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# [***N. Am. Wellness Ctr. Holdings, LLC v. Temecula Valley Real Estate, Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PMC-M0K1-F04C-T2WB-00000-00&context=)

United States District Court for the Central District of California, Eastern Division

September 29, 2017, Decided; September 29, 2017, Filed

ED 16-CV-2010-VAP-DTB

**Reporter**

2017 U.S. Dist. LEXIS 162915 \*

North American Wellness Center Holdings, LLC, Plaintiff, v. Temecula Valley Real Estate, Inc., et. al., Defendants.

**Subsequent History:** Costs and fees proceeding at, Motion denied by [*N. Am. Wellness Ctr. Holdings, LLC v. Temecula Valley Real Estate, Inc., 2017 U.S. Dist. LEXIS 217695 (C.D. Cal., Nov. 7, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RN7-2D41-JTGH-B10R-00000-00&context=)

**Core Terms**

allegations, real estate, motion to dismiss, Violations, pages, Securities, advisory services, requires, monopolize, pleadings, federal securities, commerce, invested, amend, fails, contract of purchase, monopoly, shotgun, Counts, real estate transaction, entitlement to relief, restraint of trade, relevant market, foreign nation, misrepresentations, probability, plausibly, exhibits, parties, Realty

**Counsel:** **[\*1]**For North American Wellness Center Holdings LLC, Plaintiff: Nupur Nagar, Law Office of Nupur Nagar, Riverside, CA; James V Garrison, James Garrison Law Offices, Big Bear City, CA.

For Temecula Valley Real Estate Inc., doing business as KW Commercial, Kevin Vernon, Andrew Smith, Inclusive of all forms of Business Entitites under which Andrew Smith Operates and Conducts Business, The Vernon Group, LLC, Keller Williams Realty Temecula Valley Market Center and Temecula Valley Center, Defendants: Kelly Ann Neavel, LEAD ATTORNEY, The Giardinelli Law Group APC, Canyon Lake, CA.

For Keller Williams Realty, Inc., Defendant: James E Klinkert, LEAD ATTORNEY, Ritchie Klinkert and McCallion, Anaheim, CA; Paul J Gutierrez, LEAD ATTORNEY, Ritchie Klinkert & Gutierrez, Anaheim, CA; Kelly Ann Neavel, The Giardinelli Law Group APC, Canyon Lake, CA.

For Keller Williams Realty Carmel Valley Market Center and HKT Cal Inc, Defendant: Melissa N Engle, White and Bright, LLP, Escondido, CA.

**Judges:** Virginia A. Phillips, Chief United States District Judge.

**Opinion by:** Virginia A. Phillips

**Opinion**

**Order Granting Defendants' Motion to Dismiss (Doc. No. 80.)**

On August 16, 2017, Defendants Temecula Valley Real Estate, Inc. d/b/a KW Williams Realty**[\*2]** ("TVREI"); Kevin Vernon; the Vernon Group, LLC; Andrew Smith, Keller Williams Realty, Inc. ("KWRI"), and Keller Williams Realty Temecula Valley Market Center ("TVMC") (collectively, "KWR Defendants") filed a Motion to Dismiss the First Amended Complaint ("FAC"). (Doc. No. 80.) On August 25, 2017, Plaintiff North American Wellness Center Holdings, Inc. ("Plaintiff") filed an Opposition to KWR Defendants' Motion to Dismiss. (Doc. No. 87.) On September 1, 2017, KWR Defendants filed a Reply. (Doc. No. 88.)

On August 17, 2017, Defendant HKT-Cal filed a separate Motion to Dismiss the FAC. (Doc. No. 86.) On September 20, 2017, the parties stipulated to dismiss Defendant HKT-Cal, Inc. pursuant to [*Federal Rule of Civil Procedure 41(a)(1)(A)(ii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F026-00000-00&context=). (Doc. No. 105.) The Court therefore denied HKT-Cal's Motion to Dismiss as moot. (See Doc. No. 113.)

The Court determined KWR Defendants' Motion to be appropriate for resolution without a hearing pursuant to C.D. Cal. [*L.R. 7-15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5HM5-GY90-004H-425B-00000-00&context=), and vacated the hearing originally set for September 18, 2017. (Doc. No. 98.)

After considering the papers filed in support of, and in opposition to, the Motion, the Court rules as follows.

**I. BACKGROUND**

The crux of this case is a real estate venture that soured. Plaintiff, a limited liability**[\*3]** corporation, alleges that in or around May 2012, Defendant Vernon advised it to purchase two adjacent parcels of real property in Murietta, California ("the City" or "Murietta"), about which Vernon had made misrepresentations and promised an "attractive rate of return ... within a short period of time" if Plaintiff made certain investments and improvements on the land. (FAC ¶¶ 23-24, 27-28, 43.) Vernon allegedly told Plaintiff that Defendant Smith would assist in raising equity and capital, and Smith represented that he was "locally well networked with developers and sources of Capital to allow for raising Capital." (Id. ¶¶ 27, 84.) Defendant TVREI brokered Plaintiff's purchase of the land, thus gaining "considerable and substantial fees and commission" from the transactions, while promising to provide Plaintiff with various capital advisory services. (Id. ¶ 24-26.)

