these alleged misrepresentation to each class representative. Absent evidence of these specific misrepresentations by Mr. Trump, he is entitled to summary judgment as to all claims against him individually.

C. Plaintiffs' Evidence Regarding the "Core" Misrepresentations

In support of their class certification motion, Plaintiffs identified the evidence they allege contained the "core" misrepresentations at issue.[3] Most of these exhibits contain no written or oral representations by or from Mr. Trump, but instead are TU advertisements,

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[3] Plaintiffs' Motion for Class Certification (Dkt. No. 122-1) cites the following exhibits as evidence of the alleged "core" misrepresentations: PExs. 1, 2, 13, 32, 37, 38, 40, 42, 43, 46, 47, 57, 58, 75, 79 (Plaintiffs' chart summarizing ads/marketing containing alleged misrepresentations, including letter "signed" by Mr. Trump), 86, 87, 88 (Plaintiffs' chart summarizing alleged misrepresentations in seminar transcripts), and Supp. Doc. Ex. 2. Plaintiffs' exhibits are attached to the Declaration of Amber Eck (Dkt. No. 122-2), Reply Declaration of Rachel Jensen (Dkt. No. 195-1), and Supplemental Declaration of Jason Forge (Dkt. No. 239-1). The only exhibit cited by Plaintiffs that references TU being "accredited," is a letter from the New York Better Business Bureau to Mr. Sam Empson at Trump University that characterizes what someone at the BBB allegedly saw on TU's website at some point. (*See* PEx. 13 [BBB NY 00505].)

PowerPoints used by instructors at TU seminars, transcripts from TU seminars, the TU Playbook, and other materials received by Plaintiffs at the TU seminars.

With discovery now closed, Plaintiffs' case against Mr. Trump boils down to only two pieces of evidence: (1) the Donald Trump video about TU (PEx. 1, 2 and 88); and (2) various versions of letters allegedly "signed" by Mr. Trump sent by mail or e-mail to TU students (*see e.g.* PExs. 32, 37, and 39).[4] Completely missing, however, is any evidence that any "core" misrepresentations were made by Mr. Trump to the class representatives themselves. Plaintiffs' evidence does not contain any representations by Mr. Trump that: (1) TU was an "accredited" university; or (2) that "students would receive one year of expert support and mentoring." Moreover, Plaintiffs lack any evidence that Mr. Trump did not hand select TU's instructors. To the contrary, the undisputed facts show that Mr. Trump not only personally met with some instructors, but he also reviewed the resumes of all of the instructors. (SOF 6.) Plaintiff's failure to present evidence of Mr. Trump making each of the "core" misrepresentations, let alone making them to each Plaintiff, is fatal to their claims.

D. Donald Trump Did Not Make The "Core" Alleged Misrepresentations To The Class Representatives Prior To Their Purchases From TU

1. *Makaeff was not misled by Donald Trump*

During her deposition, Plaintiff Tarla Makaeff confirmed that the "core" alleged misrepresentations were not made to her by Mr. Trump. Indeed, Makaeff testified that there were no written statements or representations made to her by Mr. Trump whatsoever prior to her purchase from TU. (SOF 10.) Makaeff never attended a free preview. (SOF 11.) In fact, Makaeff had not reviewed or seen any information regarding TU prior to attending her 3-day seminar. (SOF 12.) She did not rely on any written information directly from Mr. Trump or TU prior to her 3-day seminar (SOF 13), which

[4] Mr. Trump testified at his deposition that he did not personally send emails to prospective students, but TU may have done so. (SOF 9.)

would include letters or emails from Mr. Trump. Makaeff never went to the TU website before her purchase of the Gold Elite package—the only alleged source of any representation from TU (and not Donald Trump) regarding TU being "accredited"; nor did Makaeff see any of Mr. Trump's blog posts prior to purchase. (SOF 13.) Makaeff also cannot recall ever seeing the Donald Trump video—the only source of the alleged oral misrepresentation by Mr. Trump regarding his handpicking the TU instructors and mentors—and Mr. Trump was not present at her 3-day seminar. (SOF 15-16.) Most importantly, Makaeff confirmed that her decision to purchase the Gold Elite package was based solely on representations made by TU instructors and representatives at her 3-day seminar and written materials received from TU at that seminar.[5] (SOF 17.)

In summary, Mr. Trump did not make any of the three "core" misrepresentations to Makaeff either in writing or orally prior to her purchase from TU. If any misrepresentations were made to Makaeff they were made by TU through its instructors and written materials, not by Mr. Trump. These facts alone warrant summary judgment in Mr. Trump's favor.

2. *Low was not misled by Donald Trump*

Plaintiff Sonny Low's deposition testimony also undercuts any allegation that the "core" misrepresentations were made by Mr. Trump. Low testified that he first heard of TU in a local newspaper ad, but had no memory of the ad containing any representation regarding Mr. Trump handpicking instructors. (SOF 20.) The only writing Low could identify regarding Mr. Trump's representations was that fact that pictures of Mr. Trump were used by TU at the 3-day seminar. (SOF 21.) Low also confirmed that he never met Mr. Trump, never spoke to Mr. Trump, and Mr. Trump never made any oral statements to Low. (SOF 22-24.) Therefore, the only source for any misrepresentation to Low by

[5] The documents identified by Makaeff during her deposition as those she reviewed prior to contracting with TU do not contain either a letter or e-mail from Mr. Trump. (SOF 18.) However, these documents do contain a welcome letter from TU president Michael Sexton that states that **he chose the TU instructors**. (SOF 19.)

Mr. Trump would be the Donald Trump video, which Low cannot recall ever seeing prior to his purchase of either the $1,495 3-day seminar or the in-person mentoring. (SOF 25.) Most importantly, Low stated that his decision to purchase the in-person mentoring resulted from statements by a TU instructor at the 3-day, not Mr. Trump. (SOF 26.) Low confirmed that at the 3-day he was told by TU, not Mr. Trump, that for $25,000 he would get a "Trump University handpicked mentor" which he believed to mean "somebody handpicked using whatever criteria that Donald J. Trump and Trump University used in selecting these mentors." (SOF 27.) Low thought that the mentor might "possibly" be picked by Mr. Trump. (SOF 28.) However, regardless of Low's belief regarding the selection of the mentors or the terms of the mentorship, it was not based on representations that were made by Mr. Trump.

3. *Everett was not misled by Donald Trump*

Like Makaeff and Low, Plaintiff Everett testified that she never spoke to Mr. Trump and had no contact with him. (SOF 35.) Everett cannot recall seeing the Donald Trump video prior to her purchase from TU (SOF 36) and she did not testify that anything in the video caused her to purchase TU programs. Everett did not review any of Mr. Trump's blog entries or visit TU's website prior to purchase. (SOF 37-38.) In short, there were no misrepresentations from Mr. Trump to Everett.

