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

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

Plaintiff,

vs.

DONALD J. TRUMP,

Defendant.

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

ORDER:

**1. DENYING MOTION TO
DISMISS**

[Dkt. No. 9.]

2. DENYING MOTION TO STRIKE

[Dkt. No. 10.]

Defendant Donald J. Trump (“Defendant”) moves to dismiss Plaintiff Art Cohen’s (“Plaintiff”) putative class action Complaint on multiple grounds pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, to strike portions of the Complaint pursuant to Federal Rule of Civil Procedure 12(f). (Dkt. Nos. 9, 10.) The Parties have fully briefed both motions. (Dkt. Nos. 16-19.) Pursuant to Civil Local Rule 7.1(d)(1), the Court finds the matter suitable for adjudication without oral argument. Having considered the parties’ submissions and the applicable law, the Court DENIES Defendant’s motions.

BACKGROUND

I. Cohen’s Allegations

Plaintiff, a resident of California, sues on behalf of himself and all others

1 similarly situated. Defendant is a resident of the State of New York and was “a founder
2 and Chairman, officer, director, managing member, principal and/or controlling
3 shareholder of Trump University.” (Dkt. No. 1, Compl. ¶ 5.)

4 Plaintiff alleges learning about Trump University from a 2009 San Jose Mercury
5 News advertisement. (Compl. ¶ 4.) Plaintiff alleges receiving a “special invitation” by
6 mail to attend a Trump University seminar. (Compl. ¶ 13.) Drawn in by Defendant’s
7 name and reputation, Plaintiff attended a free preview event. (Id.) Plaintiff then paid
8 \$1,495 to Trump University to attend a real estate retreat, where he subsequently
9 purchased a “Gold Elite” program for \$34,995. (Id.) Plaintiff alleges that, but for
10 misrepresentations made by Trump University, he would not have paid for Trump
11 University programs. (Compl. ¶ 14.) Specifically, Plaintiff alleges the following
12 misrepresentations: that the programs would give access to Donald Trump’s real estate
13 investing secrets; that Donald Trump had a meaningful role in selecting the instructors
14 for Trump University programs; and that Trump University was a “university.” (Id.)

15 On October 18, 2013, Plaintiff filed a complaint in the above-captioned matter,
16 alleging a single cause of action for mail and wire fraud in violation of the Racketeer
17 Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c). Defendant
18 now moves the Court for dismissal of the Complaint. (Dkt. No. 9.) In the alternative,
19 Defendant moves the Court to strike portions of Plaintiff’s Complaint. (Dkt. No. 10.)

20 **II. Related Case, Makaeff v. Trump University LLC**

21 On October 18, 2013, Plaintiff filed a “notice of related case” requesting that the
22 above-captioned matter be transferred to the undersigned Judge because the present
23 action is related to Makaeff v. Trump University LLC, Case No. 10-cv-940-GPC-
24 WVG. Filed on April 30, 2010, the initial complaint in Makaeff alleged ten causes of
25 action under state consumer protection statutes and common law. (Case No. 10-cv-940-
26 GPC-WVG, Dkt. No. 1.) On October 7, 2013, the Court denied plaintiff Makaeff’s
27 motion to modify the scheduling order in that case to file a fourth amended complaint
28 to include a RICO cause of action. (Id., Dkt. No. 248.) On February 21, 2014 the Court

1 granted plaintiff Makaeff's motion for class certification, certifying a class of plaintiffs
2 defined as: "All persons who purchased a Trump University three-day live
3 "Fulfillment" workshop and/or a "Elite" program ("Live Events") in California, New
4 York and Florida, and have not received a full refund." (Id., Dkt. No. 298 at 35.)

5 DISCUSSION

6 **I. Requests for Judicial Notice**

7 Generally, a court may not consider material beyond the complaint in ruling on
8 a Fed. R. Civ. P. 12(b)(6) motion. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th
9 Cir. 2001). However, "[a] court may take judicial notice of 'matters of public record'
10 without converting a motion to dismiss into a motion for summary judgment," as long
11 as the facts noticed are not "subject to reasonable dispute." Intri-Plex Technologies,
12 Inc. v. Crest Group Inc., 499 F.3d 1048, 1052 (9th Cir. 2007) (quoting Lee, 250 F.3d
13 at 689); Fed. R. Civ. P. 201(b). Facts are indisputable, and thus subject to judicial
14 notice, only if they are either "generally known" under Rule 201(b)(1) or "capable of
15 accurate and ready determination by resort to sources whose accuracy cannot be
16 reasonably questioned" under Rule 201(b)(2). Fed. R. Civ. P. 201(b).