Plaintiff executed two "significant" contracts: (1) the land purchase contract and (2) the investment advisory services contract, "all allowing significant opportunities for substantial commissions, placement fees, and consulting fees" for KWR Defendants. (Id. ¶ 25.) Vernon represented to Plaintiff that the City was "development**[\*4]** friendly," that there would not be any issues with the zoning, and that the seller "was willing to wait for a long escrow to allow procurement of permits, and that KWR Defendants would assist Plaintiff with any necessary financing. (Id. ¶ 44.) Plaintiff contracted to purchase 7.24 acres of land; KWR Defendants had represented the property was $3,600,000 at the time of purchase, and its value would increase to $7,603,676 after certain investments were made and permits obtained. (Id. ¶¶ 28-29.) The land, however, was actually valued at $198,180, and the $2,500,000 purchase price that Defendants had represented to Plaintiff already included any potential appreciation to the value of the land even after the improvements were made and permits were obtained. (Id. ¶¶ 50, 55) "Vernon thus misrepresented the price to Plaintiff buy [sic] an amount of $4,825,836 (Vernon representation [sic] of value to seller at $198.180 and Vernon representation of price to [Plaintiff ] at $5,089,436)." (Id. ¶ 50.)

Plaintiff nevertheless believed the misrepresentations made by Vernon, Smith and KWR Defendants and "invested substantial sums of moneys [sic] into the Project." (Id. ¶ 27.) Based on the misrepresentations**[\*5]** of Smith and Vernon with regard to the valuation and development structure, Plaintiff and its consultants proceeded "to build the project financials," which were "predicated on false valuations and waterfall formulas, provided by Defendants, and resulted in overstating the project value, the capital needed to close the project, and [inflated] [the] commission and placement fee structure needed to close the project." (Id. ¶ 73.) "The entire scheme was set up so that Plaintiff would provide inflated commissions, fees, and other expenses." (Id. ¶ 75.) When Plaintiff completed all of the permit improvements, the seller cancelled the land purchase contract with Plaintiff. (Id. ¶ 27)

Plaintiff alleges that the "chief architects" of the scheme were Vernon and Smith, both of whom were brokers at TVREI. (Id. ¶ 33.) Plaintiff claims that Defendants'"primary scheme" was to "induce [Plaintiff ] to invest in inflated real estate [sic]," with Plaintiff investing substantial amounts of money into permits and rezoning, procuring a contract to raise capital and sell consulting fees" which would result in commissions and consulting fees for Defendants." (Id. ¶ 26.) None of the KWR Defendants, however,**[\*6]** carried the requisite certifications to provide capital advisory services. (Id. ¶ 30.) "Defendants collectively materially aided, assisted and participated in the solicitation of the Plaintiff's moneys into the investment scheme, the purchase of falsely valued development opportunity — the land integrated with the capital raising scheme." (Id. ¶ 80.) Based on these representations, Plaintiff invested more than half a million dollars into the property. (Id.) Defendants told Plaintiff that the land could be re-developed as a potential project for senior living, but this representation was misleading because the City had recently re-zoned the land as single-family residential. (Id. ¶ 37.)

Plaintiff filed its FAC on June 20, 2017. (Doc. 62.) Plaintiff employs a shotgun approach in the FAC, asserting the following claims: (1) Violation of the *Sherman Act, § 1* ("Contract, Conspiracy, Combination, and Agreement in Restraint of Trade that is Per Se Unlawful"); (2) Violation of the *Sherman Act, § 2* (Attempt to Monopolize); (3) [*California Cartwright Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1MN-00000-00&context=) (Business and Professions Code [*§§ 16700-16770*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1MN-00000-00&context=)); (4) Securities Violations (*15 U.S.C. § 78j*); (5) Securities Violations ([*15 U.S.C. § 10B*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:50S9-3P71-NRF4-4001-00000-00&context=) and SEC [*Rule 10B-5 [sic]*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5NBM-FJG0-008G-Y03K-00000-00&context=)); (6) Securities Violations of [*§ 9(a)(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GP91-NRF4-42BX-00000-00&context=) of the Exchange**[\*7]** Act; (7) [*California Corporations Code § 25401*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-DXD1-66B9-814Y-00000-00&context=); (8) Transaction, Practice or Course of Business to Defraud By Investment Advisor ([*California Corporations Code § 25235*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-DXD1-66B9-8128-00000-00&context=)); (9) Untrue and Misleading Statements ([*California Business and Professions Code § 17500*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1TH-00000-00&context=)); (10) Unfair Competition ([*California Business and Professions Code § 17200*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1SB-00000-00&context=)); (11) "Violation of Registration Requirements of California Securities Law"; (12) "Violation of Civil Code [*§ 3372*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-DKP1-66B9-84XY-00000-00&context=): Defendants Failed to Exercise Due Care in Rendering Services"; (13) "Aiding and Abetting Unlicensed Person or Unregistered Company to Evade Law" ([*California Business and Professions Code § 8639*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2CD1-DYB7-W38X-00000-00&context=)); (14) "Fraud, Deceit and Concealment"; (15) "Aiding and Abetting Fraud"; (16) "Misrepresentation, Intentional and Negligent Misrepesentation [sic]"; (17) "Aiding and Abetting Misrepresentation"; (18) "Breach of Contract and Breach of Fiduciary Duty"; (19) Negligence; (20) "Registered Investment Advisers Statutory Framework and ***Regulatory*** Scheme" ([*California Corporations Code §§ 25200*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-DXD1-66B9-80YM-00000-00&context=)-25209 and 25230-25238); and (21) "All Counts Stated Above Are Also Attributed to Additional Defendants of Market Centers [Temecula Valley Market Center and Keller Williams Realty Carmel Valley Market Center]." (Doc. 62.)

