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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA
14

15)
16) FLANNERY ASSOCIATES LLC,
17) Plaintiff,
18) vs.
19) BARNES FAMILY RANCH
20) ASSOCIATES, LLC, LAMBIE RANCH
21) ASSOCIATES, LLC, KIRBY HILL
22) ASSOCIATES, LLC, BARNES FAMILY
23) RANCH CORPORATION, LAMBIE
24) RANCH CORPORATION, KIRBY HILL
25) CORPORATION, KIRK BEEBE, SUSAN
26) BEEBE FURAY, MURRAY BANKHEAD
27) (INDIVIDUALLY AND AS TRUSTEE
28) FOR THE BAUMBACH FAMILY TRUST),
MICHAEL RICE (INDIVIDUALLY AND
AS TRUSTEE FOR THE RICE FAMILY
TRUST); CHRISTINE MAHONEY
LIMITED PARTNERSHIP, CHRISTINE
MAHONEY LIMITED PARTNERSHIP
MANAGEMENT COMPANY, EMIGH
LAND LP, EL GENERAL PARTNER, LLC,
CHRISTINE MAHONEY

Case No. 2:23-cv-00927-TLN-AC
**DEFENDANTS’ JOINT NOTICE OF
MOTION AND MOTION TO DISMISS
PLAINTIFF’S COMPLAINT
PURSUANT TO FED. R. CIV. P.
12(b)(6); MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT**

Date: August 24, 2023
Time: 2:00 p.m.
Dept.: Courtroom 2, 15th Floor
Before: Hon. Troy L. Nunley

Trial Date: None Set

1 (INDIVIDUALLY AND AS TRUSTEE OF)
THE MAHONEY 2005 FAMILY TRUST),)
2 DANIEL MAHONEY (INDIVIDUALLY)
AND AS TRUSTEE OF THE MAHONEY)
3 2005 FAMILY TRUST); IAN ANDERSON)
(INDIVIDUALLY AND AS TRUSTEE OF)
4 THE IAN AND MARGARET ANDERSON)
FAMILY TRUST), MARGARET)
5 ANDERSON (INDIVIDUALLY AND AS)
TRUSTEE OF THE IAN AND)
6 MARGARET ANDERSON FAMILY)
TRUST), NEIL ANDERSON, MARYN)
7 ANDERSON, WILLIAM DIETRICH)
(INDIVIDUALLY AND AS TRUSTEE OF)
8 THE CHILD'S TRUST FBO WILLIAM C.)
DIETRICH, A SUBTRUST UNDER THE)
9 TRUST OF WILLIAM C. DIETRICH AND)
IVANNA S. DIETRICH), PAUL DIETRICH)
10 (INDIVIDUALLY AND AS TRUSTEE OF)
THE CHILD'S TRUST FBO PAUL S.)
11 DIETRICH, A SUBTRUST UNDER THE)
TRUST OF WILLIAM C. DIETRICH AND)
12 IVANNA S. DIETRICH), JOHN ALSOP)
(INDIVIDUALLY AND AS TRUSTEE OF)
13 THE JOHN G. ALSOP LIVING TRUST),)
NANCY ROBERTS (INDIVIDUALLY)
14 AND AS TRUSTEE OF THE NANCY C.)
ROBERTS LIVING TRUST), JANET)
15 ZANARDI (INDIVIDUALLY AND AS)
TRUSTEE OF TRUST A UNDER THE)
16 ZANARDI REVOCABLE TRUST),)
RONALD GURULE (INDIVIDUALLY)
17 AND AS TRUSTEE OF THE RONALD)
GURULE 2013 FAMILY TRUST),)
18 RICHARD ANDERSON (INDIVIDUALLY)
AND AS TRUSTEE OF THE REA)
19 PROPERTIES TRUST), DAVID)
ANDERSON (INDIVIDUALLY AND AS)
20 TRUSTEE OF THE IRWIN E. ANDERSON)
SURVIVOR'S TRUST), DEBORAH)
21 WORKMAN (INDIVIDUALLY AND AS)
TRUSTEE OF THE IRWIN E. ANDERSON)
22 SURVIVOR'S TRUST), CAROL)
HOFFMAN (INDIVIDUALLY AND AS)
23 TRUSTEE OF THE IRWIN E. ANDERSON)
SURVIVOR'S TRUST), NED ANDERSON)
24 (INDIVIDUALLY AND AS TRUSTEE OF)
THE NED KIRBY ANDERSON TRUST),)
25 NEIL ANDERSON, GLENN ANDERSON,)
JANET BLEGEN (INDIVIDUALLY AND)
26 AS TRUSTEE OF THE JANET)
ELIZABETH BLEGEN SEPARATE)
27 PROPERTY TRUST), ROBERT)
ANDERSON (INDIVIDUALLY AND AS)
28 TRUSTEE OF THE ROBERT TODD)

1 ANDERSON LIVING TRUST), STAN)
 ANDERSON, LYNNE MAHRE, SHARON)
 2 TOTMAN, AMBER BAUMAN,)
 CHRISTOPHER WYCOFF; AND JOHN)
 3 DOES 1-50,)
)
 4 Defendant.)
)
 5 _____)

6 TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

7 PLEASE TAKE NOTICE THAT on August 24, 2023, at 2:00 p.m., or as soon thereafter
 8 as the matter may be heard by the Honorable Troy L. Nunley, in Courtroom 2 on the 15th floor
 9 of the U.S. District Court for the Eastern District of California, Sacramento Division, 501 I
 10 Street, Sacramento, California 95814, defendants Christine Mahoney Limited Partnership,
 11 Christine Mahoney Limited Partnership Management Company, Emigh Land LP, El General
 12 Partner, LLC, Christine Mahoney (individually and as trustee of the Mahoney 2005 Family
 13 Trust), Daniel Mahoney (individually and as trustee of the Mahoney 2005 Family Trust), Ian
 14 Anderson (individually and as trustee of the Ian and Margaret Anderson Family Trust); Margaret
 15 Anderson (individually and as trustee of the Ian and Margaret Anderson Family Trust), Neil
 16 Anderson, Maryn Anderson, William Dietrich (individually and as trustee of the Child’s Trust
 17 FBO William C. Dietrich, a subtrust under the Trust of William C. Dietrich and Ivanna S.
 18 Dietrich), Paul Dietrich (individually and as trustee of the Child’s Trust FBO Paul S. Dietrich, a
 19 subtrust under the Trust of William C. Dietrich and Ivanna S. Dietrich), John Alsop (individually
 20 and as trustee of the John G. Alsop Living Trust), Nancy Roberts (individually and as trustee of
 21 the Nancy C. Roberts Living Trust), Janet Zanardi (individually and as trustee of Trust A under
 22 the Zanardi Revocable Trust), Ronald Gurule (individually and as trustee of the Ronald Gurule
 23 2013 Family Trust), Ned Anderson (individually and as trustee of the Ned Kirby Anderson
 24 Trust), Neil Anderson, Glenn Anderson, Janet Blegen (individually and as trustee of the Janet
 25 Elizabeth Blegen Separate Property Trust), Robert Anderson (individually and as trustee of the
 26 Robert Todd Anderson Living Trust), Stan Anderson, Lynne Mahre, Sharon Totman, Amber
 27 Bauman, and Christopher Wycoff (“Defendants”) will bring on for hearing this Motion to
 28 Dismiss (the “Motion”).

1 The Motion seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) of the
2 Complaint for Damages and Injunctive Relief brought by Flannery Associates LLC on the
3 grounds that the Complaint fails to state a claim upon which relief may be granted. Specifically:
4 (1) the Complaint fails to plausibly allege an agreement among the Defendants to conspire
5 against Flannery to violate the antitrust laws; (2) Defendants are not plausibly alleged to be
6 competitors with one another, nor could they be as a matter of law because each individual
7 parcel of land owned by Defendants is unique; (3) Flannery cannot establish antitrust standing;
8 (4) the Complaint fails to plausibly plead claims against the individual Defendants who allegedly
9 acted on behalf of LLCs or trusts; (5) with respect to defendants William C. Dietrich, Ned
10 Anderson, either Neil Anderson (there are two), Maryn Anderson, Glenn Anderson, Janet
11 Blegen, Robert Anderson, Stan Anderson, Lynne Mahre, Sharon Totman, Amber Bauman,
12 Christopher Wycoff, and Janet Zanardi, the Complaint fails to plead allegations sufficient to
13 explain their alleged role in the purported conspiracy; (6) the derivative Cartwright Act claim
14 fails for the same reasons as its Sherman Act claim, and (7) the derivative UCL claim fails for
15 the same reasons as the Sherman Act claim and the Cartwright Act claim.