17 **A. Plaintiff's Declaration**

18 In support of Plaintiff's opposition to Defendant's Motion to Dismiss, Plaintiff
19 submits a declaration by attorney Jason A. Forge and an attached exhibit. Plaintiff fails
20 to properly seek judicial notice of the exhibit under Federal Rule of Evidence 201.
21 Accordingly, the Court declines to convert the present motion into a motion for
22 summary judgment by accepting Plaintiff's declaration or exhibit in consideration of
23 the present Motion to Dismiss. Lee, 250 F.3d at 688.

24 **B. Defendant's Request for Judicial Notice**

25 Defendant seeks judicial notice of two documents in support of his Motion to
26 Dismiss the Complaint: (1) Plaintiff's evaluation of a Trump University training course;
27 and (2) the ethics complaint filed by Trump against the New York Attorney General.
28 (Dkt. No. 18-1 at 2.) The Court declines to take judicial notice of the filed documents,

1 for two primary reasons. First, Defendant submits the request for judicial notice as part
2 of Defendant's reply to Plaintiff's opposition to Defendant's motion. (Id.) As such,
3 Plaintiff has had no opportunity to respond to the propriety of taking judicial notice of
4 the documents. See U.S. v. Ritchie, 342 F.3d 903, 909 (9th Cir. 2003) (“[e]ven if the
5 government's attached documents were properly the subject of judicial notice,
6 [plaintiff] should have been given some opportunity to respond to the propriety of
7 taking judicial notice of the facts alleged therein.”) (citing Fed. R. Evid. 201(e)).

8 Second, the Court does not find the documents relevant to the present motion to
9 dismiss. While the Court may take judicial notice of the fact that Plaintiff completed
10 an evaluation or that Trump filed a complaint against the New York Attorney General,
11 the Court may not take notice of disputed facts or the truth of the facts recited therein.
12 Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001). The Court therefore
13 finds the fact that Plaintiff completed an evaluation of a Trump University class and
14 the fact that Trump filed an ethics complaint against one of the eleven Attorneys
15 General referenced in the Complaint, (Compl. ¶¶ 7, 50, 52), irrelevant to whether the
16 Complaint has properly alleged a cause of action under RICO, 18 U.S.C. § 1962(c).
17 Accordingly, Defendant's two requests for judicial notice are DENIED.

18 **II. Motion to Dismiss**

19 **A. Legal Standard**

20 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint.
21 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). “While a complaint attacked by
22 a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a
23 plaintiff's obligation to provide the grounds of his entitlement to relief requires more
24 than labels and conclusions, and a formulaic recitation of the elements of a cause of
25 action will not do. Factual allegations must be enough to raise a right to relief above
26 the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal
27 quotations, brackets, & citations omitted).

28 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the

1 truth of all factual allegations and must construe them in the light most favorable to the
2 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).
3 Legal conclusions need not be taken as true merely because they are cast in the form
4 of factual allegations. Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987); W.
5 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Similarly, “conclusory
6 allegations of law and unwarranted inferences are not sufficient to defeat a motion to
7 dismiss.” Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). Courts generally do not
8 look beyond the complaint for additional facts when deciding a Rule 12(b)(6) motion.
9 United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003); Parrino v. FHP, Inc., 146
10 F.3d 699, 705-06 (9th Cir. 1998).

11 **B. Analysis**

12 Plaintiff’s Complaint alleges a single cause of action for “Violations of the
13 Racketeer Influenced and Corrupt Organizations [(“RICO”)] Act, 18 U.S.C. §
14 1962(c).” (Compl. at 30.) To state a claim under § 1962(c), a plaintiff must allege: “(1)
15 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” Sedima,
16 S.P. R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985). A plaintiff must also show harm
17 of a specific business or property interest by the racketeering conduct. Id.; Diaz v.
18 Gates, 420 F.3d 897, 900 (9th Cir. 2005). “Racketeering activity” is any act indictable
19 under the several provisions of Title 18 of the United States Code, including the
20 predicate acts alleged by Plaintiff in this case: mail fraud, 18 U.S.C. § 1341, and wire
21 fraud, 18 U.S.C. § 1343.