**II. LEGAL STANDARD**

**A.** [***Fed. R. Civ. Pro. 8(a)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=)

Under [*Federal Rule of Civil Procedure 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=). "The court may sua sponte dismiss a complaint for failure to comply**[\*8]** with [*Rule 8*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=). [*Rule 8*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) mandates that a complaint include a 'short and plain statement of the claim,' and that 'each allegation must be simple, concise, and direct.'" [*Ball v. Tate-Ball, CV No. 10-00768 DAE-KSC, 2011 U.S. Dist. LEXIS 63921, 2011 WL 2457664, at \*1 (D. Haw. June 16, 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:533Y-Y541-652H-J0SN-00000-00&context=) (internal citations omitted). "[A] dismissal for a violation under [*Rule 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) ... is usually confined to instances in which the complaint is so verbose, confused and redundant that its true substance, if any, is well disguised." [*Hearns v. San Bernardino Police Dep't, 530 F.3d 1124, 1131 (9th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SWR-7MS0-TX4N-G147-00000-00&context=) (internal citations omitted). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of the claim plainly and succinctly. [*Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X1D0-003B-G4RV-00000-00&context=). Therefore, a plaintiff must allege with at least some degree of particularity the overt acts which the defendants engaged in that support plaintiff's claim. Id. "The propriety of dismissal for failure to comply with [*Rule 8*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) does not depend on whether the complaint is wholly without merit"; [*Rule 8*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=)'s requirements "appl[y] to good claims as well as bad, and is a basis for dismissal independent of [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=)." [*McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2760-006F-M033-00000-00&context=).

**B.** [***Fed. R. Civ. Pro. 12(b)(6)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=)

[*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) is read along with [*Rule 8(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=), which requires a short, plain statement upon which a pleading shows entitlement to relief. [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=); [*Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J5D0-003B-S1MW-00000-00&context=) (holding**[\*9]** that the Federal Rules require a plaintiff to provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" (quoting [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=)).); [*Bell Atl. Corp. v Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). When evaluating a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See [*Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GX1-WDP0-0038-X2D6-00000-00&context=); [*ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GDC-R9S0-0038-X2R0-00000-00&context=); [*Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3SM0-003B-P3NG-00000-00&context=). "The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court." *Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000)*.

"While a complaint attacked by a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." [*Twombly, 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

To survive a 12(b)(6) motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." [*Twombly, 550 U.S. at 570*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=); [*Ashcroft v. Iqbal, 556 U.S. 662, 697, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). "The plausibility standard is**[\*10]** not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Twombly, 550 U.S. at 556*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)).

The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively" and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." [*Starr v. Baca, 652 F. 3d 1202, 1216 (9th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:53D4-3NY1-JCNJ-417W-00000-00&context=).

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, [*Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9M90-003B-528K-00000-00&context=), and "take judicial notice of matters of public record outside the pleadings," [*Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1HN0-001B-K124-00000-00&context=). Also, "[d]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss." [*Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-98Y0-003B-P4FW-00000-00&context=), overruled on other grounds**[\*11]** by [*Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46YD-7GF0-0038-X1KC-00000-00&context=).

**III. DISCUSSION**

Defendants attack the FAC on two grounds: (1) failure to comply with [*Rule 8(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=); and (2) failure to state a claim pursuant to [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=).

**A. Timeliness of Defendants' Motion**

In its Opposition, Plaintiff argues that the Court should deny Defendants' Motion as untimely because the Motion was filed after Defendants filed an Answer to the Complaint, and because the FAC is nearly identical to the original Complaint in this case, with the addition of two new defendants. (Doc. No. 87 at 9-10.)

This argument lacks merit. It fails to take into account the "well-established doctrine that an amended pleading supersedes the original pleading." See *Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992)*. As amendment results in the preceding pleading "no longer perform[ing] any function" and being "treated thereafter as non-existent," see [*Cano v. Taylor, 739 F.3d 1214, 1220 (9th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B8W-J3T1-F04K-V44H-00000-00&context=), the answer that Defendants originally filed that was directed toward the original complaint is therefore moot. See id. ; see also [*Stamas v. Cty of Madera, No. CV F 09-0753 LJO SMS, 2010 U.S. Dist. LEXIS 3241, 2010 WL 289310, at \*4 (E.D. Cal. Jan. 15, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XK5-YYT0-YB0M-N0VM-00000-00&context=) (permitting defendants to move for dismissal of an amended complaint even though these defendants did not move for dismissal of the original complaint on the grounds that "[t]he amended pleading is subject to**[\*12]** the same challenges as the original.").