Additionally, while Everett testified that she had received an invitation signed by Mr. Trump stating that he had handpicked the instructors,[6] she also testified that she did not rely on that letter in purchasing TU programs. (SOF 40.) Everett's testimony confirmed that her decision to purchase the 3-day seminar was based solely on representations made the TU speaker at the preview seminar, the Trump name on the program, and Mr. Trump's reputation, not written or oral representations by Mr. Trump.

[6] The invitation identified by Everett at her deposition as the only written representations received from Mr. Trump prior to her purchase, does not contain either the "core" misrepresentations regarding TU being an "accredited" university or that of TU providing students with one year of expert support or mentoring. (SOF 39.)

(SOF 41.) Additionally, Everett confirmed that her decision to purchase the Gold Elite package was based on representations made the TU instructor during the 3-day seminar, representations contained in her contract with TU, and other representations by TU, not representations by Mr. Trump. (SOF 42.) Finally, Everett stated that she understood that Trump University was not a traditional university (akin to the University of Florida) and had no memory of either Mr. Trump or TU representing to her that TU was "accredited." (SOF 43-44.) Instead, she simply thought TU was "like a real estate school or special school that has certification . . . ." (SOF 45.) Everett therefore was not misled by Mr. Trump because he did not make any of the "core" misrepresentations to her.

4. *Brown was not misled by Donald Trump*

Plaintiff Brown testified that he first learned of TU through a mail or e-mail announcement, but had no memory of the content of the announcement. (SOF 48.) Brown stated he had not received any writings from Mr. Trump regarding the $1,495 program before he purchased it. (SOF 49.) Moreover, when asked to identify each written ad or TU marketing piece relied on before purchase, Brown did not identify any writings from Mr. Trump. (SOF 50.) Also, when asked to identify all documents promising or representing that TU would provide one year in-person mentoring or a year-long mentorship, Brown again did not identify a single writing from Mr. Trump.[7] (SOF 51.)

Brown also testified that neither Mr. Trump nor anyone from TU ever represented that TU was an "accredited" university, but rather that was "impl[ied]" by Brown. (SOF 56.) Also, Brown never visited the TU website prior to his purchase. (SOF 57.) Most importantly, Brown confirmed that before he purchased the 3-day seminar he knew the

[7] Brown further testified that: (1) he did not see any literature from TU regarding the in-field mentorship prior to purchase, he was just "told" about it (SOF 52); (2) he was told the mentorship was phone calls prior to in-person mentoring (SOF 53); (3) no one represented that the in-person mentoring was ever more than three days (SOF 54); and (4) that Mr. Trump never represented that he would receive an unlimited one year of expert support and mentoring (SOF 55).

organization was called Trump University, but he did not think it was actually a university (SOF 58) or that the 3-day would be held in a "university-type" setting (SOF 59).[8]

Brown never met or spoke with Mr. Trump (SOF 61) and Mr. Trump never said anything to Brown about what Brown would get in any specific program (SOF 62). Mr. Trump did not attend either the preview or 3-day attended by Brown. (SOF 63.) Therefore, the only source of any alleged oral representations from Mr. Trump made to Brown was in the Donald Trump video.[9] Brown initially testified at his deposition that he did not recall anything in the video regarding Mr. Trump handpicking the instructors and generally had no memory of the content of the video (SOF 64.)[10] When asked why he decided to purchase the 3-day seminar Brown stated "I wanted to continue making money. I felt that more education would be able to help me make better judgments and better choices – or maybe not better, but the best choices." (SOF 65.)

E. Plaintiffs Contracted With And Paid Trump University, Not Donald Trump

None of the Plaintiffs entered into written contracts with Mr. Trump or made payments to Mr. Trump for their TU seminars. Makaeff, did not attend a free preview (SOF 11) and never entered into any contract for the 3-day seminar; instead, she split the $1,500 and paid a friend that had attended the preview $750. (SOF 29.) Makaeff

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[8] Also, Brown testified that Mr. Trump never said that TU was a "legitimate academic institution." (SOF 60.)

[9] Brown testified that the source of the full year of mentoring representation were the people from TU whom Brown signed his contract with (SOF 55) and that he could not recall Mr. Trump saying anything about an unlimited year of expert support and mentoring (*Id.*).

[10] After hours of testimony and breaks to consult with his counsel, Brown's testimony morphed to include a claim that he now remembered that Mr. Trump said in the video that everyone at TU was handpicked by Mr. Trump. (DEx. 12 at 98:1-99:1 & 182:25-183:20.) However, Brown never testified that this representation was material to him or caused him to purchase either the 3-day seminar or mentorship package. Additionally, this is not a misrepresentation, Mr. Trump had handpicked the instructors. (SOF 6.)

contracted with and paid TU, not Mr. Trump for her Gold Elite package. (SOF 30.) Similarly, Low never paid any money to Mr. Trump for the TU programs. (SOF 31.) Low's 3-day and in-field mentorship contracts are between Low and TU. (SOF 32.) Everett and Plaintiff Brandon Keller, and Edward Oberkrom also only contracted with and paid TU for the seminars and mentorship. (SOF 46, 67-68.) Finally, Brown's experience was no different from the other Plaintiffs; he too contracted solely with TU for the 3-day seminar and in-field mentorship. (SOF 66.) None of the named Plaintiffs have presented any evidence of either a contract with or payment to Mr. Trump individually.

III. DONALD TRUMP IS ENTITLED TO SUMMARY JUDGMENT ON ALL ASSERTED CAUSES OF ACTION BECAUSE PLAINTIFFS CANNOT MEET THEIR LEGAL AND/OR EVIDENTIARY BURDEN ON EACH CLAIM[11]

A. Legal Standard For Summary Judgment

Under Federal Rule of Civil Procedure 56, "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." *See* Fed. R. Civ. P. 56(a). "The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* Once the moving party demonstrates a lack of a genuine issue of material fact, the nonmoving party must set forth specific evidence showing that there remains a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 247-48. A nonmoving party cannot

[11] Due to the voluminous number of Plaintiffs and causes of action addressed in this Motion, Defendant has attached as DEx. 22 to the Stagg Decl. a chart summarizing the legal and evidentiary failures of each of Plaintiffs' certified and uncertified claims.

merely rest upon his allegations or denials in his pleading as a basis for demonstrating a genuine triable issue. *Id.*

In addition, a moving party may demonstrate that there is no genuine dispute of material fact by either (1) negating an element of the opposing party's claim or defense, or (2) showing that the opposing party does not have enough admissible evidence of an essential element of its claim to carry its ultimate burden at trial.[12] *See* Fed. R. Civ. P. 56(c)(1)(B); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). This showing "can be made by pointing out through argument [the] absence of evidence to support plaintiff's claim." *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*en banc*) (internal quotation omitted).