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1 The Motion is based upon this Notice of Motion to Dismiss, the attached Memorandum
2 of Points and Authorities in support thereof, all pleadings and papers filed in this action, and
3 such other matter as may be presented in reply or at the hearing.

4 Dated: July 11, 2023

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14 By /s/ Morgan K. Lopez
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17 and Margaret Anderson Family Trust),
18 Margaret Anderson (Individually and as
19 Trustee of the Ian and Margaret
20 Anderson Family Trust), Neil Anderson,
21 and Maryn Anderson

22 [See Signatures below for all defendants and counsel]
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In 2017, Plaintiff Flannery Associates LLC (“Flannery”) commenced a campaign to
4 become the dominant landowner in Solano County. (Dkt. 1 ¶ 162.) Flannery admits it is the “de
5 facto only” buyer of properties in the area. (*Id.* ¶ 274.) Its goal is to establish a “large holding of
6 contiguous assembled property under common ownership” that would be “more valuable than if
7 such assemblage is missing properties.” (*Id.* ¶ 294.) Anyone familiar with the Monopoly board
8 game will recognize what Flannery is trying to accomplish. And this is not conjecture by
9 Defendants, it is precisely what Flannery itself alleges throughout the Complaint.

10 Flannery also makes clear how it acquired, and has perpetuated, its dominant position in
11 Solano County. Starting in 2018, Flannery overwhelmed local families and farmers with
12 unprecedented cash and non-cash consideration, paying in its words “multiples of fair market
13 value.” (*Id.* ¶ 13.) Flannery states that since 2018, “not a single other buyer has emerged who
14 would offer even a fraction of the prices and terms that Flannery was offering.” (*Id.* ¶¶ 12, 13.)
15 As a result, “the vast majority of the landowners in the area” sold their properties to Flannery
16 because its “offers were simply too good to pass up.” (*Id.* ¶ 165.) In fact, Flannery offered such
17 exorbitant “cash prices and non-cash concessions” that it was able “[t]o purchase properties that
18 were not listed for sale.” (*Id.* ¶ 163.)

19 Why has Flannery acted so aggressively to re-make the Solano County real estate
20 market? What is its business objective? What legitimate commercial purpose requires such
21 massive, concentrated property ownership within Solano County? Flannery will not say.
22 Flannery’s ownership and objectives have remained shrouded throughout its interaction with the
23 Solano County community. The Complaint is similarly mysterious. It does not explain what
24 Flannery does, who or what owns it, or how it envisions using the “large holding of contiguous
25 assembled property” it deems so essential.¹

26 _____
27 ¹ This has been the subject of considerable public and governmental concern, particularly given
28 the proximity of Flannery’s large and growing holdings near Travis Air Force Base, as reflected
in various media accounts. (*See, e.g., Investors Bought Nearly \$1 Billion in Land Near a*

1 So, what does any of this have to do with the Defendants? Defendants are long-time
2 Solano County farmers or landowners who have either engaged in good-faith, arms-length
3 transactions for the sale of land, or were not tempted by Flannery’s prices, because they had no
4 desire (or ability) to sell. Certain of Defendants’ families have farmed in Solano County for
5 more than 100 years. Because some of these deeply-rooted defendants preferred farming or
6 owning their land to selling it, they told Flannery “no thanks.” But that was unacceptable to
7 Flannery, which apparently believes greater concentration of ownership will result in greater
8 economic reward to Flannery.

9 The crux of Flannery’s antitrust claims is that it overpaid for land as a result of a
10 horizontal price-fixing agreement by Defendants. This is completely illogical given Flannery’s
11 own allegations that its overpayments were voluntary and by design, to overwhelm sellers (both
12 willing and unwilling) with offers they could not refuse. Indeed, Flannery has completely failed
13 to allege sufficient facts to state its claims under Section 1 of the Sherman Act (or its derivative
14 claims under the California Cartwright Act and Unfair Competition Law). The claims fail as a
15 matter of law on the following grounds.

- 16 • *First*, Flannery has not alleged any agreement at all. It points to various
17 communications among some Defendants about Flannery’s activities, but none
18 evidences an agreement. Moreover, the communications alleged all occurred well
19 *after* Flannery alleges the conspiracy commenced.
- 20 • *Second*, Flannery’s allegations make clear that Defendants are not competitors
21 under antitrust law, and thus could not make a horizontal price-fixing agreement
22 concerning their individual land. The Ninth Circuit has never recognized real
23 property as the proper subject of a horizontal price-fixing claim. That is because
24 each parcel of land is by definition unique, and not the sort of uniform,
25 commoditized product that is susceptible to conspiratorial price fixing.
- 26 • *Third*, Flannery cannot establish antitrust standing. Flannery does not allege any
27 facts showing harm to competition generally (as opposed to harm only to
28 Flannery itself), it fails to allege any direct injury, and it fails to identify any non-
speculative harm. A cognizable injury would require that Flannery be able to
prove the but-for fair market value of the land it purchased. Flannery does not
allege facts to establish the fair market value benchmark, nor could it, given its
allegations that it remade the market through its massive, voluntary, above-market
offers (most of which preceded by years the alleged price-fixing agreement).

27 *California Air Force Base. Officials Want to Know Who Exactly They Are*, Wall St. J., July 7,
28 2023, at 2, a copy of which is attached as Exhibit A.)

1 Thus, none of Flannery’s claims meets the applicable plausibility standard. The
2 Complaint is a ham-fisted intimidation tactic designed to impose massively expensive and
3 invasive litigation to punish those farmers that already sold to Flannery and/or to force those
4 farmers who prefer to continue to farm to sell to Flannery. None of the transactions to date are
5 suspect, and there is certainly nothing unlawful about a farmer refusing to sell his property at any
6 price, no matter how voracious the purchaser. The idea that the Court should apply antitrust law
7 to punish non-selling landowners, paving the way for Flannery to further monopolize that
8 market, turns the law and logic on its head. Accordingly, the Court should grant this motion and
9 dismiss the Complaint with prejudice.

10 **II. FACTUAL BACKGROUND**

11 **A. Flannery Has Rapidly Become the Largest Private Landowner in Solano Co.**

12 Flannery first began purchasing properties in Solano County in 2017. (Dkt. 1 ¶ 162.) At
13 the time of filing, its real estate portfolio included 140 properties in this area, for which it
14 purportedly paid \$800 million. (*Id.*) It purchased these properties predominantly from local
15 families and their affiliated entities, many of which were generational farmers and ranchers. (*Id.*
16 ¶ 5.) Who owns Flannery, and the reasons for its massive investment, remain a mystery.

17 Flannery claims that Defendants made an illegal agreement to charge Flannery top dollar,
18 which led it to overpay for some unspecified percentage of its real property purchases. (*Id.* ¶¶ 7,
19 15, 20.) It does not allege the time, place or terms of any such “agreement.” Flannery also does
20 not identify every purchase allegedly influenced by Defendants’ alleged agreement. Rather, it
21 provides a handful of property purchases for which it allegedly overpaid. (*Id.* ¶¶ 277-281.)

22 In total, Flannery identifies nine specific sales transactions (including land swaps)
23 allegedly influenced by Defendants’ agreement. A chart identifying these transactions is
24 attached hereto as Exhibit B. As discussed below, Flannery concedes that each transaction was
25 subject to lengthy negotiations and a unique structure. (*E.g., id.* ¶¶ 185-202.)

26 **B. Flannery Intentionally Paid Premium Prices.**

27 Flannery concedes that upon commencing its acquisition spree it intentionally offered to
28 pay a premium above the pre-existing fair market value of these properties. (*Id.* ¶¶ 12, 162.) It

1 paid these premiums not only to ensure that it would be the “de facto only purchaser of
2 properties in this area during the period” (*id.* ¶ 274), but also to entice landowners who were not
3 otherwise inclined to sell their property (*id.* ¶ 14). Indeed, Flannery admits that “[t]o purchase
4 properties that were not listed for sale, Flannery offered both higher cash prices and non-cash
5 concessions to sellers. . . .” (*Id.* ¶ 163.)