To the extent Plaintiff argues that Defendants are time-barred from moving for dismissal pursuant to [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), the Court again finds its argument foreclosed by Ninth Circuit precedent. "This circuit allows a motion under [*Rule 12(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) any time before the responsive pleading is filed." [*Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1474 (9th Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YDV0-001B-K2B8-00000-00&context=). Here, as Defendants filed their 12(b)(6) Motion in lieu of answering the FAC, the Court finds that their Motion is timely, notwithstanding the fact that the Motion was filed approximately two months after the FAC was served. See id. ("while some courts hold that [*Rule 12(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motions must be made within 20 days of service of the complaint, the rule itself only requires that such motions 'be made before pleading if a further pleading is permitted.'").

**B. Compliance with** [***Fed R. Civ. P. 8(a)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=)

In their Motion, Defendants argue that the FAC "does not state Plaintiff's claims with clarity sufficient to allow Defendants to frame true and accurate responsive pleadings" because it "is too long, repetitious, confusing, and disorderly," and "is so incomprehensible that Defendants cannot tell what Plaintiff is truly alleging." (Doc. No. at 80-1 at 11.) Defendants further note that the FAC is 97 pages; contains 58 pages of exhibits;**[\*13]** contains a 68-page "overview" that cross-references the 58 pages of exhibits without providing any contextual structure; and fails to describe the 21 counts alleged against Defendants until the 69th page. (Id.) As a result, "[i]n order for Defendants to even begin to decipher the factual support of the claims against them, Defendants have to cross-reference the first 68 pages ... to the 58 pages of exhibits, which is extremely difficult to do," and "Defendants are unable to truly understand what Plaintiff is trying to allege." (Id. at 11-12.) Furthermore, Defendants argue that Plaintiff's use of "shotgun pleadings" that incorporate all of the general allegations and claims into each subsequent claim and failure to specify which allegations are relevant to the particular claim at issue are also in violation of [*Rule 8(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) and serve as a basis for dismissing the FAC. (Id. at 12.)

Plaintiff's 65-page Opposition[[1]](#footnote-0)1 attempts in vain to clarify the FAC's allegations by specifying which pages in the FAC refer to which claims it makes. (Doc. No. 87 at 11-12.) According to Plaintiff, "[t]he [FAC] is long, but is not repetitive or redundant, it is organized into supportive facts for various counts and in chronological order. In fact, the**[\*14]** [FAC] lays out systematically the parties, the description of the transaction, and enumerates various legal claims, each of which describes the defendants involved and the legal basis on which these claims are alleged." (Id. at 12.) Plaintiff attempts to liken the FAC to the one at issue in Hearns, where the Ninth Circuit reversed a district court's dismissal of a complaint with prejudice because the complaint, although lengthy, was "intelligible and clearly delineate[d] the claims and the Defendants against whom the claims [were] made." See [*530 F.3d at 1132*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SWR-7MS0-TX4N-G147-00000-00&context=).

Upon careful review of the FAC, the Court finds it distinguishable from the pleading the Ninth Circuit described in [*Hearns*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SWR-7MS0-TX4N-G147-00000-00&context=), that Defendants have accurately characterized the FAC as extremely difficult to digest, and that the FAC fails to comply with [*Rule 8(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=). Plaintiff's self-serving description of the FAC in the preceding paragraph is inaccurate -- the FAC is repetitive, disjointed, littered with typographical errors, at points unintelligible, and as Defendants observed, spans approximately 97 pages. Indeed, Plaintiff's characterization of the FAC in the preceding paragraph was copied and pasted word-for-word from Hearns, but without the proper citation. (See Doc. No. 87**[\*15]** at 12.) "Prolix, confusing complaints such as the one[] [P]laintiff filed in this case impose unfair burdens on litigants and judges." [*McHenry, 84 F.3d at 1179*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2760-006F-M033-00000-00&context=).

The burden imposed by the FAC is evidenced by Defendants' observation that Plaintiff "compounds the confusion by conflating Defendant Vernon, Defendant Smith, Defendant [TVREI], and Defendant [KWRI], collectively referring to all of them as 'Defendants' throughout the FAC." (See Doc. No. 88 at 9.) Although the FAC does include some allegations specific to individual Defendants, the vast majority of the FAC simply refers to conduct allegedly committed by "Defendants" collectively, which as Defendants point out, results in confusion as to which Defendant is allegedly liable under which claim. By way of example, although KWRI is one of the first named Defendants in the FAC, the FAC fails to attribute any of its allegations to KWRI specifically, but repeatedly refers to "all Defendants" throughout its 97 pages. These aspects of the FAC typify it as the kind of "shotgun pleading" that has been roundly rejected in federal courts as a violation of [*Rule 8*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=). This type of impermissible pleading occurs

with multiple defendants where the plaintiff uses the omnibus term "Defendants"**[\*16]** throughout a complaint by grouping defendants together without identifying what the particular defendants specifically did wrong . . . [or] where the plaintiff recites a collection of general allegations toward the beginning of the Complaint, and then "each count incorporates every antecedent allegation by reference [.]"