B. Summary Judgment Is Appropriate Against The California Subclass Representatives

1. The UCL/FAL Claims Fail Because Mr. Trump Did Not Make The "Core" Misrepresentations Alleged By Makaeff and Low And The "Core" Misrepresentations Did Not Cause Their Injury

The UCL and FAL do not allow awards for injunctive relief and/or restitution if the consumer was never exposed to the allegedly wrongful conduct of the defendant. *See Cohen v. DirecTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009). The class representatives are not excused from meeting Proposition 64's standing requirements: actual injury and causation (loss of money **as a result of** defendant's conduct). *Id.* Any presumption of exposure or reliance that allowed Makaeff and Low to survive class certification is

[12] In actions based on diversity jurisdiction, such as the present lawsuit, state law controls substantive issues including the elements of the causes of action, measure of damages, and applicable defenses. *See Bank of Cal., N.A. v. Opie*, 663 F.3d 977, 980 (9th Cir. 1981).

rebutted by their actual testimony demonstrating a lack of misrepresentations made by Mr. Trump.

UCL/FAL claims based on allegations of false advertising and misrepresentations to consumers "impose an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong."[13] *In re Tobacco II Cases*, 46 Cal. 4th 298, 325-326 (2009). While it is not required that Makaeff and Low prove that Mr. Trump's conduct was "the sole or even the predominant or decisive factor in influencing" their purchase decision, they are still required to prove that Mr. Trump's alleged "misrepresentation[s were] an immediate cause of the injury-producing conduct," the purchase of TU seminars and mentorships. *Id.* at 326-27. Absent evidence of exposure to misrepresentations by Mr. Trump, there is no causation. *See Cohen*, 178 Cal. App. 4th at 980. "Where discovery has been completed, summary judgment is appropriate when a party challenged by motion fails to offer evidence supporting an element of a claim on which that party bears the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

Both Makaeff and Low testified at deposition that they were not exposed to the alleged "core" misrepresentations from Mr. Trump.[14] *See* Sections II.D.1-2. Additionally,

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[13] Makaeff and Low cannot escape the actual reliance requirement for their UCL claims. The gravamen of the allegations in the TAC and the central nexus of operative facts all relate to Mr. Trump and TU's alleged misrepresentations about the nature of TU's seminars, instructors, and mentorship program based on the allegedly false and misleading statements in TU's advertising and marketing, either in writing or orally prior to or at the seminars. *See generally* TAC (Dkt. No. 128). It is this same factual nexus that forms the basis for Makaeff and Low's allegations under the "unlawful," "fraudulent," and "unfair" prongs of the UCL. *See* TAC at ¶¶129-136. There are no allegations against Mr. Trump and no evidence of unlawful or unfair practices outside of the advertising and marketing context which are not subsumed in the reliance analysis presented by *Tobacco II*. The analysis within applies to all three "prongs" of the UCL as no "unlawful" or "unfair" practice has been identified unrelated to the false advertising at issue.

[14] Additionally, Mr. Trump's statement that he "handpicked" TUs instructors is a true statement (*see* Section II.C & SOF 6) and therefore is not a misrepresentation. However,

both testified under oath that their decision to purchase the TU programs was not caused by reliance on any representations from Mr. Trump, but rather in reliance on representations made to them by TU; either through speakers at the TU preview and 3-day seminars or in TU written materials distributed at the seminars. *Id.* Makaeff and Low's confirmation that they were not exposed to the alleged "core" misrepresentations from Mr. Trump and that his conduct did not cause their purchase is fatal to their claims against him individually. Absent exposure and reliance on any "core" misrepresentations made by Mr. Trump, summary judgment should be granted in favor of Mr. Trump on the UCL/FAL claims.

2. Makaeff And Low Are Not Entitled To Injunctive Relief Against Or Restitution From Mr. Trump

Alternatively, the UCL and FAL claims fail because plaintiffs cannot prove they are entitled to either an injunction or restitution. Only two remedies are available for private litigants under the UCL or FAL: injunction and restitution.[15] *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130 (2009). Makaeff and Low are not entitled to either.

a. There is no basis for an injunction against Mr. Trump

First, an injunction cannot issue against Mr. Trump because both Makaeff and Low, as discussed above in Section III.B.1, did not suffer an injury in fact and lose money or property *as a result of* Mr. Trump's conduct. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021-22 (9th Cir. 2004) (applying Article III standing to UCL injunction in federal court). Makaeff and Low were not exposed to misrepresentations alleged to have been made by Mr. Trump. There is no causal connection to their alleged injury. Makaeff and Low never had any contractual

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the Court does not need to reach this determination because both Makaeff and Low testified they were not exposed to this representation from Mr. Trump.

[15] "The restitutionary remedies of section 17203 and 17535 . . . are identical and are construed in the same manner." *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 177, fn. 10 (2000).

relationship with Mr. Trump and are not threatened by his conduct in the future. An injunction cannot issue. *Id.* (reversing district court injunction based on plaintiff's lack of Article III standing to pursue injunction in federal court).

Second, there is no real or immediate threat of an irreparable injury in the future that warrants an injunction. "Injunctive relief should be denied if at the time of the order or judgment, there is no reasonable probability that the past acts complained of will reoccur." *California Service Station & Auto. Repair Ass'n v. Union Oil Co. of Cal.*, 232 Cal. App. 3d 44, 57 (1991); *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1123 (9th Cir. 1999), *overruled on other grounds in eBay Inc. v. MercExchange, LLC,* 547 U.S. 388 (2006). Moreover, the California Supreme Court has held that to state a § 17200 claim, something more must be shown than the simple fact that defendant is still in business and is in a position to err again. *State of Cal. v. Texaco, Inc.*, 46 Cal. 3d 1147, 1169-70 (1998). TU ceased enrolling students in classes after July 2010. (SOF 33.) TU also changed its name to the Trump Entrepreneur Initiative on June 2, 2010. (SOF 34.) "Neither speculation nor subjective apprehension about possible harm establishes standing." *Hunt v. Fields*, 2014 U.S. Dist. LEXIS 61004 at *3 (E. D. Cal., May 1, 2014) (citing *Mayfield v. U.S.*, 599 F.3d 964, 970 (9th Cir. 2010)). When there is no likelihood of future injury to be addressed by injunctive relief, standing to pursue the remedy is lacking. *Delarosa v. Boiron, Inc.*, 2012 U.S. Dist. LEXIS 188828 at *17 (C.D. Cal., Dec. 28, 2012). Plaintiffs cannot establish entitlement to an injunction against Mr. Trump (or TU).