6 Flannery does not say that any conduct by Defendants compelled it to pay these market-
7 setting premium prices. Rather, Flannery admits that it made this choice deliberately and freely
8 in order to become the dominant purchaser in Solano County, and that its strategy was
9 successful. (*Id.* ¶¶ 12, 162-166.) As a result, “[d]uring the five years that Flannery has been
10 investing in this area, not a single other buyer has emerged who would offer even a fraction of
11 the prices and terms that Flannery was offering.” (*Id.* ¶ 13.) It also admits that “the vast
12 majority of the landowners in the area” sold their properties to Flannery because its “offers were
13 simply too good to pass up” (*id.* ¶ 165), as opposed to because Defendants acted conspiratorially.

14 **C. Flannery Negotiated Unique Deals for Each Parcel It Purchased.**

15 The Complaint includes detailed discussions of many of Flannery’s negotiations. (*See,*
16 *e.g., id.* ¶¶ 166, 169, 170, 179, 203.) This includes properties Flannery purchased from third
17 parties (*id.* ¶ 166), properties Flannery purchased from Defendants (*id.* ¶¶ 185-202 (Emigh 45
18 Property), ¶¶ 222-226 (Ila Property and McKinnon 18 Property)), and properties Flannery has
19 been unable to purchase (*id.* ¶¶ 169, 170, 179, 203). Indeed, Flannery spends 20 paragraphs
20 describing the lengthy negotiation history and unique structure—including multiple property
21 swaps—of its purchase of the Emigh Industrial Property. (*Id.* ¶¶ 182-202.) These allegations
22 show that Flannery’s negotiation of each sale is unique, not only in terms of the specific land
23 being acquired and agreed-upon price, but also the ancillary terms governing the sale. (*Id.*)

24 Flannery does not allege that Defendants’ conduct influenced any of its purchase offers.
25 To the contrary, Flannery admits that it prepared offers based on its own property appraisals, and
26 thus without regard to any conduct by Defendants. (*Id.* ¶ 164 (“the premiums Flannery offered
27 fluctuated depending on both the general macroeconomic situation [] and on the details of each

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1 specific transaction”), ¶ 177 (discussing independent appraisals Flannery obtained.) Flannery
2 does not plead that any of the purchases were tied to the sale of other goods or services.

3 **D. Flannery Unsuccessfully Attempted to Purchase Property from Certain**
4 **Defendants.**

5 In addition to the 140 properties Flannery successfully purchased in the region, Flannery
6 pleads 29 properties that it unsuccessfully attempted to purchase. A chart identifying these
7 properties is attached as Exhibit C.

8 Flannery does not allege that any of these properties were publicly listed for sale. It does
9 not allege that Defendants were marketing these properties or had any desire to sell them.
10 Rather, Flannery alleges only that it desired to purchase them (regardless of Defendants’
11 desire—or lack of desire—to sell them). Flannery nonetheless alleges conclusionally that
12 Defendants’ unwillingness to sell to Flannery is due to their alleged price-fixing agreement (*id.* ¶
13 289), as opposed to an independent business reason, or Defendants’ desire to continue owning
14 and farming their land. But Flannery alleges no facts to support the conclusion.

15 **E. Flannery’s Agreement Allegations Fail to Show Collusion.**

16 Flannery alleges that, in the spring of 2023, it became aware that Defendants agreed to
17 collude against it in connection with their sales negotiations. (*Id.* ¶ 256.) But, it does not allege
18 the terms of any such agreement, or provide any plausible factual basis to establish the existence
19 of any such agreement. Instead, Flannery refers to (1) a text message suggesting that certain
20 landowners should meet to discuss Flannery’s impact on the market (*id.*, Ex. A), (2) an email
21 concerning a map of Flannery’s purchases (*id.*, Ex. B), (3) an email discussing one family’s
22 strategy for negotiating with Flannery (*id.*, Ex. C), (4) an email to Flannery’s lawyer advising
23 that certain of the Anderson defendants were not interested in selling to Flannery (*id.*, Ex. D),
24 and (5) an email regarding one family’s proceeds from a “gas through-put payment” (*id.*, Ex. E).
25 These communications represent the totality of the alleged direct evidence establishing the
26 supposed anti-competitive conspiracy, and none of the evidence remotely demonstrates any
27 agreement at all (much less one to fix prices). (Dkt. 1 ¶¶ 258-263.)

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1 Although Flannery claims that this supposed 2022 agreement influenced sales beginning
2 in 2018 (*id.* ¶ 257), it presents no direct evidence of such influence. (*See id.* ¶¶ 249-251
3 (alleging undocumented conversations regarding Flannery’s identity); ¶¶ 252-255 (conjecturing
4 that Defendants must have conspired because they are family members and neighbors). Nor
5 does Flannery plead facts demonstrating that the alleged agreement harmed competition
6 generally (as opposed to harming only Flannery itself). This is unsurprising; Flannery admits
7 that the supposed agreement was directed solely to Flannery. (*Id.* ¶ 273.) Finally, Flannery
8 wholly fails to define the market it alleges was influenced by Defendants’ alleged agreement;
9 rather, the market appears to comprise those parcels Flannery was intent on purchasing for its
10 undisclosed purposes. (*Id.* ¶¶ 14, 294.)

11 **III. LEGAL STANDARD**

12 **A. Standard for Motion to Dismiss**

13 To defeat a Rule 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to
14 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A
15 court must take all allegations of material fact as true and construe them in the light most
16 favorable to the nonmoving party, but “conclusory allegations of law and unwarranted inferences
17 are insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067
18 (9th Cir. 2009) (citation and internal quotations omitted); *see also In re Gilead Scis. Sec. Litig.*,
19 536 F.3d 1049, 1055 (9th Cir. 2008) (the court need not accept as true “allegations that are
20 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”).

21 Thus, a complaint must set forth “more than labels and conclusions, and a formulaic
22 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citation
23 omitted). The “[f]actual allegations must be enough to raise a right to relief above the
24 speculative level.” *Id.* When the allegations do not allow the court to infer more than the mere
25 possibility of wrongdoing, they fall short. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)
26 (“plausibility standard” requires “more than a sheer possibility that a defendant has acted
27 unlawfully” where a claim pleads facts that are “merely consistent with a defendant’s liability,”
28 it “stops short of the line between possibility and plausibility”) (internal quotations omitted).

B. Pleading Standards in an Antitrust Action

1 **B. Pleading Standards in an Antitrust Action**
2 “A [Sherman Act] Section 1 claim requires a complaint with enough factual matter (taken
3 as true) to suggest that an agreement was made.” *Twombly*, 550 U.S. at 556. Thus, plaintiff
4 must plead evidentiary facts which, if true, will prove (1) a contract, combination, or conspiracy
5 between two or more persons or distinct business entities; (2) by which the persons or entities
6 intended to harm or restrain trade or commerce among the several States or with foreign nations;
7 and (3) which actually injures competition. *Kendall v. Visa U.S.A.*, 518 F.3d 1042, 1047 (9th
8 Cir. 2008); *Stanislaus Food Prod. Co. v. USS-POSCO Indus.*, 782 F. Supp. 2d 1059, 1072 (E.D.
9 Cal. 2011) (granting motion to dismiss where plaintiff failed to include allegations suggesting an
10 illegal agreement was made). In pleading the conspiracy, “[a]llegations of facts that could just as
11 easily suggest rational, legal business behavior . . . as they could suggest an illegal conspiracy are
12 insufficient to plead a violation of the antitrust laws.” *Kendall*, 518 F.3d at 1049. In other
13 words, a merely possible agreement is not sufficient. *Twombly*, 550 U.S. at 557.

14 A plaintiff’s allegations must be evaluated as to each individual defendant. *See In re*
15 *TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008) (granting
16 individual motions to dismiss where allegations were “insufficient to put specific defendants on
17 notice of the claims against them”). An antitrust complaint “must allege that each individual
18 defendant joined the conspiracy and played some role in it because, at the heart of an antitrust
19 conspiracy is an agreement and a conscious decision by each defendant to join it.” *Id.*; *see also*
20 *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436
21 (6th Cir. 2008) (“Generic pleading, alleging misconduct against defendants without specifics as
22 to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*.”); *cf.*
23 *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014) (to satisfy Rule 8, a
24 complaint must “distinguish adequately claims and alleged wrongs among defendants and
25 others” and state facts of “defendants’ specific wrongdoing”).