[*Sollberger v. Wachovia Sec., LLC, No. SACV 09-0766 AG (ANx), 2010 U.S. Dist. LEXIS 66233, 2010 WL 2674456, at \*4 (C.D. Cal. June 30, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YW5-VBD1-652H-7014-00000-00&context=) (citing [*Byrne v. Nezhat, 261 F.3d 1075, 1130 (11th Cir. 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43RT-KVP0-0038-X4FH-00000-00&context=). "Shotgun pleadings overwhelm defendants with an unclear mass of allegations and make it difficult or impossible for defendants to make informed responses to the plaintiff's allegations. They are unacceptable." [*Shin v. Time Squared Global, LLC, Case No. SACV 15-00943 AG (GJSx), 2015 U.S. Dist. LEXIS 190218, 2015 WL 13284952, at \*2 (C.D. Cal. Aug 26, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PKJ-KR61-F04C-T0TX-00000-00&context=). Id.

Similarly, given that Defendants have had difficulty sorting through the FAC and comprehending the claims alleged against them, the Court has likewise spent an inordinate amount of time reviewing the FAC and assessing Defendants' motion. "[E]xperience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." [*Mason v. County of Orange, 251 F.R.D. 562, 563-64 (C.D. Cal. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TPD-F0J0-TXFP-C1XH-00000-00&context=) (quoting [*Anderson v. District Board of Trustees, 77 F.3d 364, 366-67 (11th Cir. 1996))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4580-006F-M2GC-00000-00&context=); see also [*Byrne, 261 F.3d at 1130*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43RT-KVP0-0038-X4FH-00000-00&context=) ("Cases framed by shotgun pleadings consume**[\*17]** an inordinate amount of a court's time. As a result, justice is delayed, if not denied, for litigants who are standing in the queue waiting to be heard. Their impression of the court's ability to take care if its business can hardly be favorable. As the public becomes aware of the harm suffered by victims of shotgun pleading, it, too, cannot help but lose respect for the system.").

For the foregoing reasons, the Court determines that the FAC violates [*Rule 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=). Although there is authority[[2]](#footnote-1)2 upon which the Court could find that the FAC's violation of [*Rule 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) merits dismissal with prejudice, because the Court has expended a great deal of time reviewing the FAC in light of the relevant law, and has discerned the essence of the relief Plaintiff seeks and the FAC's factual allegations, the Court will evaluate the FAC under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=).

**C. Failure to State a Claim pursuant to** [***Fed R. Civ. P. 12(b)(6)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=)

The FAC alleges twenty-one claims, five of which purport to allege violations of federal law. Accordingly, the Court first turns to these claims -- Counts 1 and 2 allege violations of the *Sherman* ***Antitrust*** *Act ("Sherman Act")*, and Counts 4, 5, and 6 allege federal securities violations.

**1. *Section 1* of the Sherman Act**

"Liability under *§ 1* of the Sherman**[\*18]** Act, *15 U.S.C. § 1*, requires a 'contract, combination ..., or conspiracy, in restraint of trade or commerce." [*Twombly, 550 U.S. at 548*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) (quoting *15 U.S.C. § 1*). The Ninth Circuit has further clarified that in order to state such a claim, a plaintiff:

must plead not just ultimate facts (such as a conspiracy), but evidentiary facts, which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entitles intended to harm or restrain trade or commerce among the several States or with foreign nations; (3) which actually injures competition.

Kendall v. Visa U.S.A., Inc., 518 F.3d, 1042, 1047 (9th Cir. 2008). Alternatively, the Ninth Circuit has recognized the "quick look" theory, where the plaintiff must plead that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." [*California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1134 (9th Cir.2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:539G-B5M1-JCNJ-40X9-00000-00&context=) (quoting [*California Dental Ass'n v FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJ6-7N70-004C-100F-00000-00&context=). "The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." [*California Dental Ass'n, 526 U.S. at 781*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJ6-7N70-004C-100F-00000-00&context=).

Here, the FAC falls far short of adequately pleading a**[\*19]** *§ 1* claim under either theory. Plaintiff alleges that Defendants' inducement of Plaintiff to purchase the land and Defendants' capital advisory services is a violation of the Sherman Act because Defendants' actions "limited Plaintiff's options of seeking out and considering alternatives ... prevented Plaintiff from reaching out to other competitors ... [and] secured Plaintiff's commitment to 2 separate products [the 'tying' agreement], alleging better pricing which were disguised under the 'standard' fee allegations but in reality were exorbitantly priced." FAC ¶ 125. Even generously construing the FAC, as it must, the Court cannot conceive how these allegations provide the necessary factual context to support a conclusion that KWR Defendants violated *§ 1*. The allegations fail under the first theory because Defendants' inducement of Plaintiff to purchase the real estate at a price far higher than market value in Murietta, California, does not in any conceivable way "harm or restrain trade or commerce among the several States or with foreign nations," or "actually injure competition." As a matter of common sense, persons or entities seeking to purchase real estate and undertake construction**[\*20]** projects, as Plaintiff here has done, generally can choose who to work with, and the mere fact that a purchaser did not recoup what it had expected from a real estate investment does not amount to a *§ 1* violation. "In pleading injury to competition, 'plaintiffs must plead an injury to competition beyond the impact to plaintiffs themselves.'" [*Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co., 166 F. Supp. 3d 988, 997 (N.D. Cal. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J9W-FJW1-F04C-T38W-00000-00&context=) (quoting [*Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1198 (9th Cir. 2012))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5596-MWK1-F04K-V2TN-00000-00&context=). The FAC fails to allege any injury to competition beyond the impact to Plaintiff.