b. Restitution is improper—Mr. Trump did not take anything from Makaeff or Low

Requiring Mr. Trump to pay restitution to Makaeff and Low of the money that they paid to TU under their contracts with TU for seminars and mentorship would not be restitutionary in nature. It is undisputed that Makaeff and Low contracted with and paid money to TU, not Mr. Trump. (SOF 29-32.) Mr. Trump cannot be required to repay

money he never obtained. Restitution under the UCL requires some identification of funds or property in Mr. Trump's possession in which Makaeff and Low have a vested interest and restitution against a defendant that never took anything from Makaeff and Low is simply an improper claim for damages not allowed by the UCL.[16] *See Groupion, LLC v. Groupon, Inc.*, 859 F. Supp. 2d 1067, 1083 (N.D. Cal. 2012) (holding that restitution was unavailable because plaintiff "ha[d] not submitted any evidence or . . . argument, to show that [defendant] obtained money from [plaintiff] or that [plaintiff] otherwise ha[d] any ownership interest of any of [defendant's] profits," citing *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 699 (2006) (a plaintiff can seek money or property as restitution only when the "money or property identified as belonging in good conscience to the plaintiff [can] clearly be traced to particular funds or property in the defendant's possession"); *Hill v. Opus Corp.*, 464 B.R. 361, 394 (C.D. Cal. 2011) (restitution is not available where the money claimed by plaintiff cannot be "traced to any particular funds in [defendants'] possession"); s*ee also Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1268 (1992) (with restitution, "defendant is asked to return something he wrongfully received; he is not asked to compensate the plaintiff for injury suffered as a result of his conduct").

c. Restitution cannot be awarded without evidentiary support

Mr. Trump is also entitled to summary judgment on the UCL/FAL claims because Makaeff and Low have no admissible evidence establishing a valid methodology for restitution or the amount of restitution. Restitution cannot be awarded without evidentiary

[16] Additionally, Mr. Trump cannot be held vicariously liable for the conduct of TU. *See Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 808 (9th Cir. 2007) ("[A]n unfair practice claim under section 17200 cannot be predicated on vicarious liability. … A defendant's liability must be based on his personal participation and unbridled control over the practices that are found to violate section 17200 and 17500.") c*iting Emery v. Visa Int'l. Serv. Assn.*, 95 Cal. App. 4th 952, 960 (2002). Moreover, the TAC does not allege that Mr. Trump is liable for the conduct of TU based on either principles of agency or liability for aiding and abetting.

support. *In re Vioxx*, 180 Cal. App. 4th at 131. Unlike at the class certification stage, Makaeff and Low cannot skirt the need for a viable restitutionary model with ***evidence*** of the amount of restitution at summary judgment. Simply put, there is no evidence that the TU seminars purchased by Makaeff and Low were completely worthless as they allege. In the context of this false advertising case, the recovery is not the total value of the purchase. *See Weredebaugh v. Blue Diamond Growers*, 2014 U.S. Dist. LEXIS 71575 at *78-79 (N.D. Cal., May 23, 2014) (rejecting full refund model of damages as inappropriate where plaintiff seeks restitution, plaintiff "may not retain some unexpected boon, yet obtain the windfall of a full refund and profit from the restitutionary reward."). The delta between the value of what was allegedly received (here, real estate seminars) and what was paid is the proper measure of restitution. *See Cortez*, 23 Cal. 4th at 174. This requires Makaeff and Low to produce evidence of the actual value of the TU seminars/mentorships purchased. *In re Vioxx*, 180 Cal. App. 4th at 131. They have not. Moreover, a determination of the value actually received would require expert testimony—no experts were designated in this case—not just conjecture from Makaeff and Low. *See Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 U.S. Dist. LEXIS 1640, 37-38 (N.D. Cal. Jan. 7, 2014) (Restitution can be quantified by "computing the effect of the unlawful conduct on the market price of a product purchased by the class. . . . Expert testimony may be necessary to determine the amount of price inflation attributable to the challenged practice."); *In re eBay Litig.*, 2012 U.S. Dist. LEXIS 128616 at *15-16 (N.D. Cal., Sept. 10, 2012) (expert witness necessary to validate plaintiffs' damages/restitution model); *Colgan*, 135 Cal. App. 4th at 698-700 (plaintiff must prove the existence of a "measurable amount" of restitution, supported by the evidence).[17]

[17] In *Colgan*, the Court of Appeal noted the trial court's rejection of plaintiffs' attempt to recover restitution measured by either the entire purchase price of the products or the defendant's gross profit from sale of the products as inequitable when plaintiffs did receive product in exchange for their purchase. *Id*. at 676-677.

In *Colgan*, a UCL/FAL/CLRA false advertising case, the Court of Appeal reversed an award of restitution even when plaintiff had presented expert evidence on the issue of restitution. The court found that even when plaintiff **had** presented "expert testimony that 'Made in U.S.A.' claims have a significant positive impact on consumers and that [defendant] realized a 'substantial advantage' by using a 'Made in U.S.A.' representation, this was still **not evidence** of the amount of restitution because there was no attempt by the expert "to quantify either the dollar value of the consumer impact or the advantage realized by [defendant]." *Id.* at 700; *accord Ogden v. Bumble Bee Foods, LLC*, 2014 U.S. Dist. LEXIS 565 at *52 (N.D. Cal. Jan. 2, 2014) (Granting defendant's motion for summary judgment on UCL, FAL, and CLRA claims when plaintiff failed to offer any evidence of the price of comparable products without the unlawful misrepresentations and when plaintiff failed to offer any expert evidence of the premium paid for product due to unlawful misrepresentations); I*n re Facebook, Inc., PPC Adver. Litig.*, 282 F.R.D. 446, 461 (N.D. Cal. 2012) ("[W]ith regard to the UCL claim for restitution, plaintiffs must be able to prove, for each class member, the difference between what the plaintiffs paid and the value of what the plaintiffs received.").

Makaeff and Low lack any expert evidence to support their claims the seminars and mentorships were worthless to provide a valid determination of restitution. Additionally, as in *Colgan*, Makaeff and Low failed to present any evidence, let alone expert testimony, to quantify either the dollar value of the consumer impact or the advantage realized by TU based on dissemination of the "core" alleged misrepresentations. Therefore, there is no evidence in the record to support a determination of the delta between what was allegedly received and what plaintiff alleged they paid for based on the "core" misrepresentations to determine restitution. This absence of evidence is fatal to the UCL and FAL claim because the Court cannot grant relief beyond the boundaries of a Plaintiff's evidentiary showing. *Colgan*, 135 Cal. App. 4th at 700; *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988)

("[S]ummary judgment is appropriate where appellants have no expert witnesses or designated documents providing competent evidence from which a jury could fairly estimate damages."); *In re eBay Litig.*, 2012 U.S. Dist. LEXIS 128616 at *15-16 (N.D. Cal., Sept. 10, 2012) (Granting summary judgment on breach of contract, UCL, and FAL claims when plaintiff failed to engage an expert witness to validate its damages/restitution model). Summary judgment for Mr. Trump is warranted.