22 Defendant moves to dismiss Plaintiff’s Complaint on four grounds: (1) Plaintiff’s
23 Complaint constitutes impermissible claim splitting; (2) Plaintiff’s RICO claim is time
24 barred; (3) Defendant’s allegedly fraudulent misrepresentations constitute non-
25 actionable puffery; and (4) Plaintiff has failed to plead his claims of fraud with the
26 required specificity. (Dkt. No. 19-1 at 1-3.)

27 **1. Claim Splitting**

28 Defendant first argues the Court should dismiss Plaintiff’s Complaint due to

1 impermissible claim splitting. (Dkt. No. 9-1 at 5-9) (citing Adams v. California Dep't
2 of Health Services, 487 F.3d 684 (9th Cir. 2007); Single Chip Sys. Corp. v. Intermec
3 IP Corp., 495 F. Supp. 2d 1052, 1058 (S.D. Cal. 2007) (Houston, J.)). Under the claim
4 splitting doctrine, "plaintiffs generally have no right to maintain two separate actions
5 involving the same subject matter at the same time in the same court and against the
6 same defendant." Adams, 487 F.3d at 688 (citing Walton v. Eaton Corp., 563 F.2d 66,
7 70-71 (3d Cir. 1977) (en banc)) (internal quotation marks omitted), cert. denied, 128
8 S. Ct. 807, 169 L. Ed. 2d 607 (2007). In order to promote judicial economy and the
9 comprehensive disposition of litigation, protect the parties from vexatious and
10 expensive litigation, and serve the societal interest in bringing an end to disputes,
11 courts have discretion to: (1) dismiss a duplicative complaint with prejudice; (2) stay
12 the later filed action pending resolution of the previously filed action; (3) enjoin the
13 parties from proceeding with the later filed action; or (3) consolidate the duplicative
14 actions. Id. at 691.

15 Plaintiff responds that while the Ninth Circuit has not expressly addressed the
16 application of the claim splitting doctrine to a plaintiff who is a member of a potential
17 class in another case, "other Circuits have considered and rejected its application in the
18 class action context." (Dkt. No. 16 at 4) (citing Gooch v. Life Investors Ins. Co. of
19 Am., 672 F.3d 402, 428 n.16 (6th Cir. 2012); Gunnells v. Healthplan Servs., Inc., 348
20 F.3d 417, 432 (4th Cir. 2003); Valentine v. WideOpen West Fin., LLC, 288 F.R.D.
21 407, 415 (N.D. Ill. 2012)). Plaintiff argues precluding his RICO claim based on a
22 separate proposed class action prior to certification of that class action would run afoul
23 of the Supreme Court's holding in Standard Fire Ins. Co. v. Knowles, U.S., 133 S.
24 Ct. 1345, 1348-49 (2013), that a "plaintiff who files a proposed class action cannot
25 legally bind members of the proposed class before the class is certified." (Dkt. No. 16
26 at 5.)

27 As an initial matter, the Court notes that the parties briefed the present motion
28 prior to the Court's grant of class certification in Makaeff v. Trump, Case No. 10-cv-

1 940-GPC-WVG. Although the Court disagrees with Plaintiff's assertion that the claim
2 splitting doctrine does not apply to class action complaints, see Moreno v. Castlerock
3 Farming & Transport, Inc., No. CIV-F-12-0556 AWI JLT, 2013 WL 1326496 (E.D.
4 Cal. Mar. 29 2013); Weinstein v. Metlife, Inc., No. C 06-0444 SI, 2006 WL 3201045
5 (N.D. Cal. Nov. 6, 2006), the Court finds that the policies behind the claim splitting
6 doctrine do not weigh in favor of dismissing the present action. In Makaeff v. Trump,
7 the Court certified a narrow class and three subclasses of Trump University customers
8 for state statutory unfair competition and false advertising claims in the states of
9 California, Florida, and New York. (Case No. 10-cv-940-GPC-WVG, Dkt. No. 298.)
10 The Court declined to certify any fraud claims. (Id.) Here, Plaintiff's Complaint alleges
11 a single cause of action under a federal statute, alleging fraud and racketeering, on
12 behalf of a nationwide class.