For the same reason, even under a "rudimentary" understanding of economics, the FAC's allegations that Plaintiff overpaid for a piece of real estate could in no way support the legal conclusion that this transaction "would have an anticompetitive effect on customers and markets" under the "quick look" analysis set forth in [*Harris, 651 F.3d at 1134*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:539G-B5M1-JCNJ-40X9-00000-00&context=). As the FAC does not allege any injury to competition beyond the impact to Plaintiff, it also fails under the "quick look" analysis, which requires a showing that a restraint has had an anticompetitive effect on customers and markets. See [*Cal. Dental, 526 U.S. at 771*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJ6-7N70-004C-100F-00000-00&context=) (the "quick look" analysis is not appropriate if an arrangement "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.").

Accordingly, the Court GRANTS**[\*21]** Defendants' Motion as to Plaintiff's *§ 1* claim. Upon careful consideration of the facts alleged in the FAC, the Court has determined that there is no plausible way that its allegations of a failed real estate development venture in one town within California and the retention of a realty company to provide capital advisory services could actually "harm or restrain trade or commerce among the several States or with foreign nations," or "actually injure competition." Under Ninth Circuit precedent, "a claim that involves activity occurring within a single enterprise ... is not a viable ***antitrust*** claim." [*Jack Russell Terrier Network of Northern Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1036 (9th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G66-K310-0038-X0SB-00000-00&context=). Thus, dismissal shall be without leave to amend because under the facts pleaded, amendment would be futile. [*Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FN50-008H-V0FG-00000-00&context=) ("A district court does not err in denying leave to amend where the amendment would be futile ... or where the amended complaint would be subject to dismissal.").

**2. *Section 2* of the Sherman Act**

"*Section 2* of the Sherman Act makes it unlawful to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." [*Pac. Bell Telephone Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPF-5H70-TXFX-11YJ-00000-00&context=) (quoting *15 U.S.C. § 2*). "[T]he statute targets 'the willful acquisition or maintenance**[\*22]** of [monopoly power] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Id. (internal citation omitted). "To demonstrate a claim of attempted monopolization under *§ 2*, the plaintiff must show '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." [*Meijer, Inc. v. Abbott Laboratories, 544 F. Supp. 2d. 995, 999 (N.D. Cal. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S9P-N8V0-TXFP-C327-00000-00&context=) (quoting *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008)*.

The FAC fails to state a claim for a *§ 2* violation. Its allegations that Defendants'"consolidation" of the real estate purchase agreement and the investment services contract being "offered in a combination of persons" thereby "denied Plaintiff a free access to market competition" and "foreclose[d] a substantial amount of interstate commerce" (FAC ¶ 129-132), are unintelligible as well as conclusory. Although the FAC is 97 pages long, it concerns a real estate purchase development effort in Murietta, California. Even assuming it to be a significant venture, one real estate development within the state cannot possibly amount to a monopoly of "any part of the trade or commerce among the several States, or with foreign nations." [*Linkline, 555 U.S. at 448*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPF-5H70-TXFX-11YJ-00000-00&context=).

The FAC does allege that KWR**[\*23]** advertised itself as providing "integrated real estate services for clients in virtually any market worldwide" (FAC ¶ 101), that KWR associates "provide the very highest level of service to multifamily owners and investors with superior market knowledge and can deliver valuation and analysis of market trends" (id.), and that Defendants swindled Plaintiff through their real estate transactions (id. ¶ 50). Nevertheless, these allegations cannot be construed as adequately alleging that Defendants were a "monopoly" within the meaning of the Sherman Act.

In contrast, a court in the Northern District found an adequate allegation of a violation of *§ 2* of the Sherman Act where the plaintiff alleged that the defendant, a well-known electronics company, had disabled a feature in its own electronic music player device so that this device would not play competitors' digital music files, and making its own digital music files incapable of playback on other digital music players. [*Tucker v. Apple Computer, Inc., 493 F. Supp. 2d. 1090, 1102 (N.D. Cal. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P02-19D0-TVSH-32W8-00000-00&context=). The court determined that the plaintiff had adequately alleged that the defendant had "intentionally destroy[ed] other companies' ability to compete, that the conduct was "designed to destroy competition, and that the defendant had**[\*24]** "a probability of achieving monopoly power in the relevant markets," given that the defendant's share of the online music market was 83 percent. [*Id. at 1093, 1102*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GDC-R9S0-0038-X2R0-00000-00&context=).

In this case, the FAC utterly fails to allege a violation of *§ 2*. Unlike the defendant in [*Apple Computer*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P02-19D0-TVSH-32W8-00000-00&context=), who controlled 83 percent of the relevant market, the FAC is silent as to the amount of control that KWR Defendants had in the relevant market. Plaintiff thus failed to allege "both that a 'relevant market' exists and that the defendant has power within that market." [*Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir.2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RNG-82F0-TXFX-D2PV-00000-00&context=).