3. The CLRA Claim Fails Because Donald Trump Was Not Involved In A "Transaction" With Makaeff or Low, Makaeff and Low Cannot Show Reliance on "Core" Misrepresentations Made By Mr. Trump, And There Is No Admissible Evidence Of Actual Damages Attributable To The "Core" Misrepresentations

a. There was no actionable "transaction" with Mr. Trump

The CLRA protects consumers against "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a **transaction** intended to result or which results in the sale or lease of good or services to any consumer . . . ." Cal. Civ. Code § 1770(a) (emphasis added). Pursuant to section 1761(e), the term "transaction" is defined as "an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to that agreement." Makaeff and Low cannot meet the statutory requirements to prove their CLRA claim.

The evidentiary record is void of any agreement between Mr. Trump and Makaeff and Low. Absent such an agreement, they have no CLRA claim. *Cirulli v. Hyundai Motor Co.*, 2009 U.S. Dist. LEXIS 124670, at *12 (CD. Cal. Nov. 9, 2009) (dismissing CLRA claim with prejudice because no transaction alleged between plaintiff and one defendant); *Fullford v. Logitech*, 2008 U.S. Dist. LEXIS 95175 at *2 (N.D. Cal., Nov. 14, 2008) (same); *Nordberg v. Trilegiant Corp*., 445 F. Supp. 2d 1082, 1096-97 (N.D. Cal. 2006) (holding plaintiff who did not enter into agreement with defendant failed to allege transaction under CLRA). Makaeff and Low testified, and their enrollment contracts

confirm, that they only entered into an agreement or transaction with TU to purchase the real estate seminars and mentorship. (SOF 29-32.) Mr. Trump did not provide any services to them. All seminars, mentorship, and other programs were to be provided by and performed by TU pursuant to TU's enrollment agreements with the students. This fact is buttressed by Makaeff and Low's allegations in the TAC. Neither allege the existence of a contract with Mr. Trump and neither sued Mr. Trump for breach of contract or breach of the implied covenant of good faith and fair dealing. TAC at ¶¶149-161. The lack of exposure to any of the "core" misrepresentations made by Mr. Trump also undercuts any argument that an agreement with Mr. Trump exists. Plaintiffs do not have a viable CLRA claim.[18]

b. There is no evidence of causation/reliance—a necessary element of Makaeff and Low's CLRA claim

Makaeff and Low's failure to present evidence of actual reliance on alleged "core" misrepresentations made by Mr. Trump warrants summary judgment in Mr. Trump's

[18] This is not a case where Makaeff and Low can maintain a CLRA claim against Mr. Trump despite the fact that they purchased the seminars/mentorships from TU. The cases that have allowed CLRA claims to proceed in the absence of a transaction directly between plaintiff and defendant involved distinguishable factual circumstances not present here. The cases had a prior transaction between the supplier/manufacturer and the reseller that was intended to result in the sale of goods and services to consumers and the manufacture had exclusive knowledge of a defect that was not disclosed to the consumer. *See Dei Rossi v. Whirlpool Corp*., 2013 U.S. Dist. LEXIS 153682 at *28-29 (E.D. Cal., Oct. 24, 2013); *Herron v. Best Buy Stores, LP*, 2013 U.S. Dist. LEXIS 116625 at *8-10 (E.D. Cal., Aug. 15, 2013); *Keilholtz v. Superior Fireplace Co.*, 2009 U.S. Dist. LEXIS 30732 at *9-10 (N.D. Cal. Mar. 30, 2009); *Chamberlan v. Ford*, 369 F. Supp. 2d 1138, 1144 (N.D. Cal. 2005). There is no such transaction between Mr. Trump and TU present here that was "intended to result" in the sale of seminars to consumers that saves the CLRA claim. *See Green v. Candiae Corp.*, 2009 U.S. Dist. LEXIS 133058 at *9-11 (C.D. Cal., June 9, 2009) (dismissing CLRA claim with prejudice and distinguishing *Chamberlan's* analysis of "intended to result" language and noting that used car dealers were authorized dealerships acting as agents of Ford). Mr. Trump never transacted business with Makaeff or Low.

favor. *See Cohen*, 178 Cal. App. 4th at 980 ("[A]ctual reliance must be established for an award of damages under the CLRA."); *In re Vioxx*, 180 Cal. App. 4th at 129 (Plaintiff in a CLRA action must "show not only that a defendant's conduct was deceptive but that the deception caused the harm."); *see also Annunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1136-37 (C.D. Cal. 2005) (recognizing that CLRA claim imposes a reliance requirement).

Both Makaeff and Low testified that they were not exposed to misrepresentations made by Mr. Trump. *See* Sections II.D.1-2. Additionally, both testified their decision to purchase the TU programs was not caused by reliance on any misrepresentations from Mr. Trump. *Id.* Makaeff and Low's confirmation that they were not exposed to misrepresentations from Mr. Trump and his conduct did not cause their purchase is fatal to their CLRA claims against him.

c. Makaeff and Low have no evidence of CLRA damages

A determination of damages under the CLRA requires the defrauded purchaser to establish "the difference between the [market] value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damages arising from the particular transaction." *See Colgan*, 135 Cal. App. 4th at 675. Here, as with the UCL and FAL claims discussed above in Section III.B.2.c, Makaeff and Low failed to produce any evidence that the TU seminars purchased were not worth what they paid for them—a necessary predicate to determining the difference between what was paid and the value of what was received. Because they cannot prove a key element of their claim, summary judgment in favor of Mr. Trump should be granted on the CLRA claim. *See Weinberg v. Whatcom Cnty.*, 241 F.3d 746, 751-52 (9th Cir. 2001) (affirming grant of defendant's motion for summary judgment because "[w]hen damages are an essential element of plaintiff's claim, failure to offer competent evidence of damages support a grant of summary judgment") (internal quotation omitted).

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4. Low's Elder Abuse Claim Fails

There is no evidence supporting Low's claim that Mr. Trump engaged in financial elder abuse. Financial abuse of an elder occurs when a defendant takes (or assists in taking) the real or personal property of an elder to a wrongful use or with intent to defraud. Cal. Welfare & Inst. Code § 15610.30(a). The elder abuse statute defines the taking of property as for a "wrongful use" if the person or entity "knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." Cal. Welfare & Inst. Code § 15610.30(b). Low generally alleges that Defendants manipulated Low into purchasing TU seminars. TAC at ¶ 210. However, Low has no evidence that Mr. Trump took or assisted in taking anything from Low or that Mr. Trump knew his conduct would result in harm to an elder.