13 Furthermore, although the Court denied plaintiffs' motion to file a fourth
14 amended complaint to add a RICO cause of action in Makaeff v. Trump, the Court did
15 so on procedural grounds due to lack of timeliness rather than due to a finding of
16 prejudice to defendants. (Id., Dkt. No. 271); cf. Adams v. California Dept. of Health
17 Servs., 487 F.3d 684, 687 (district court denied leave to amend in the first-filed action
18 because plaintiff failed to demonstrate good cause and because granting leave to amend
19 would prejudice the defendants already named in the complaint). Accordingly, the
20 Court DENIES Defendant's motion to dismiss the present action due to claim splitting.

21 2. Statute of Limitations

22 Defendant further seeks dismissal of Plaintiff's RICO claims on the ground that
23 they are barred by the four-year statute of limitations set forth in the Clayton Act, 15
24 U.S.C. § 15b. (Dkt. No. 9-1 at 10-11.) Defendant argues that because Plaintiff attended
25 the Foreclosure Real Estate Retreat in May, 2009, and purchased the Gold Elite
26 Program on May 10, 2009, Plaintiff knew or should have known about any allegedly
27 fraudulent misrepresentations by May 2009. (Id.) According to Defendants, "all of the
28 predicate acts underlying Plaintiff's RICO claim occurred . . . in May 2009," more than

1 four years before Plaintiff filed the Complaint on October 18, 2013. (Id. at 11.)

2 In support of his motion, Defendant argues the civil RICO limitations period
3 began to run when Plaintiff knew or should have known about the injury that underlies
4 the RICO cause of action. (Dkt. No. 9-1 at 10-11) (citing Rotella v. Wood, 528 U.S.
5 549, 556 (2000), and Grimmett v. Brown, 75 F.3d 506, 510 (9th Cir. 1996)). In Rotella,
6 the U.S. Supreme Court rejected the “injury and pattern discovery rule” adopted by
7 some Circuit Courts of Appeal in favor of the “injury discovery rule” adopted by the
8 majority of the Circuit Courts of Appeal,¹ including the Ninth Circuit in Grimmett, to
9 have considered the question of when the statute of limitations begins to run on a RICO
10 claim. 528 U.S. at 554. Under the injury discovery rule, the civil RICO limitations
11 period “begins to run when a plaintiff knows or should know of the injury that
12 underlies his cause of action.” Grimmett, 75 F.3d at 510 (citing Pocahontas Supreme
13 Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987)). The court in
14 Grimmett held that where a plaintiff’s primary alleged injury was the “loss of her
15 interest in [defendant’s] medical practice,” the injury was perfected, and the statute of
16 limitations began to run, upon reorganization of the medical practice. 75 F.3d at 511.

17 Defendant argues that, pursuant to the injury discovery rule, the running of the
18 statute of limitations on Plaintiff’s RICO claim is apparent on the face of Plaintiff’s
19 Complaint. (Dkt. No. 18 at 6) (citing Jablon v. Dean Witter & Co., 614 F.2d 677, 682
20 (9th Cir. 1980) (statute of limitations defense may be raised on a motion to dismiss if
21 “the running of the statute is apparent on the face of the complaint”)). According to
22 Defendant, Plaintiff knew or should have known “whether or not Trump was present
23 and whether or not Trump was giving the lectures” as well as “that the seminar was not
24 in a traditional university setting” when Plaintiff attended the Trump University
25 programs. (Dkt. No. 18 at 7.)

26
27 ¹The Supreme Court noted, however, that it did not “settle upon a final rule,” but
28 merely eliminated the minority “injury pattern and discovery rule” while leaving in tact
the “injury discovery rule” followed by the majority of Circuit Courts of Appeal to
consider the RICO statute of limitations. Rotella v. Wood, 528 U.S. 549, 554 n.2
(2000).

1 However, the Ninth Circuit has held that RICO fraud claims accrue when
2 plaintiffs have “actual or constructive knowledge” of the fraud. Living Designs, Inc.
3 v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 365 (9th Cir. 2005). To impute
4 constructive knowledge on a plaintiff, the plaintiff must be deemed to have “enough
5 information to warrant an investigation which, if reasonably diligent, would have led
6 to discovery of the fraud.” Id. (citing Pincay v. Andrews, 238 F.3d 1106, 1110 (9th Cir.
7 2001)). “[T]he question of whether a plaintiff knew or should have become aware of
8 a fraud” is ordinarily left to the jury. Living Designs, Inc., 431 F.3d at 365.