Therefore, the Court GRANTS Defendants' Motion as to Plaintiff's *§ 2* claim. Upon careful consideration of the facts alleged and the relevant law, which requires a plausible allegation that the defendant had the requisite market power "to pose a threat of monopoly," the Court further determines that dismissal shall be with prejudice. This case concerns one isolated real estate venture in one city in California, hence, it is implausible that the conduct of KWR Defendants created a "dangerous probability that [they] would gain a dominant share of the market," as would be required to plead a Sherman Act violation. See [*Transphase Systems, Inc. v. So. Cal. Edison Co., 839 F. Supp. 711, 717 (C.D. Cal. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-DNR0-001T-60K3-00000-00&context=) (citing [*Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S5B-0D20-003B-R505-00000-00&context=) for the proposition that "[i]t is axiomatic in ***antitrust* [\*25]** law that a defendant may not be found liable under the Sherman Act for monopolizing or attempting or conspiring to monopolize a market unless that defendant is a competitor in the relevant market and his conduct creates a dangerous probability that he will gain a dominant share of the market."). Granting leave to amend this claim would therefore be futile. See id.; [*Saul, 928 F.2d at 834*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FN50-008H-V0FG-00000-00&context=).

**3. Federal Securities Claims**

Counts 4, 5, and 6 of the FAC allege violations of federal securities law. Ac-cordingly, all three of these claims depend upon whether the real estate transactions at issue in this case implicate "the sale of a security." See [*Salameh v. Tarsadia Hotel, 726 F.3d 1124, 1129 (9th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5941-W5H1-F04K-V064-00000-00&context=). A "security" includes any "investment con-tract," which has been defined as "(1) an investment of money, (2) in a common en-terprise, (3) with an expectation of profits produced by the efforts of others." Id. (citing [*Hocking v. Dubois, 885 F.2d 1449, 1454 (9th Cir. 1989))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-98W0-003B-50HX-00000-00&context=). In the context of real estate transactions, the Ninth Circuit has further clarified that in determining "whether a scheme involves a security, the inquiry is not limited to the contract or other written instrument," but also whether the security was sold at the time the real estate was transferred. [*Salameh, 726 F.3d at 1131*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5941-W5H1-F04K-V064-00000-00&context=).

Generously construing the FAC, the Court finds it alleges**[\*26]** that the transaction at issue involve "an investment of money" and "with an expectation of profits pro-duced by the efforts of others." Nevertheless, the FAC fails to state a securities claim because it does not adequately allege that any "security" was ever sold. The Ninth Circuit has made clear that the chronology of events in a real estate transac-tion may be dispositive as to whether the transaction actually involves a security.

In Salameh, the Ninth Circuit determined that the plaintiff had not sufficient-ly alleged that a security was sold when the plaintiffs purchased condominiums from the defendants. See id. The plaintiffs in Salameh claimed that the sale of the hotel condominiums and later rental management agreement together constituted the sale of a security. [*Id. at 1129*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5941-W5H1-F04K-V064-00000-00&context=). The Ninth Circuit noted that the plaintiffs did not even allege when the purchase contracts and the rental management agreements were signed, and that it was defendants, in a motion to dismiss, who informed the district court that the rental management agreements were executed eight to fifteen months after the purchase agreements. [*Id. at 1131*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5941-W5H1-F04K-V064-00000-00&context=). The Ninth Circuit noted that "a large time gap between the real estate purchase and**[\*27]** the execution of a rental-management agreement may not be dispositive in every case," but found that where the plaintiffs did not allege that the contracts were presented at the same time, "the large time gap underscores [the] holding that Plaintiffs were not offered a security." [*Id. at 1132*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5941-W5H1-F04K-V064-00000-00&context=). Here, the FAC alleges that Defendants presented the real estate purchase contract and the investment advisory services contract were presented as a "package," and that in August 2012, Plaintiff entered into the real estate purchase contract (FAC ¶ 45), but failed to provide the date that the parties signed the investment advisory services contract. In their Motion, Defendants reveal[[3]](#footnote-2)3 that the investment advisory services contact was signed by the parties on June 15, 2013 - which is nearly one year after Plaintiff signed the real estate purchase contract. As was the case in Salameh, the Court finds that "the two transactions were distinct" and that Plaintiff has not alleged the sale of a security and thus has not stated a claim for relief under fed-eral securities law. See [*726 F.3d at 1132*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5941-W5H1-F04K-V064-00000-00&context=).

The Court additionally finds that the real estate transaction at issue does not constitute a "common enterprise," as required to plead**[\*28]** the sale of a security. A "common enterprise" requires a showing of "vertical commonality" -- "that the fortunes of the investors are linked with that of the promoters." [*SEC v. R.G. Reynolds Enters., Inc., 952 F.2d 1125, 1130 (9th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6PB0-008H-V0WJ-00000-00&context=). "One indicator of vertical commonality, though by no means the only indicator, is an arrangement to share profits on a percentage basis between the investor and the seller or promoter." Id. Upon review of the FAC and the voluminous documents submitted alongside the pleadings, it is evident that Plaintiff would have controlled the operation of the real estate development, and there is no evidence of profit sharing between Plaintiff and Defendants. "No 'investment contract' is involved when a person invests in real estate, with the hope perhaps of earning a profit as a result of general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise hereby it is expressly or impliedly understood that the property will be developed or operate by others." [*Van Arsdale v. Claxton, 391 F. Supp. 538, 541 (S. D. Cal. 1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-NHX0-0054-62P2-00000-00&context=). As Defendants point out, the only "interest" alleged in the FAC is that Defendants would receive commissions and fees, but they would not share in any profits resulting from the development. Accordingly,**[\*29]** the Court finds that the real estate transactions at issue here do not "fall within the scope of federal securities laws." See id.