First, Mr. Trump did not "take" anything from Low. Low's testimony and contracts make clear that he never contracted with or paid any money to Mr. Trump, rather all payments made by Low were to TU pursuant to his contracts with TU. *See* Sections II.D.2 & II.E. Second, Mr. Trump did not "assist in taking" anything from Low because Low admits that Mr. Trump did not make misrepresentations to Low. *Id*. at II.D.2. Therefore, Mr. Trump cannot be liable for elder abuse.

Additionally, Low testified that he had never met or spoken to Mr. Trump, *see* Section II.D.2, and Mr. Trump testified that he did not know the age of the TU students, *see* Section II.A. Because there is no evidence that Mr. Trump took (or assisted in taking) money from Low, evidence that Mr. Trump knew Low was a senior, or evidence that Mr. Trump intended to defraud seniors when they enrolled in TU to learn about real estate investing, Mr. Trump is entitled to summary judgment.[19]

[19] Summary judgment is also appropriate on Low's claim for treble damages pursuant to Cal. Civ. Code § 3345 in relation to his elder abuse claim. There is no evidence that Low was more vulnerable than others because of his age, impaired understanding, impaired health, restricted mobility, or disability, as required by the statute.

C. Summary Judgment Is Appropriate Plaintiff Everett, The Florida Subclass Representative

1. The Florida Misleading Advertising Law Subclass

In order to maintain a civil action for violation of Section 817.41(1), Florida Statutes (1999) (hereinafter referred to as "MAL"), Everett must prove each of the elements of common law fraud in the inducement. *Smith v. Mellon Bank*, 957 F.2d 856 (11th Cir. 1992) (citing *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So. 2d 1367, 1370 (Fla. 4th DCA 1981); *Burton v. Linotype Co.*, 556 So. 2d 1086 (Fla. 1990), *review denied*, 564 So. 2d 1086 (Fla. 1990). Accordingly, Everett must prove: (1) defendant made a false statement of material fact; (2) defendant knew or should have known of the falsity of the statement at the time it was made; (3) defendant intended that the representation would induce another to rely and act on it; and (4) the plaintiff suffered injury in justifiable reliance on the representation. *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 497 (Fla. 4th DCA 2001); *Hillcrest Pacific Corp. v. Yamamura*, 727 So. 2d 1053, 1055 (Fla. 4th DCA 1999. The undisputed facts demonstrate that Everett cannot prove all of these elements.

a. ***Mr. Trump did not make a false statement of material fact***

Similar to the claims under California law, summary judgment is properly granted for a MAL claim where the Defendant did not himself make the alleged misrepresentation. *See, e.g., Kramer v. Unitas*, 831 F.2d 994, (11th Cir. 1987) (holding that celebrity promoting services of mortgage/investment broker could not be held liable for misrepresentations made by broker because celebrity did not make the false representations). Here, there is no evidence that Mr. Trump represented to Everett that TU was an accredited university or that students would receive one year of expert support

and mentoring. *See* Section II.D.3. As he did not make these representations, there is no basis for holding him liable for such statements.[20]

Additionally, Mr. Trump's statements that he "handpicked" TUs instructors is a true statement (SOF 6) and therefore cannot be a false statement supporting liability.

b. *Everett did not reasonably rely on the misrepresentations*

The law is clear that reliance by a party claiming fraud must be *reasonable* and *justified* under the circumstances. *Uvanile v. Denoff*, 495 So. 2d 1177, 1180 (Fla. Dist. Ct. App. 1986), *review dismissed*, 504 So. 2d 766 (1987) (recipient of misrepresentation cannot "blindly rely" on misrepresentation); *Besett v. Basnett*, 389 So. 2d 995, 997-98 (Fla. 1980) (plaintiff cannot rely on misrepresentation that is obviously false).

Everett admitted that she didn't rely on any of the "core" misrepresentations in making her purchase from TU, including the sole "core" misrepresentation allegedly made by Mr. Trump (i.e. that he handpicked TU instructors). *See* Section II.D.3.

Accordingly, any injury[21] that Everett claims was not the result of any "core" misrepresentations. Therefore, for this additional reason, her claim fails.

2. The Florida Financial Elder Abuse Subclass

For Everett's FDUTPA claim to survive, she must prove: (1) "a deceptive act or unfair practice, (2) causation, and (3) actual damages." *Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F. Supp. 2d 1314, 1326 (M.D. Fla. 2007). "[D]eception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (quotation marks and citation

[20] Although he didn't make the statement, even if he did, Mr. Trump could not be held liable for the representation that Everett would receive one year of expert support and mentoring, as Everett admitted that she received in excess of the promised "one-year" but chose not to avail herself of this opportunity. (SOF 47.) Thus, as to Everett, this alleged promise by Trump University is indisputably true.

[21] Everett's claim also fails because there is no evidence of actual damages as discussed below in Section III.C.2.b.

omitted). Pursuant to this standard, Everett must show "probable, not possible, deception" that is "likely to cause injury to a reasonable relying consumer." *Millennium Commc'ns & Fulfillment, Inc. v. Office of the Att'y Gen.*, 761 So. 2d 1256, 1263 (Fla. Dist. Ct. App. 2000) (internal quotations and citation omitted). An unfair practice is "one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *PNR*, 842 So. 2d at 777 (quotation marks and citation omitted).

a. *Mr. Trump did not engage in a deceptive act or unfair practice*

Much like the flaw in her MAL claim, Everett's claim under the FDUTPA fails because the undisputed evidence demonstrates that Mr. Trump did not make two of the three alleged misrepresentations, i.e. that TU is an accredited university or that TU would provide one year of unlimited mentoring and support. Where a party is not involved in the alleged deceptive act, he cannot be held liable. *See, e.g., Borden v. Saxon Mortgage Services, Inc.*, 2010 U.S. Dist. LEXIS 101823, at *35 (S.D. Fla. 2010); *Rensin v. State of Fla., Office of the Att'y General, Dept. of Legal Affairs,* 18 So. 3d 572, 576 (Fla. Dist. Ct. App. 2009) (to find a corporate officer liable under the FDUTPA, the officer must "personally and intentionally" engage in the specific alleged conduct).