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1 **IV. ARGUMENT**

2 **A. The Complaint Fails to Allege Sufficient Facts to Establish a Horizontal**
3 **Price-Fixing Agreement Among Defendants.**

4 **1. Flannery fails to allege a horizontal price-fixing agreement.**

5 Flannery’s theory of liability rests solely on the assertion Defendants entered into a price-
6 fixing agreement, which is *per se* illegal under the Sherman Act. (Dkt. 1 ¶¶ 21, 319.²) Thus, the
7 Complaint must include adequate allegations of the terms of an actual agreement to fix prices.
8 *See, e.g., Twombly*, 550 U.S. at 547 (plaintiff must allege sufficient “factual matter (taken as
9 true) to suggest that an agreement was made”); *In re Musical Instruments & Equip. Antitrust*
10 *Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015) (plaintiff must allege “who, did what, to whom (or
11 with whom), where, and when?”); *see also Kendall*, 518 F.3d at 1047-48 (dismissing claim due
12 to failure to plausibly plead agreement). Allegations that are merely “consistent” with an illegal
13 agreement are not enough. *Twombly*, 550 U.S. at 547.

14 Flannery’s Complaint fails to provide even a generalized description of any such price-
15 fixing agreement. For example, Flannery makes no allegation that Defendants mutually agreed
16 not to sell below a particular price per acre (the mark of a traditional price-fixing agreement in
17 which defendants agree not to sell widgets for less than “x dollars per widget”). *See, e.g., In re*
18 *Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008).
19 Flannery likewise fails to allege that Defendants mutually agreed to sell less land than they
20 otherwise would have sold if other Defendants also agreed (the mark of an OPEC-like
21 “restriction of production” agreement). *See, e.g., In re Musical Instruments & Equip.*, 798 F.3d
22 at 1191. Rather, the Complaint includes absolutely no description of what the supposed *per se*
23 illegal agreement actually was between the Defendants. Thus, the Complaint falls well short of
24 the pleading requirement to allege “who, did what. . . where, and when.” *Id.* at 1194.

25

26 ² Flannery’s choice to limit Defendants’ alleged Sherman Act liability to a “*per se*” price-
27 fixing theory constrains this Court to analyze the Complaint under the applicable strict pleading
28 standards set forth in this Motion, as opposed to alternative pleading standards applicable to the
more common “rule of reason” Sherman Act inquiry. *See Jain Irrigation, Inc. v. Netafim*
Irrigation, Inc., 386 F. Supp. 3d 1308, 1314 (E.D. Cal. 2019) (“The court will respect plaintiffs’

1 Instead, Flannery claims “‘smoking gun’ evidence of a price-fixing conspiracy” can be
2 found in various documents it allegedly obtained through discovery in a separate case it brought
3 against another local landowner. (Dkt. 1 ¶ 10; ¶¶ 22-27 & Exhs. A-E.) But none of those
4 exhibits establishes any cognizable agreement. For example, Exhibit A is a text message in
5 which one Defendant suggests that “the remaining property owners should be in agreement on
6 what we would want to sell our properties.” This message, which (at most) refers only to a
7 potential future agreement, shows no cognizable agreement, and the Complaint alleges no other
8 facts establishing that any agreement was made, let alone any suggestion as to what that
9 agreement might be, who made it, where or when.

10 Flannery’s other exhibits likewise fall far short of the plausibility standard. In Exhibit B,
11 a Defendant writes “[t]hat’s great we can support each other.” This establishes nothing, and as
12 shown above, the fact that it could potentially be “consistent with” an unlawful agreement is
13 insufficient. *Twombly*, 550 U.S. at 547. Exhibit C notes that Flannery seems motivated to
14 purchase land and may be willing to pay even higher prices—obvious facts that Flannery itself
15 alleges throughout the Complaint (Dkt. 1 ¶¶ 18, 171, 174, 207, 231). Exhibit D simply confirms
16 that some Defendants are not interested in selling their land at any price, a choice they had every
17 right to make. And Exhibit E concerns an intrafamily discussion regarding irrelevant matters.
18 Finally, each of these Exhibits was created in the summer of 2022, almost four years after the
19 conspiracy allegedly commenced. (*Id.* ¶ 257.) None of these communications provides the
20 terms of an agreement, and thus they are insufficient to meet Flannery’s pleading burden.
21 Flannery says it has a “smoking gun,” but its pleading is all smoke and mirrors.

22 Flannery tries to obscure its complete failure to allege a cognizable conspiracy with a
23 conclusory statement that because Defendants could have made significant profits by selling
24 their properties at prices originally offered by Flannery, their choice not to sell at those prices
25 must evidence an illegal conspiracy. (Dkt. 1 ¶ 6.) This makes no sense for multiple reasons.

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28 decision and therefore confines its analysis to the question of whether the FAC adequately
alleges a per se violation of the Sherman Act.”).

1 First, as shown above, Flannery’s surmise that certain facts are “consistent with”
2 concerted action is not sufficient. *Twombly*, 550 U.S. at 547.

3 Second, as explained *infra*, land is not a commodity to be bought and sold solely for
4 economic benefit, especially land on which families have lived and worked for generations.
5 Rather, property rights include the right not to sell at any price, for any reason, as part of an
6 owner’s complex “bundle of rights.” *Est. of Sigourney*, 93 Cal. App. 4th 593, 604 (2001). That
7 bundle includes the “rights to possess the property, to use the property, to exclude others from
8 the property, and to dispose of the property by sale or by gift.” *Id.* at 603; *see also Bounds v.*
9 *Superior Ct.*, 229 Cal. App. 4th 468, 479 (2014) (same). Defendants may have had any number
10 of non-collusive reasons to decline to sell, which is precisely why Flannery must allege more
11 than conduct merely “consistent with” an unlawful agreement.

12 Third, even were Defendants demonstrably willing to sell land to Flannery, Flannery
13 alleges no facts from which to infer Defendants’ refusal to sell at the first available opportunity is
14 evidence of a conspiracy. Flannery admits that it anxiously desires to purchase land in Solano
15 County, no matter the price. (Dkt. 1 ¶ 19 (Flannery offered “2-3 times more than what these
16 properties are worth in the open market”); ¶ 144 (“in addition to paying premium prices,
17 [Flannery] would let sellers or property keep their income from wind leases”); ¶ 164 (“the
18 premiums Flannery offered fluctuated. . . .”). Under the pled facts, it is entirely rational for any
19 land-owning Defendants to hold out for higher offers for their properties. In sum, the Complaint
20 is wholly consistent with expected individual action, and fail to nudge the bald assertions of
21 conspiratorial agreement beyond “consistent” to “plausible.” *Twombly*, 550 U.S. at 547.

22 2. Flannery fails to allege that Defendants are competitors.

23 Flannery not only fails to allege a plausible price-fixing agreement among Defendants,
24 but also fails to allege facts to establish that Defendants were market competitors in the first
25 place.³ An agreement among persons who are not actual or potential competitors in a relevant

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27 ³ To the contrary, as shown above, Flannery alleges that it desired to purchase *all* of the real
28 property in the area, as opposed to a traditional scenario in which it would purchase one
supplier’s commodity over another’s.

1 market is for Sherman Act purposes *brutum fulmen.*” *United States v. Sargent Elec. Co.*, 785
 2 F.2d 1123, 1127 (3d Cir. 1986). A “horizontal price-fixing conspiracy cannot realistically bear
 3 the name unless made among entities that should be competing, for otherwise it has no reason for
 4 coming into existence.” *United States v. Ashland-Warren, Inc.*, 537 F. Supp. 433, 443 (M.D.
 5 Tenn. 1982). Thus, the typical price-fixing conspiracy is among competitors selling uniform or
 6 commoditized products. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d
 7 651, 658 (7th Cir. 2002); *In re California Bail Bond Antitrust Litig.*, No. 19-CV-00717-JST,
 8 2022 WL 19975276, at *11 (N.D. Cal. Nov. 7, 2022) (noting that “standardized, commodity-like
 9 products” may make a “market susceptible to conspiratorial price-fixing”) (citations omitted).