For these reasons, the Court GRANTS Defendant's Motion as it relates to Plaintiff's federal securities claims. Upon careful review of the FAC and the relevant law, the Court further finds that amendment would be futile. In light of the gap in time between the contracts, as described above, and the lack of any profit sharing arrangement between Plaintiff and Defendant, there are no additional facts that Plaintiff could allege that would bring its claims within the scope of federal securities law. See id. In this regard, the Court is also mindful that Plaintiff was previously granted an opportunity to amend (see Doc. No. 58), and that Plaintiff's Opposition failed to make any proffer of additional factual allegations that could cure the deficiencies identified by the Court in this Order. Therefore, dismissal shall be with prejudice. See [*Norman v. Intersango, LLC, Case No. 16-cv-03587 YGR, 2016 U.S. Dist. LEXIS 175276, 2016 WL 7325010, at \*4 (N.D. Cal. Dec. 16, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MF5-SG71-F04C-T0XB-00000-00&context=) ("[G]iven the nature of the allegations and the prior opportunity to amend, plaintiff cannot plead a violation of federal securities law, [and the] dismissal shall be with prejudice and without**[\*30]** leave to amend.").

**4. State Law Claims**

The Court has determined, supra, that the FAC fails to plead adequately any federal claims. The Court declines to exercise supplemental jurisdiction under [*28 U.S.C. § 1367*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GSN1-NRF4-44MM-00000-00&context=) over the FAC's state law claims. [*Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n. 7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FXP0-003B-413X-00000-00&context=) ("In the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims."). The Court thus DISMISSES all remaining state law claims, without prejudice to their being filed in state court.

**IV. CONCLUSION**

For the reasons stated above, the Court **GRANTS** Defendants' Motion to Dismiss **WITH PREJUDICE**, as the FAC's allegations do not plausibly support any entitlement to relief in federal court. The Court's careful consideration of these allegations, supra, established that permitting Plaintiff leave to amend any of the federal claims would be futile. Accordingly, the Court **VACATES** the pre-trial conference currently set for October 2, 2017, **DENIES AS MOOT** all pending trial-related motions (Doc. Nos. 91, 92, 93, & 94), and **VACATES** the jury trial currently set for October 10, 2017.

**IT IS SO ORDERED**.

Dated: 9/29/17

/s/ Virginia A. Phillips

Virginia A. Phillips**[\*31]**

Chief United States District Judge

**Judgment**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD**:

Pursuant to the Order granting Defendants' Motion to Dismiss filed herewith, IT IS ORDERED AND ADJUDGED that the Count 1, Violation of the *Sherman Act, § 1*; Count 2, Violation of the Sherman Act, *§ 2*; Count 4, Securities Violations under *15 U.S.C. § 78j*; Count 5, Securities Violations under SEC [*Rule 10b-5*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5NBM-FJG0-008G-Y03K-00000-00&context=); and Count 6, Securities Violations under [*§ 9(a)(4) of the Securities Exchange Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GP91-NRF4-42BX-00000-00&context=) in Plaintiff's First Amended Complaint are DISMISSED WITH PREJUDICE. All remaining claims are dismissed without prejudice to re-filing in state court. The Court orders that such judgment be entered.

**IT IS SO ORDERED**.

Dated: 9/29/17

/s/ Virginia A. Phillips

Virginia A. Phillips

Chief United States District Judge

**End of Document**

1. 1Although the Opposition brief itself is 25 pages long, it incorporates by reference a 26-page "Table of Facts" that regurgitates the FAC and makes legal conclusions, and includes a four-page list of "Noteworthy Cases." [↑](#footnote-ref-0)
2. 2See, e.g., [*McHenry, 84 F.3d at 1177-80*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2760-006F-M033-00000-00&context=) (affirming trial court's dismissal with prejudice of a complaint that was "argumentative, prolix, replete with redundancy, and largely irrelevant" and consisted "largely of immaterial background infor-mation"); [*Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673-4 (9th Cir. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0GP0-0039-W0BT-00000-00&context=) (affirming trial court's dismissal with prejudice of a complaint that was "verbose, confusing and almost entirely conclusory" and consisted of "48 pages with 14 pages of addenda and 9 pages of exhibits.") [↑](#footnote-ref-1)
3. 3Defendants attached a copy of the investment advisory services contract to their Motion. Because this document is one whose contents are alleged in the FAC, the Court may consider its contexts in evaluating Defendants' 12(b)(6) motion. [*Branch, 14 F.3d at 454*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-98Y0-003B-P4FW-00000-00&context=). [↑](#footnote-ref-2)