9 The Court therefore disagrees with Defendant that, reading the Complaint’s
10 allegations with the required liberality, Plaintiff may not prove that the statute of
11 limitations was tolled as a matter of law. See Jablon, 614 F.2d at 682. In particular,
12 Plaintiff alleges the “uniform deceptive portrayal of Trump University,” (Compl. ¶ 21j),
13 continued the representations made by Defendant in the allegedly offending
14 advertisements and letters, (Compl. ¶¶ 21g-h). The Complaint includes multiple
15 allegations that Trump misrepresentations continued throughout Trump University
16 programs. (Compl. ¶¶ 32-38.) The Court therefore rejects Defendant’s argument at this
17 stage of the litigation that Plaintiff “knew or should have become aware of the fraud”
18 on the date Plaintiff purchased his final Trump product in May 2009 as a matter of law.
19 (Dkt. No. 18 at 7.) Accordingly, the Court DENIES Defendant’s motion to dismiss
20 Plaintiff’s Complaint as time-barred under the Clayton Act, 15 U.S.C. § 15b.

21 3. **Non-Actionable Puffery**

22 Defendant next moves to dismiss Plaintiff’s RICO claim on substantive grounds,
23 arguing the advertising identified in the Complaint constitutes “mere puffery” not
24 actionable under RICO. (Dkt. No. 9-1 at 11) (citing County of Marin v. Deloitte
25 Consulting, LLP, 836 F. Supp. 2d 1030, 1039 (N.D. Cal. 2011)). In County of Marin,
26 the court found the following statements, among others, were “mere puffery” failing
27 to state the predicate act of fraud for a RICO claim:

28 [Defendant] is “uniquely qualified”; has “deep experience”; has
 “assembled a highly skilled and experienced” team; has “experienced

1 consultants”; has a “seasoned team”; has a “breadth” of capability and
2 “unmatched” understanding of the County’s needs; has “[c]ommitment to
3 dedicate our best resources”; has “deep bench strength”; has an
4 “experienced team that has worked together before”; has “solid”
5 references from every one of its North American installation clients; has
6 great “strength” in integration of “all aspects of ERP implementations”;
7 will “draw upon the experience of a full range of public sector
8 specialists”; is “absolutely committed to the success of this project”; and
9 that Deloitte and SAP have a “winning solution, a proven implementation
10 approach, and the strong project team needed to meet” the County’s
11 requirements.

12 836 F. Supp. 2d at 1038-39 (citing amended complaint).

13 In opposition, Plaintiff argues that while many of the advertisements at issue in
14 this action contained “puffing” or “sales puffery,” Plaintiff’s allegations center on the
15 relationship, or lack thereof, between Trump and Trump University rather than
16 Defendant’s claims of general program quality. (Dkt. No. 16 at 13-14.) Plaintiff argues
17 County of Marin is distinguishable from the present case, because the plaintiff in that
18 case challenged the quality of service obtained rather than the identity of the service
19 provider. (Id. at 11-12.)

20 A statement is considered “mere puffery” when the statement is general rather
21 than specific and thus “extremely unlikely to induce consumer reliance.” Newcal
22 Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1052-54 (9th Cir. 2008) (finding
23 a statement that a company would deliver flexibility and lower costs was “mere
24 puffery,” while finding actionable a statement that contracts intended to be for a fixed
25 term of sixty months would expire after that term). In other words, “misdescriptions of
26 specific or absolute characteristics” are actionable while advertising “which merely
27 states in general terms that one product is superior is not actionable.” Cook, Perkis &
28 Liehe v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990) (internal
quotations and citation marks omitted).