10 But land is unique as a matter of law, and therefore not interchangeable. *Glynn v.*
 11 *Marquette*, 52 Cal. App. 3d 277, 308 (1984) (cited with approval in *Cottonwood Christian*
 12 *Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1230 (C.D. Cal. 2002) (“Every
 13 piece of property is unique. . .”); *accord Real Estate Analytics, LLC v. Vallas*, 160 Cal. App. 4th
 14 463, 466 (2008) (“The law generally presumes real property is unique and that the breach of an
 15 agreement to transfer property cannot be adequately relieved by pecuniary compensation.”)
 16 Thus, in *Souza v. Estate of Bishop*, the court recognized that land could be subject to the antitrust
 17 statutes “only if there is considerable judicial stretching of the words used in those statutes.” 594
 18 F. Supp. 1480, 1483, n.2 (D. Haw. 1984), *aff’d*, 821 F.2d 1332 (9th Cir. 1987); *see also Western*
 19 *Sunview Properties, LLC v. Federman*, 338 F. Supp. 2d 1106, 1124 (D. Haw. 2004) (citing
 20 *Souza*). “In common parlance the word ‘commodity’ is not used to describe real estate, and the
 21 dictionaries, both general and legal, defining ‘commodity’ use the words ‘personal’ and
 22 ‘movable’ and do not use the term ‘real estate.’”⁴ *Souza*, 594 F. Supp. at 1483.

23 Moreover, the implausibility of a conspiracy to fix the price of land is even greater here
 24 than in a typical situation for at least two reasons. First, the various parcels of land at issue are
 25

26 ⁴ Courts have also determined that land is not a commodity in other contexts. *See Western*
 27 *Sunview Properties*, 338 F. Supp. 2d at 1124 (holding that the term “commodity” in Hawaii
 28 monopolization statute did not include the purchase of real estate by an individual owner);
Moore v. James H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977) (holding that the word
 “commodity” in Section 3 of the Clayton Act did not include cemetery lots).

1 not simply unique (as all parcels are), they are strikingly different. Some are zoned for industrial
2 use while others are zoned for agricultural use. (Dkt. 1 ¶ 183.) The agricultural parcels are used
3 for different types of livestock and different types of crops. Some parcels have significant
4 improvements (houses, other buildings) and some do not. Some have substantial numbers of
5 wind turbines and some do not. Second, many of the transactions at issue were not sales for cash
6 but swaps for different land. (See Exhibit B hereto.) As difficult as it is to conceive a price-
7 fixing agreement regarding the sale of disparate land plots, it is near-impossible to imagine such
8 an agreement that also incorporated swaps for land alongside cash sales. Because all Flannery’s
9 allegations concern Defendants’ unwillingness to sell land (or to sell at a price dictated by
10 Flannery), Flannery does not plausibly allege that Defendants are competitors.

11 Flannery’s specific factual allegations belie the conclusion that Defendants are
12 competitors. See *Twombly*, 550 U.S. at 555. For example, the allegation that a “large holding of
13 contiguous assembled property under common ownership is more valuable than if such
14 assemblage is missing properties,” (Dkt. 1 ¶ 294) demonstrates that Flannery views each parcel
15 as uniquely significant. (See also *id.* (alleging that “[i]f Flannery had been able to purchase the
16 above-referenced properties, Flannery’s overall portfolio would be significantly more
17 valuable”).) Moreover, Flannery pleads that its negotiations surrounding each property were
18 unique. (*E.g., id.* ¶ 164 (“the premiums Flannery offered fluctuated depending on both the
19 general macroeconomic situation [] and on the details of each specific transaction”).)

20 Because the properties are not substitutable, Defendants are “not, in any meaningful
21 sense, competitors with one another,” and thus lack any incentive (or practical ability) to agree
22 on prices for like goods. *Ashland-Warren, Inc.*, 537 F. Supp. at 442-43 (an “‘understanding’
23 requires reciprocal benefits and burdens to its participants before they may be found to have
24 engaged in an unlawful agreement”); see also *High Fructose Corn Syrup*, 295 F.3d at 658 (“If
25 the product is differentiated and as a result each seller has a little pocket of monopoly power . . .
26 no inference of collusion can be drawn from the fact that the sellers are all discriminating.”).

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1 Tellingly, there is no allegation Defendants were competing with each other—or anyone else for
2 that matter—before Flannery began its aggressive acquisition tactics.⁵

3 Thus, Flannery has failed to plausibly plead that Defendants are competitors engaged in
4 the sale of like products. For this further reason, Flannery has not alleged an actionable
5 agreement and its claim fails as a matter of law.

6 **B. Flannery Cannot Establish Antitrust Standing.**

7 The Sherman Act does not provide a remedy to anyone injured by an antitrust violation
8 simply on a showing of causation; plaintiff must have “antitrust standing.” *Knevelbaard Dairies*
9 *v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000). In assessing whether a plaintiff meets
10 this threshold standing requirement, courts will analyze the following factors: “(1) the nature of
11 the plaintiff’s alleged injury; that is, whether it was the type the antitrust laws were intended to
12 forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of
13 duplicative recovery; and (5) the complexity in apportioning damages.” *City of Oakland v.*
14 *Oakland Raiders*, 20 F.4th 441, 455 (9th Cir. 2021), *cert. denied sub nom. City of Oakland,*
15 *California v. Oakland Raiders*, 214 L. Ed. 2d 13 (2022) (citing *Am. Ad Mgmt., Inc. v. Gen. Tel.*
16 *Co. of California*, 190 F.3d 1051, 1054 (9th Cir. 1999)). At least three of these factors weigh in
17 favor of finding that Flannery lacks standing to bring its antitrust claims.

18 **1. Flannery’s alleged injuries are not the type antitrust laws are**
19 **intended to forestall.**

20 Antitrust standing does not exist if a plaintiff fails to establish the first factor of “antitrust
21 injury.” *City of Oakland*, 20 F.4th at 456 (cleaned up) (compiling cases and explaining that a
22 showing of antitrust injury is necessary, but not always sufficient to establish standing).⁶

23
24 ⁵ Flannery claims that the Department of Justice has prosecuted conspiracies involving the
25 purchase and sale of real property, but those cases involved bid-rigging, not price-fixing. (Dkt. 1
26 ¶ 9, n.4.) Moreover, those cases did not involve an agreement among *landowners*. Rather,
potential purchasers agreed not to compete at public auctions to suppress the price of individual
properties. The alleged conspiracy had nothing to do with the sale of the properties at issue.

27 ⁶ As discussed *infra*, even if antitrust injury is plausibly alleged, the Court must balance the
28 remaining factors to determine whether antitrust standing has been established. *City of Oakland*,
20 F.4th at 455-56.

1 Flannery’s alleged injuries—overpayment for land or inability to force the sale of land—are not
2 the type of injury antitrust laws were intended to forestall.

3 As an initial matter, “[t]he history of the Sherman Act as contained in the legislative
4 proceedings is emphatic in its support for the conclusion that ‘business competition’ was the
5 problem considered and that the act was designed to prevent restraints of trade which had a
6 significant effect on such competition.” *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493, fn. 15
7 (1940). As explained above, Defendants are not competitors within the meaning of antitrust
8 laws. Moreover, Flannery acknowledges that Defendants were not actively seeking to sell;
9 accordingly, it employed a variety of tactics just to bring Defendants to the negotiating table.
10 (Dkt. 1 ¶¶ 163-165 (unsolicited supracompetitive offers for unlisted properties), ¶¶ 205, 235, 291
11 (buying land impacting Defendants’ interest out from under them), ¶ 296, fn. 17 (purchasing
12 properties surrounding a target property to add pressure to sell).)

13 Additionally, the Supreme Court has made clear that “[t]he antitrust injury requirement
14 ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or
15 effect of the defendant’s behavior.” *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344
16 (1990) (explaining that “[t]he need for this showing is at least as great under the per se rule as
17 under the rule of reason.”). Thus, “[i]f the injury flows from aspects of a defendant’s conduct
18 that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant’s
19 conduct is illegal.” *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1003 (9th
20 Cir. 2008). Flannery’s admission that it is the “de facto only” buyer of properties in the area
21 with a goal of assembling a “large holding of contiguous assembled property under common
22 ownership” to maximize its portfolio makes abundantly clear that Flannery does not seek to
23 promote competition in any way. (Dkt. 1 ¶¶ 274, 294.)