With respect to the alleged misrepresentation that Mr. Trump "handpicked" the instructors, as shown above, this also cannot constitute a deception or unfair practice because it is a true statement. (SOF 6.)

b. *There is no causal link between the alleged misrepresentations and damages*

For an unfair or deceptive trade practice to be actionable, the alleged practice must be the cause of loss or damage to the consumer. *Gen. Motors Acceptance Corp. v. Laesser*, 718 So. 2d 276, 277 (Fla. 4th DCA 1998). Under the FDUPTA, actual damages are defined as "the difference in the market value of the product or service in the

condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 454 (Fla. 1st DCA 1985). Where a party fails to provide evidence of actual damages proximately caused by the alleged violations of the FDUTPA, the claim fails. *See Himes v. Brown & Co. Sec. Corp.*, 518 So. 2d 937, 938 (Fla. 3d DCA 1988). Here, there is no causal link between the alleged misrepresentations and any actual damages to Everett.

Everett admits that none of the "core" misrepresentations (even those for which Mr. Trump cannot be liable because he did not make the misrepresentations) caused her damages, as she admits: (1) the letter she received containing the alleged misrepresentation that Mr. Trump handpicked instructors did not influence her purchase of TU programs (SOF 40); (2) she understood that TU was not a traditional university and had no recollection of anyone (including Mr. Trump), representing that TU was "accredited" (SOF 43-44); and (3) she was provided in excess of the allegedly promised year-long mentoring, but choose not to avail herself of the opportunity (SOF 47).

Finally, even if Everett could show that the "core" misrepresentations caused her damage (which she cannot), the claim still fails because she has no evidence of any actual damages—and any evidence she tries to provide would only be speculative. For example, based on the measure of actual damages, Everett can only recover for the difference in value between what she paid for TU and what TU's training would be worth had it been an accredited university. Or, the difference in value between what she received as part of TU's year-long mentoring and the value of what an expert deems she should have received for the represented year-long mentoring. Or, finally, and perhaps the clearest illustration of the failure to produce evidence of actual damages, the difference in value between what the students paid for TU and what TU's education was worth had Mr. Trump not handpicked the instructors. Everett has failed to provide any evidence of such "actual damages" and therefore her claim fails.

c. *Everett's elder abuse claim fails because she has no facts supporting her FDUTPA claim*

The FDUTPA provides a penalty provision for violations of the act targeting senior citizens. Fla. Stat. section 501.2077(2) ("[a]ny person who is willfully using, or has willfully used, a method, act, or practice in violation of this part, which method, act, or practice victimizes or attempts to victimize senior citizens or handicapped persons, and commits such violation when she or he knew or should have known that he or his conduct was unfair or deceptive, is liable for a civil penalty of not more than $15,000 for each such violation."). Where summary judgment is appropriate as to the underlying FDUTPA claim, summary judgment is also appropriate for any alleged elder abuse violation. *See Borden*, 2010 U.S. Dist. LEXIS 101823, at *34-35. Here, as Everett has no claim against Mr. Trump under the FDUTPA, her elder abuse claim fails.

D. Summary Judgment Is Appropriate Against The New York Gen. Bus. Law § 349 Subclass Representative's Claim

A plaintiff suing under GBL § 349 must prove "that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading, and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Oscar v. BMW of N. Am., LLC*, 2012 U.S. Dist. LEXIS 84922 at *8 (S.D.N.Y. June 19, 2012). While proof of justifiable reliance is not required, a plaintiff must prove that defendant's material deceptive act or practice actually caused plaintiff's injury. *Id*. at *8-9. Plaintiff Brown cannot prove entitlement to relief under GBL § 349 because: (1) he cannot prove that exposure to misrepresentations by Mr. Trump caused his injury; (2) he has failed to state an injury cognizable under New York law; and (3) he has no evidence of damages.

1. Mr. Trump Did Not Cause Brown's Injury

Brown's sworn deposition testimony confirms that he was not exposed to misrepresentations by Mr. Trump and that such misrepresentations did not cause his injury.

First, Brown testified that Mr. Trump never represented to him that TU was an "accredited" university, rather Brown assumed it. (SOF 56.) Moreover, any representation regarding the "accreditation" of TU (there was none), could not have caused Brown injury, because he did not think it was actually a university. (SOF 58.)[22]

Second, Brown testified that Mr. Trump never represented to him that he would receive an unlimited one year of expert support and mentoring. (SOF 55.) At deposition, Brown could not identify a single document from Mr. Trump that promised or represented that TU would provide one year in-person mentoring or a year-long mentorship. (SOF 51; footnote 7 *supra*.)

Finally, Brown testified that he did not recall anything in the Donald Trump video regarding Mr. Trump handpicking the TU instructors or mentors, and besides a few unrelated immaterial details, had no memory of the content of the video.[23] (SOF 64.) Additionally, when asked why he decided to purchase the 3-day seminar Brown did not identify any of the "core" misrepresentations, but rather Brown stated that "I wanted to continue making money. I felt that more education would be able to help me make better judgments and better choices – or maybe not better, but the best choices." (SOF 65.)

2. Brown's Full Refund Model Does Not State A Cognizable Injury Under GBL § 349

New York law does not provide a cause of action for refund of the full purchase price of a service on the basis that it would not have been purchased absent defendant's acts or practice under GBL § 349. *Dash v. Seagate Tech. (US) Holdings, Inc.*, 2014 U.S.

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[22] Even if Plaintiffs/Brown try to spin this representation as one relating to TU license status with the New York State Education Department, the court in the New York Attorney General action has already ruled that the operation of TU without a license is not prima facie evidence of a deceptive business practice under GBL § 349. *See Matter of People of the State of N.Y. v Trump Entrepreneur Initiative LLC*, 2014 N.Y. Misc. LEXIS 4533 at *21 (N.Y. Sup.Ct., Oct. 8, 2014).

[23] Because Mr. Trump's statements that he "handpicked" TUs instructors is true (SOF 6) that representation could not cause injury to Brown.

Dist. LEXIS 88780 at *9 (E.D.N.Y, June 30, 2014) *citing Small v. Lorillard Tobacco Co.*, 94 N.Y. 2d 43, 56 (N.Y. 1999) (rejecting argument "that consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices have suffered an injury under General Business Law § 349."). "The rationale for this is that deceived consumers may nevertheless receive—and retain the benefits of—something of value, even if it is not precisely what they believed they were buying." *Id.* (internal quotations and citations omitted). A refund of the full purchase price is exactly what Brown seeks for himself and the NY subclass in this case under his GBL § 349 claim. Brown does not have a legally cognizable full refund claim.

3. There Is No Evidence Of Brown's Damages

Brown cannot save his claim by seeking damages measured by the difference between the cost of the TU seminar or mentorship as represented and the actual value of the seminar or mentorship received. As discussed above in Sections III.B.2.c and III.B.3.c, Brown has failed to produce any evidence of the actual value of the TU seminars purchased; a necessary predicate to determining the difference between what was paid and the value of what was received. Because he cannot prove a key element of his claim, summary judgment in favor of Mr. Trump should be granted.