Here, although many of Plaintiff’s allegations challenged by Defendant as “mere
puffery” contain classic “seller’s talk,” (see, e.g., Compl. ¶ 20) (“Learn from the
Master”), the gravamen of Plaintiff’s allegations is that Trump’s advertising falsely
marketed Trump University as both an institution with which Donald Trump was

1 integrally involved as well as “an actual university with a faculty of professors and
2 adjunct professors.” (Compl. ¶ 19.) Rather than challenging Trump’s subjective and
3 general claims as to quality, Plaintiff challenges whether Trump University delivered
4 the specific or absolute characteristics of (1) Donald Trump involvement; and (2) an
5 “actual university.” The Court therefore agrees with Plaintiff that the present case is
6 distinguishable from the statements that failed to state a RICO claim in County of
7 Marin. 836 F. Supp. 2d at 1038-39.

8 In reply, Defendant compares Trump University classes to Michael Jordan brand
9 sneakers and Fred Astaire’s Dance Studio, arguing Trump’s name is attached to Trump
10 University as a “brand.” (Dkt. No. 18 at 9-10) (“a consumer action for fraud could not
11 be brought against Fred Astaire Dance Studio on the grounds that Fred Astaire himself
12 does not teach classes there.”).

13 As an initial matter, the Court notes that Defendant offers only hypothetical
14 examples, and not legal support, for his claim that “Trump” in “Trump University” is
15 merely a brand. However, the Court finds even Defendant’s hypothetical examples
16 distinguishable. Plaintiff’s Complaint includes extensive allegations that Trump made
17 repeated representations as to his participation with Trump University beyond lending
18 his name to the institution. (Compl. ¶¶ 20-21.) For example, the Complaint alleges
19 advertisements featured Trump’s signature, with statements such as “I can turn anyone
20 into a successful real estate investor, even you. - Donald Trump.” (Compl. ¶ 21(a).)
21 Taking Plaintiff’s allegations as true, the Court finds that Plaintiff sufficiently alleges
22 a relationship between Trump and Trump University to state a claim for the predicate
23 act of mail or wire fraud for a claim under RICO. While Defendant may seek to prove
24 that “Trump” was a brand or that Trump’s statements constituted mere puffery as a
25 factual matter, the Court declines to find that Plaintiff’s fraudulent statement
26 allegations fail to state a RICO claim as a matter of law. See Hansen Beverage Co. v.
27 Innovation Ventures, LLC, No. 08-cv-1166-IEG POR, 2009 WL 6597891 at *17 (S.D.
28 Cal. Dec. 23, 2009) (Gonzalez, J.) (declining to dismiss plaintiff’s statement that a

1 drink provided “twice the buzz” as mere puffery because “it is a question of fact
2 whether the level of ‘buzz’ or energy can be scientifically quantified or whether it is
3 a subjective feeling.”).

4 4. Particularity Requirement of Fed. R. Civ. P. 9(b)

5 Defendant further argues Plaintiff’s allegations fail to meet the Federal Rules of
6 Civil Procedure 9(b) requirements of stating allegations of fraud with particularity.
7 (Dkt. No. 9-1 at 14-15) (citing City of Marin, 836 F. Supp. 2d at 1038). Defendant
8 argues Plaintiff “does not allege exactly what statements he relied upon, who made
9 them, the content of such statements, when the alleged statements were made, or in
10 what format they were made.” (Id. at 15; Dkt. No. 18 at 10.)

11 Under Rule 9(b), the pleader of a RICO fraud claim “must state the time, place,
12 and specific content of the false representations as well as the identities of the parties
13 to the misrepresentation.” Schrieber Distributing Co. v. Serv-Well Furniture Co., Inc.,
14 806 F.2d 1393, 1400 (9th Cir. 1986) (citing Bosse v. Crowell Collier & MacMillan,
15 565 F.2d 602, 611 (9th Cir. 1977). “[T]he circumstances constituting the alleged fraud
16 [must] be specific enough to give defendants notice of the particular misconduct . . .
17 so that they can defend against the charge and not just deny that they have done
18 anything wrong.” Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)
19 (internal quotation marks omitted).

20 As Plaintiff notes, the Complaint includes detailed allegations regarding the
21 letter, invitation, and main promotional video viewed by Plaintiff. (Dkt. No. 16 at 15-
22 16) (citing Compl. ¶¶ 3, 4, 13). For example, Plaintiff alleges that:

23 Cohen learned about Trump University in 2009 when he saw an
24 advertisement in the San Jose Mercury News, which is delivered daily to
25 his home. Cohen believes that he also received by mail a ‘special
26 invitation’ to Trump University from Donald Trump, which included 2
27 VIP tickets to the free seminar. . . . Cohen attended the Preview Live
28 Event at the Fremont Marriott Silicon Valley in Fremont, California, on
April 29, 2009, where Cohen was shown the Main Promotional Video.
Based on Defendant’s misrepresentations and material omissions that he
would receive Donald Trump’s real estate secrets from his handpicked
‘professors’ and mentors at his ‘University,’ Cohen purchased the \$1,495
Fast Track to Foreclosure Real Estate Retreat, which he attended from
May 8-10, 2009, at the Sheraton Palo Alto Hotel in Palo Alto.