24 To the contrary, Flannery admits that its objective was and is to establish a monopolistic
25 ownership of Solano County land (for reasons that remain a mystery). Under such facts, an
26 agreement by Defendants *not* to sell to Flannery would have *prevented* precisely the type of
27 harm to competition the antitrust laws are intended to prevent. If anything, the Complaint

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1 establishes that Flannery brought more potential sellers to market through its aggressive tactics.
2 For this further reason, the claim fails as a matter of law and the Court should dismiss it.

3 **2. The alleged injuries are not direct.**

4 This factor focuses on “the chain of causation between [the plaintiff’s] injury and the
5 alleged restraint” of trade. . . . The harm may not be ‘derivative and indirect’ or ‘secondary,
6 consequential, or remote.’” *City of Oakland*, 20 F.4th at 458 (citations omitted). Here, Flannery
7 asserts four categories of injuries: (1) overpayment to conspirators; (2) overpayment to non-
8 conspirators; (3) lost profits for land conspirators refused to sell; and (4) lost profits for land non-
9 conspirators refused to sell. (Dkt. 1 ¶¶ 272-313.)

10 Flannery’s claim it was injured by overpaying (to both conspirators and third parties) is
11 not plausible because Flannery concedes that these overpayments were independent of any
12 alleged acts by Defendants. Specifically, Flannery admits it set the market price for properties in
13 the area through aggressive unsolicited above-market offers and by paying well-above market
14 value. (Dkt. 1 ¶¶ 161-167, 274.) Flannery cannot now allege that any Defendant is directly
15 responsible for other Defendants and non-parties attempting to negotiate, and expecting to
16 receive, supracompetitive purchase prices.

17 That Flannery seeks damages for overpayment to non-conspirators is telling, in and of
18 itself. The Complaint tacitly acknowledges that it is normal for landowners to consider impacts
19 on neighbors, market conditions, and recent sales within their area when negotiating with a
20 prospective purchaser, without any presumed elaborate price-fixing conspiracy. (Dkt. 1 ¶ 296,
21 n.17.) The inclusion of damages for overpayment to non-conspirators undermines the
22 plausibility of any purported agreement among Defendants in the first instance, because it
23 evidences that Defendants’ conduct may be parallel without necessarily evidencing an unlawful
24 conspiracy. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d at 1193 (“mere
25 allegations of parallel conduct—even consciously parallel conduct—are insufficient to state a
26 claim under § 1.”) The Complaint also fails to offer any basis for Flannery’s assumption that
27 non-conspirators changed their negotiation strategies with Flannery based on any of the

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1 Defendants’ alleged reputation as “shrewd operators” (Dkt. 1 ¶ 297), particularly when Flannery
2 acknowledges that other reputable sophisticated landowners sold early and for less (*id.* ¶ 14).

3 Additionally, Flannery’s claim that it lost profits when it was unable to acquire land from
4 Defendants and third parties fails as a matter of law. Absent exceptions not applicable here,
5 “nonpurchaser” damages are not available in this Circuit. *City of Oakland*, 20 F.4th at 460. That
6 is because there “are too many speculative links in the chain of causation between Defendants’
7 alleged restrictions on output and [nonpurchaser’s] alleged injuries.” *Id.* That concern is
8 particularly applicable here. Although the Complaint makes a conclusory assertion that
9 unspecified third parties wanted to sell but were dissuaded by Defendants’ decisions not to sell
10 (Dkt. 1 ¶ 297), it fails to allege any facts to support this conclusion, or to establish what price (if
11 any) these unnamed third parties would have ultimately agreed to, or that the (unspecified) price
12 the (unnamed) third parties purportedly would have sold for was determined through a specific
13 agreement rather than based on Flannery’s notorious willingness to pay above market.

14 **3. The alleged harm is too speculative.**

15 Flannery alleges Defendants and non-conspirator third parties all would have sold at
16 some unspecified price, but for the alleged conspiracy. But, as noted above, nonpurchaser
17 damages are considered inherently indirect and speculative. *City of Oakland*, 20 F.4th at 460
18 (“Nonpurchasers who are priced out of the market, however, present a special problem, due to
19 the speculative nature of the harm”). Nor does Flannery allege facts to establish that Defendants
20 would have sold; it is pure conclusion.

21 For those Defendants or non-conspirators that did sell, Flannery’s “overpayment”
22 damages are likewise too speculative. First, there is no benchmark, just a naked allegation of
23 \$170 million in overpayment. (Dkt. 1 ¶ 11.) Second, Flannery admits that it intentionally and
24 voluntarily paid above-market premiums, and provided valuable non-monetary consideration.
25 (*Id.* ¶¶ 12, 13, 163.) Third, Flannery did all of this years before the various communications it
26 contends formed Defendants’ “agreement.” (*See* section IV.A. *supra.*) Thus, Flannery’s own
27 allegations preclude any plausible and non-speculative measure of harm as a matter of law.

28 ///

1 *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1124 (E.D. Cal. 2002) (damages claim cannot
2 be based on “speculation or guesswork”).

3 As confirmed by *City of Oakland*, the lack of direct injury and speculative nature of the
4 harm, standing alone, is enough to warrant dismissal of the entire action. 20 F.4th at 460.

5 **C. Flannery Cannot Maintain Its Claims Against Individual Defendants Who**
6 **Acted on Behalf of LLCs or Trusts.**

7 For members and managers of LLCs, and trustees acting on behalf of their trust, personal
8 liability is expressly limited by statute. Cal. Corp. Code § 17703.04(a)(2) (LLC liabilities do not
9 become liabilities of a “member or manager solely by reason of the member acting as a member
10 or manager acting as a manager for the limited liability company.”); Cal. Prob. Code § 18001
11 (“A trustee is personally liable for obligations arising from ownership or control of trust property
12 only if the trustee is personally at fault.”) Thus, for any manager or member of a Defendant LLC
13 to be sued in their individual capacity, Flannery must specifically plead that the individual
14 manager or member personally participated in tortious or criminal conduct, or that the LLC is a
15 mere alter ego of the members. *People v. Pac. Landmark, LLC*, 129 Cal. App. 4th 1203, 1212
16 (2005); *Walsh v. Kindred Healthcare*, 798 F. Supp. 2d 1073, 1082 (N.D. Cal. 2011). Likewise,
17 for Flannery to maintain claims against any trustee in his or her individual capacity, the
18 Complaint must plead that the individuals are “personally at fault”; *i.e.*, that they personally
19 engaged in unlawful conduct. *Stine v. Dell’Osso*, 230 Cal. App. 4th 834, 845 (2014), *as modified*
20 *on denial of reh’g* (Nov. 14, 2014). Flannery has not done so and cannot do so.

21 First, the Complaint fails to include any non-conclusory conspiracy allegations against
22 the majority of the individually-named Defendants. Hence, these individuals cannot be held
23 personally liable solely because of their affiliation with an LLC or trust holding title to
24 Flannery’s target properties. For those individually-named Defendants who opted not to sell to
25 Flannery, allegedly in both their individual capacity and their capacity as a trustee or LLC
26 member, the Complaint merely alleges that Flannery was informed (typically through second-
27 hand accounts) that these Defendants had a generalized interest in selling. (*E.g.*, Dkt. 1 ¶¶ 229-
28 237.) The Complaint’s conclusory allegations that the trustees’ and LLC members’ decision not

1 to sell, despite purported interest⁷ from other members or beneficiaries, because of an
2 unspecified price-fixing agreement, are insufficient to establish a price-fixing agreement, and
3 cannot pierce the trusts and LLCs and impose individual liability. *Twombly*, 550 U.S. at 556.

4 Similarly, for those entities that did sell, their members and trustees are not individually
5 liable simply because the LLC or trusts sought and received an above-market purchase price. By
6 its own admission, Flannery eagerly offered several times more than any buyer in the area. (Dkt.
7 ¶¶ 13, 14.) As such, the allegation that a trustee or LLC may have expected and negotiated a
8 supracompetitive price for its property after learning of Flannery’s offers does not provide any
9 evidence that a trustee or member directly participated in, or was even aware of, the supposed
10 price-fixing agreement.