IV. DONALD TRUMP IS ENTITLED TO SUMMARY JUDGMENT ON ALL REMAINING INDIVIDUAL CLAIMS

A. Money Had And Received

None of the Plaintiffs have a claim for money had and received against Mr. Trump. As set forth in Section II.E above, none of the Plaintiffs contracted with or paid any money to Mr. Trump.[24] (SOF 29-32, 46, 66-68.)

[24] *See Zumbrun v. University of Southern California*, 25 Cal. App. 3d 1, 14 (1972) ("One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money.") (internal citations omitted); *Rotea v. Izuel*, 14 Cal. 2d 605, 611 (1939) ("Recovery is denied in such cases

B. Unjust Enrichment

Makaeff and Low have no claim for unjust enrichment against Mr. Trump because there is not cause of action for unjust enrichment in California.[25] Brown, Everett, Keller, and Oberkrom's[26] claims also fail because they did not contract with or pay any money to Mr. Trump, thus unjustly enriching him.[27] (SOF 46 & 66-68.)

C. Fraud & Negligent Misrepresentation

Plaintiffs cannot prove their claims for fraud and negligent misrepresentation against Mr. Trump. These claims against Mr. Trump are all based on the alleged "core" misrepresentations. With minor differences in wording, California, Florida, and New York claims for fraud and California and Florida claims for negligent misrepresentation all require common elements: (1) misrepresentation to plaintiff; (2) intent to defraud; (3) reliance/justifiable reliance on the misrepresentation(s); and (4) damages caused by the reliance.[28] Plaintiffs have no evidence establishing: (1) that Mr. Trump made the

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unless the defendant himself has actually received the money.") (internal citations omitted); *Payne v. Humana Hosp. Orange Park*, 661 So. 2d 1239, 1240 (Fla. Dist. Ct. App. 1995) (defendant must have possession of the money of the plaintiff); *Brewer v. State*, 176 Misc. 2d 337, 344, 672 N.Y.S. 2d 650, 656 (Ct. Cl. 1998) (essential element of claim is defendant's receipt of money belonging to plaintiff).

[25] *See Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008); *Melchior v. New Line Productions, Inc.*, 106 Cal. App. 4th 779, 793.

[26] As stated in the TAC, Oberkrom is a resident of Missouri, therefore venue for Oberkrom's individual claims is improper. *See* 28 U.S.C. 1391(b)(2).

[27] *See Samuel L. Hagan II, P.C. v. J.P. Morgan Chase Bank, N.A.* 939 N.Y.S. 2d 744, 744 (Sup. Ct. 2011) ("to prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense . . . ."); *Moynet v. Courtois*, 8 So. 3d 377, 379 (Fla. Dist. Ct. App. 2009) (unjust enrichment requires a benefit conferred on defendant, knowledge of the benefit by defendant, acceptance or retention of the benefit by defendant, and inequity requiring the return).

[28] *Seeger v. Odell*, 18 Cal. 2d 409, 414 (1941) (fraud); *Friedman v. Merck & Co.*, 107 Cal. App. 4th 454, 476 (2003) (negligent misrepresentation); *Specialty Marine & Indus. Supplies v. Venus*, 66 So. 3d 306, 309-10 (Fla. Dist. Ct. App. 2011) (fraud and negligent misrepresentation); *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E. 2d 1104, 1108-09 (N.Y. 2011) (fraud). The only difference is a claim for negligent misrepresentation in

"core" misrepresentations—that TU was "accredited" or that they would receive "one year of expert support and mentoring"; (2) that Mr. Trump, not TU, made the misrepresentations to them, let alone intended to defraud them; (3) that any representation by Mr. Trump caused Plaintiffs to make purchases from TU; and (4) damages attributable to the misrepresentations, namely the difference in value as represented versus as received.[29] Because Plaintiffs are unable to make this evidentiary showing, Mr. Trump is entitled to summary judgment on these claims.

D. False Promise

Finally, Plaintiffs' claims for false promise, a subspecies of fraud also fail. Plaintiffs have no evidence of a promise made by Mr. Trump to perform a future act without the intent to perform. Mr. Trump did not enter into a contract with the Plaintiffs and none of the alleged "core" misrepresentations relate to future performance by Mr. Trump. Absent a promise of future performance without the intent to perform, Plaintiffs cannot establish the necessary misrepresentation element of this claim.[30]

New York which requires "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Mandarin*, 944 N.E. 2d at 1109. Brown does not allege the existence of any special or privity-like relationship with Mr. Trump in the TAC. *See* TAC at ¶¶113-123 & 165-183.

[29] Like the other Plaintiffs, Keller's claims also fail. Before the lawsuit, Keller never met Mr. Trump, never spoke to Mr. Trump, and never communicated in writing with Mr. Trump. (SOF. 69-71.) Mr. Trump did not appear at Keller's preview seminar. (SOF 72.) Keller's decision to purchase the 3-day seminar was not caused by reliance on any representation from Mr. Trump. (SOF 73.) While Keller signed up for the Gold Elite program, he received a full refund for that program from TU. (SOF 74.) Oberkrom also, had never met or spoken with Mr. Trump (SOF 75-76.) Oberkrom's decision to purchase the in-field mentorship was made based on what he was told at the 3-day seminar (SOF 77); a seminar Oberkrom knew Mr. Trump would not attend (SOF 78).

[30] "'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996); *see also*

Additionally, as discussed above at Sections III.B, III.C, and III.D, Plaintiffs cannot establish the remaining elements of their false promise claim—intent to defraud, reliance, and resulting damages.

V. CONCLUSION

For all of the foregoing reasons Mr. Trump's Motion for Summary Judgment should be granted as to all claims against him in this case.

DATED: February 12, 2015

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Dalessio v. Kressler, 6 A.D. 3d 57, 62, 773 N.Y.S. 2d 434, 437 (App. Div. 2004) (Essential to a cause of action sounding in fraudulent inducement based upon a false promise is that the defendant had no intention to perform the promise at the time it was made."). It is the misrepresentation of the promisor's intention regarding the future act that satisfies the necessary element of the fraud claim. *Hamlen v. Fairchild Indus., Inc.*, 413 So. 2d 800, 802 (Fla. Dist. Ct. App. 1982) (stating that the "general rule of law that fraud must refer to a present or existing fact" has "an exception where the promise to perform a material matter in the future is made without any intention of performing or made with the positive intention not to perform.")

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on **February 12, 2015** to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civil Local Rule 5.4.

s/ Nancy L. Stagg
Nancy L. Stagg