1 (Compl. ¶ 13.) The Complaint further alleges the special invitation was sent from
2 Trump to Cohen in March or April 2009, and that an email was sent from Trump
3 University to Cohen with a link to the Main Promotional Video on August 26, 2009.
4 (Compl. ¶¶ 73(a)-(b).) The Court therefore finds that, contrary to Defendant’s assertion,
5 Plaintiff’s Complaint alleges the “statements [Cohen] relied upon, who made them, the
6 content of such statements, when the alleged statements were made, and in what format
7 they were made.” (Dkt. No 9-1 at 14-15.) Accordingly, the Court DENIES Defendant’s
8 motion to dismiss Plaintiff’s RICO claim for lack of specificity under Federal Rule of
9 Civil Procedure 9(b).

10 **III. Motion to Strike**

11 In addition, Defendant moves to strike two categories of allegations from
12 Plaintiff’s Complaint: (1) allegations of puffery used in Trump’s advertising; and (2)
13 allegations concerning government investigations into Trump University and Trump
14 University’s Better Business Bureau rating. (Dkt. No. 10-1 at 1) (seeking to strike
15 paragraphs 2-4; 6-7; 19-21(a)-(b), (d)-(I) and (l); 24-26; 32; 49-52; and 53-56 from
16 Plaintiff’s Complaint).

17 **A. Legal Standard**

18 A motion to strike is brought under Federal Rule of Civil Procedure 12(f). Rule
19 12(f) provides that a “court may strike from a pleadings an insufficient defense or any
20 redundant, immaterial, impertinent, or scandalous matter.” The function of a motion
21 to strike is to avoid unnecessary expenditures that arise throughout litigation by
22 dispensing of any spurious issues prior to trial. Sidney–Vinstein v. A.H. Robins Co.,
23 697 F.2d 880, 885 (9th Cir. 1983). Rule 12(f) motions “are generally regarded with
24 disfavor because of the limited importance of pleading in federal practice, and because
25 they are often used as a delaying tactic.” Neilson v. Union Bank of Cal., N.A., 290 F.
26 Supp. 2d 1101, 1152 (C.D. Cal. 2003). Thus, courts generally grant a motion to strike
27 only where “it is clear that the matter to be stricken could have no possible bearing on
28 the subject matter of the litigation.” Walters v. Fidelity Mortg. of Cal., 730 F. Supp.

1 2d 1185, 1196 (E.D. Cal. 2010) (citing Lilley v. Charren, 936 F. Supp. 708, 713 (N.D.
2 Cal. 1996)).

3 “A motion to strike is . . . not normally granted unless prejudice would result to
4 the movant from the denial of the motion.” United States v. 729,773 Acres of Land,
5 531 F. Supp. 967, 971 (D. Haw. 1982). The Ninth Circuit has found a motion to strike
6 appropriately granted where the allegations at issue “created serious risks of prejudice
7 . . ., delay, and confusion of the issues.” Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1528
8 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994).

9 **B. Analysis**

10 **1. Sales Puffery**

11 Defendant first moves to strike as immaterial Plaintiff’s allegations of
12 representations made by Trump University that constitute “slogans, ‘puffery’ or
13 ‘seller’s talk’ in advertisements marketing Trump University to the general public.”
14 (Dkt. No. 10-1 at 1.) As discussed at length above, although the challenged statements
15 may contain slogans or “seller’s talk” found non-actionable when challenged as general
16 claims as to superior quality, the Court finds that issues of fact exist as to whether the
17 statements also make absolute claims regarding Trump’s involvement with Trump
18 University and whether the program was a university. In addition, Trump makes no
19 claim that the statements at issue create serious risk of prejudice, delay, or confusion
20 of the issues. See Fantasy, Inc., 984 F.2d at 1528. Accordingly, the Court DENIES
21 Defendant’s motion to strike the paragraphs of the Complaint containing statements
22 considered by Defendant to constitute “mere puffery.” (Dkt. No. 10-1 at 2-3.)