11 Hence, even were the properties subject to antitrust laws (they are not), Flannery failed to
12 allege that the individual Defendants personally engaged in tortious conduct in their sales—or
13 decisions not to sell—on behalf of the LLCs or trusts. The claims against individual Defendants
14 thus fail as a matter of law, and the Court should dismiss them, for this independent reason.

15 **D. The Complaint Makes Insufficient Allegations Against Certain Defendants.**

16 To withstand *Twombly*, a complaint must present sufficient allegations against each
17 individual defendant. *See Total Benefits*, 552 F.3d at 436. Here, the Complaint fails to plead
18 factual allegations to establish that the following defendants had a role in the alleged conspiracy:
19 William C. Dietrich, Paul Dietrich, John Alsop, Nancy Roberts, Ronald Gurule, Ned Anderson,
20 either Neil Anderson (there are two), Maryn Anderson, Glenn Anderson, Janet Blegen, Robert
21 Anderson, Stan Anderson, Lynne Mahre, Sharon Totman, Amber Bauman, Christopher Wycoff,
22 and Janet Zanardi. With respect to each of these defendants Flannery fails to allege facts about
23 any specific wrongdoing. (Dkt. ¶¶ 22-31 (alleging communications among other defendants).)
24 Further, there is nothing in the Complaint that, even if taken as true, would indicate they had
25 knowledge of the alleged conspiracy, much less participated in it. (*Id.* ¶ 10.) For instance, the
26 Complaint identifies William Dietrich under “Anderson Defendants” and “Anderson Properties”

27 _____
28 ⁷ Again, it must be noted that Flannery aggressively manufactured “interest” through its own
deliberate acts, such as unsolicited supracompetitive offers. (*E.g.*, Dkt. ¶¶ 163-165.)

1 respectively. (Dkt. 1 ¶¶ 60, 121.) The Complaint makes no specific allegations about him. The
2 lack of any factual allegations distinguishing between defendants requires dismissal under
3 *Twombly*. *Flores*, 997 F. Supp. 2d at 1103 (a complaint lumping defendants together should
4 “distinguish adequately claims and alleged wrongs among defendants and others” and state facts
5 of “defendants’ specific wrongdoing”); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-
6 2420 YGR, 2014 WL 309192, at *13 (N.D. Cal. 2014) (holding that plaintiff must “allege that
7 each individual defendant joined the conspiracy and played some role in it because, at the heart
8 of an antitrust conspiracy is an agreement and conscious decision by each defendant to join it”).

9 **E. Flannery’s Cartwright Act Claim Fails for the Same Reasons as Its Sherman**
10 **Act Claim.**

11 “The requirements to plead a claim under California’s Cartwright Act are ‘patterned after
12 section 1 of the Sherman Act.’” *Kelsey K. v. NFL Enterprises, LLC*, 757 F. App’x 524, 527 (9th
13 Cir. 2018) (quoting *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1476–77 (9th Cir. 1986));
14 *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (because
15 Cartwright Act, is “modeled after the Sherman Act,” the analysis of California’s antitrust law
16 “mirrors the analysis under federal law.”). Hence, Flannery’s derivative Cartwright Act claim
17 fails for the same reasons as its Sherman Act claim. *Id.*; *see also Jain Irrigation*, 386 F. Supp. 3d
18 at 1316 (dismissing Cartwright Act claim that rose and fell with deficient Sherman Act claim).

19 **F. Flannery’s UCL Cause of Action Must be Dismissed Because It is Dependent**
20 **Upon Its Failed Antitrust Claims.**

21 Flannery’s UCL claim is premised on allegations that Defendants’ conduct is prohibited
22 under the UCL’s “unlawful” and “unfair” prongs. (Dkt. 1 ¶¶ 334, 335.)

23 To be “unlawful,” Defendants’ conduct must violate another “borrowed” law. *Cel-Tech*
24 *Comm’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999); *AT & T Mobility*
25 *LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1107, n. 1 (9th Cir. 2013). Where, as here, “a
26 complaint alleges the same conduct as both a violation of the Sherman Act and a violation of
27 California’s Cartwright Act and UCL, the determination that the alleged conduct is not an
28 unreasonable restraint of trade under the Sherman Act necessarily implies that the conduct is not

1 unlawful under the Cartwright Act or the ‘unlawful’ prong of the UCL.” *Lenhoff Enters., Inc. v.*
2 *United Talent Agency, Inc.*, 729 F. App'x 528, 531 (9th Cir. 2018) (internal citations omitted);
3 *William O. Gilley Enterprises, Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009).

4 In determining whether an act or practice is properly alleged to violate UCL’s “unfair”
5 prong, California courts remain unsettled as to what test should be applied. *Davis v. HSBC Bank*
6 *Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012) citing *Lozano v. AT & T Wireless Servs., Inc.*,
7 504 F.3d 718, 735–36 (9th Cir. 2007). Regardless of the test applied, this Court adopted the rule
8 that where the unfair business practices alleged under the “unfair” prong of the UCL overlap
9 entirely with the business practices addressed in the fraudulent and unlawful prongs of the UCL,
10 the unfair prong of the UCL cannot survive if the claims under the other two prongs of the UCL
11 do not survive. *Linde, LLC v. Valley Protein, LLC*, No. 116CV00527DADEPG, 2019 WL
12 3035551, at *21 (E.D. Cal. July 11, 2019) (citations omitted). Flannery’s claims of unfairness
13 are solely dependent on the alleged incipient violation of state and federal antitrust laws (Dkt. 1
14 ¶¶ 333-339); its cause of action under the UCL’s “unlawful” and “unfair” prongs thus fails for
15 the same reasons its Sherman Act and Cartwright Act claims fail.

16 **V. CONCLUSION**

17 For the reasons stated above, the Complaint fails to allege a claim upon which relief may
18 be granted and should be dismissed, with prejudice.

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28 Dietrich and Ivanna S. Dietrich)

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Dated: July 11, 2023

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EXHIBIT A

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<https://www.wsj.com/articles/investors-bought-nearly-1-billion-in-land-near-a-california-air-force-base-officials-want-to-know-who-exactly-they-are-fd868e38>

◆ **WSJ NEWS EXCLUSIVE** | NATIONAL SECURITY

Investors Bought Nearly \$1 Billion in Land Near a California Air Force Base. Officials Want to Know Who Exactly They Are.

Flannery Associates' purchases near Travis Air Force Base have alarmed local and federal officials

By *Kristina Peterson* [Follow](#), *Jack Gillum* [Follow](#) and *Kate O'Keeffe* [Follow](#)

July 7, 2023 9:00 am ET



Flannery Associates, an investment group, has purchased at least 20 parcels of land near Travis Air Force Base in California. PHOTO: HEIDE COUCH/U.S. AIR FORCE

WASHINGTON—Government officials are investigating large land acquisitions near a major air force base northeast of San Francisco, concerned that foreign interests could be behind the investment group that purchased the land.