23 **2. Governmental Investigations**

24 Defendant also moves the Court to strike allegations from Plaintiff’s Complaint
25 describing “irrelevant government agency investigations into Trump University and
26 Trump University’s Better Business Bureau (“BBB”) rating.” (Dkt. No. 10-1 at 3.)
27 Defendant argues the allegations regarding investigations have no bearing on
28 Plaintiff’s RICO claim and unduly prejudice Trump because they are likely to “cause

1 a trier of fact to draw unwarranted inferences at trial.” (Dkt. No. 10-1 at 4) (citing
2 Fantsay, Inc., 984 F.2d at 1528).

3 In response, Plaintiff argues the investigations are potentially probative of
4 Trump’s knowledge and intent to defraud. (Dkt. No. 17 at 2.) The Court agrees.
5 Plaintiff’s Complaint alleges Defendant committed mail and wire fraud as predicate
6 acts of racketeering under RICO. (Compl. ¶¶ 84(a)-(b).) A claim for violation of the
7 mail fraud statute, 18 U.S.C. § 1341, requires a showing that “(1) defendant devised a
8 scheme or artifice to defraud; (2) defendant used the mails in furtherance of the
9 scheme; and (3) defendant did so with the specific intent to deceive or defraud.” Sun
10 Sav. & Loan Ass’n v. Dierdorff, 825 F.2d 187, 195 (9th Cir. 1987) (citing Schreiber
11 Distributing Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1399 (9th Cir. 1986)).
12 The gravamen of a mail fraud claim is the “scheme to defraud.” Bridge v. Phoenix
13 Bond & Indem. Co., 553 U.S. 639, 647 (2008). Furthermore, the Ninth Circuit has
14 found that evidence of continuing participation in a fraudulent scheme despite
15 knowledge of complaints regarding the scheme can support a conviction for mail fraud
16 under 18 U.S.C. § 1341. See U.S. v. Peters, 962 F.2d 1410, 1414 (9th Cir. 1992). The
17 Court therefore finds Plaintiff’s allegations regarding governmental investigations into
18 Trump University and Trump University’s Better Business Bureau (“BBB”) rating are
19 related to and potentially probative of Trump’s intent to defraud.

20 In addition, although Defendant claims undue prejudice would result from
21 inclusion of the allegations at issue, the Court finds the allegations in this case
22 distinguishable from those found prejudicial in Fantasy Inc. v. Fogerty, 984 F.2d at
23 1528. In Fantasy, Inc., the court found allegations regarding Fantasy, Inc’s predecessor-
24 in-interest to create a risk of prejudice to Fantasy, Inc. where the allegations consisted
25 of “stale and [time] barred charges that had already been extensively litigated and
26 would have been burdensome for Fantasy to answer.” 984 F.2d at 1528. Here, as
27 explained above, the Court finds the allegations regarding governmental investigations
28 and Better Business Bureau ratings relevant to an element of the prima facie case for

1 violation of the mail fraud statute. Furthermore, the allegations at issue in this case are
2 not time barred; have not been extensively litigated; and relate to a party in this case
3 rather than a third-party predecessor-in-interest not before the court. Accordingly, the
4 Court DENIES Defendant's motion to strike Plaintiff's allegations related to
5 governmental investigations into Trump University and Trump University's Better
6 Business Bureau rating.

7 **CONCLUSION**

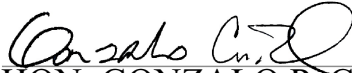
8 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 9 1. Defendant's request for judicial notice, (Dkt. No. 18-1), is DENIED;
10 2. Defendant's Motion to Dismiss, (Dkt. No. 9), is DENIED; and
11 3. Defendant's Motion to Strike, (Dkt. No. 10), is DENIED.

12 Accordingly, Defendant shall file an answer to the Complaint within 14 days of
13 entry of this Order. Fed. R. Civ. P. 12(a)(4)(A).

14 **IT IS SO ORDERED.**

15 DATED: February 21, 2014

16 
17 HON. GONZALO P. CURIEL
United States District Judge

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