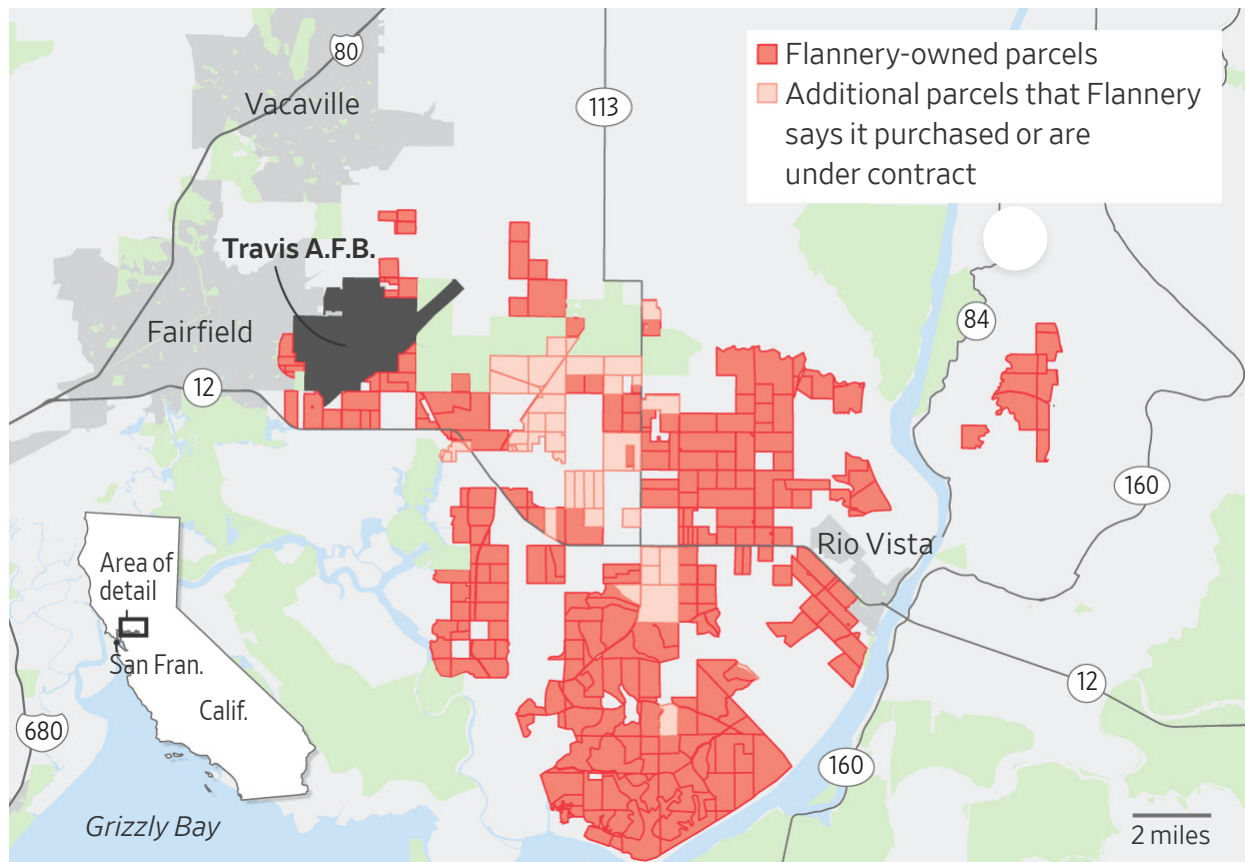
At the center of the probes is Flannery Associates, which has spent nearly \$1 billion in the last five years to become the largest landowner in California's Solano County, according to county officials and public records.

An attorney representing Flannery said it is controlled by U.S. citizens and that 97% of its invested capital comes from U.S. investors, with the remaining 3% from British and Irish

investors. Flannery previously told Solano County the entity “is owned by a group of families looking to diversify their portfolio from equities into real assets, including agricultural land in the western United States.”

“Any speculation that Flannery’s purchases are motivated by the proximity to Travis Air Force Base” is unfounded, the attorney said.

The Air Force’s Foreign Investment Risk Review Office has been investigating Flannery’s purchases of roughly 52,000 acres, including around Travis Air Force Base, according to people familiar with the matter. But the office, which has been looking into the matter for about eight months, has yet to be able to determine who is backing the group, one of the people said.



Note: county data is as of June 6 from the Solano County assessor
Sources: Solano County property records; federal court filings
Brian McGill and Jack Gillum/THE WALL STREET JOURNAL

“We don’t know who Flannery is, and their extensive purchases do not make sense to anybody in the area,” said Rep. John Garamendi, (D., Calif.) the top Democrat on the House Armed Services Committee’s readiness panel. “The fact that they’re buying land purposefully right up to the fence at Travis raises significant questions.”

Garamendi and Rep. Mike Thompson (D., Calif.), whose districts include the area where land has been bought, have asked for an investigation by the Committee on Foreign Investment in the U.S., a multiagency panel that can advise the president to block or unwind foreign acquisitions for security concerns.

The U.S. Agriculture Department also has inquired about Flannery's ownership, according to correspondence reviewed by The Wall Street Journal. Nearly all of the land is in unincorporated parts of Solano County, and most of it is zoned for agricultural use, records show. Several of the parcels include wind turbines.

The Journal found that at least 20 parcels surround Travis, known as the "Gateway to the Pacific" and home to the largest wing of the Air Force's Air Mobility Command, which provides planes to refuel other aircraft and those to transport military personnel and supplies, including munitions used in Ukraine following Russia's invasion.

The Flannery attorney declined to provide more details about Flannery's investors. Local and federal officials also say they have been unable to learn the identities of those in the Flannery group.



Rep. John Garamendi (D., Calif.) has asked the Committee on Foreign Investment in the U.S. to investigate Flannery Associates. PHOTO: MARIAM ZUHAIB/ASSOCIATED PRESS

Flannery's statement that it is U.S.-owned can't be confirmed or denied by federal agencies at this time, a congressional aide said. Cfius, which is led by the Treasury Department and includes the Departments of Defense, Justice, State and others, declined to comment.

If Cfius takes up the case, the Treasury Department could subpoena Flannery to get more information about its backers, but people familiar with the panel, whose operations are

confidential, have said they couldn't think of a time when the department had used that authority.

Acquisitions around Travis Air Force Base have raised security concerns among Solano County officials, who have been trying to determine the investors in Flannery and their plans for the land for years, said Bill Emlen, the county administrator.

County supervisor Mitch Mashburn said if Flannery intends to develop the land, it would make sense for the group to engage with local officials—but it hasn't.

"The majority of the land they're purchasing is dry farmland," he said. "I don't see where that land can turn a profit to make it worth almost a billion dollars in investment."

A spokesperson for Travis said that its officials and other Air Force offices "are aware of the multiple land purchases near the base and are actively working internally and externally with other agencies."

In a recent federal court filing, Flannery Associates said it is a wholly owned subsidiary of Flannery Holdings, a limited liability company registered in Delaware. LLCs registered in Delaware don't have to publicly disclose the identity of their owners.

Use of LLCs to purchase land is a common practice. Nearly one in five homes were purchased by investors in early 2023, including LLCs and other corporate entities, according to data compiled by real-estate firm Redfin of more than 40 of the largest U.S. metro areas.

"While I can see Cfus being interested in who owns real estate near a military base, the fact that a property's ownership is opaque does not mean anything nefarious is going on," said Rick Sofield, an attorney at Vinson & Elkins who used to run the Justice Department's Cfus team.

In May, Flannery filed a price-fixing lawsuit in federal court in California, alleging that landowners had colluded against it to drive up prices, in some instances overcharging Flannery and in others refusing to sell their properties.

Attorneys for the defendants didn't respond to requests for comment or declined to comment. Flannery settled with one group of defendants in late June and filed notice of a contingent settlement with another group of defendants Thursday.

The 52,000 acres Flannery now owns in Solano County is spread out over more than 300 parcels, a Journal analysis of property records shows. The company said in court filings that it

has invested more than \$800 million in its acquisitions and acknowledged paying prices of “multiples of fair market value.”



A plan by a Chinese-owned company to develop land near Grand Forks Air Force Base in North Dakota was halted after the Air Force said it posed a national security risk. PHOTO: LEWIS ABLEIDINGER FOR THE WALL STREET JOURNAL

Flannery has offered various explanations for its purchases over time. In 2019, Flannery attorney Richard Melnyk said in an email to a Solano County official that Flannery planned to work with local farmers and might explore “new types of crops or orchards,” he said, ruling out any cannabis operations.

In its May price-fixing lawsuit, Flannery said it planned to use the land for renewable energy and related projects. The entity has allowed many sellers to continue farming or remain on the land and collect income from wind turbine leases for the remainder of the lease, according to court filings.

In a June 5 email to Emlen reviewed by the Journal, Melnyk said Flannery was considering leasing “a substantial portion” of its land to olive growers, including some near Travis Air Force Base.

“Nobody can figure out who they are,” said Ronald Kott, mayor of Rio Vista, Calif., which is now largely surrounded by Flannery-owned land. “Whatever they’re doing—this looks like a very long-term play.”

Flannery’s holdings near Travis raised concerns similar to those sparked by a Chinese-owned company’s plan to develop land 12 miles from the Grand Forks Air Force Base in North Dakota. The plan was halted after the Air Force said it posed a national security risk, and lawmakers

have continued to introduce bipartisan legislation restricting foreign ownership of U.S. farmland or increasing transparency around these acquisitions.

The Chinese company's U.S. arm said at the time the planned facility wouldn't be used to spy on the U.S.

Flannery told USDA in June that it didn't need to register its holdings in Solano County because no foreign person "holds any significant interest or substantial control" of Flannery, according to a letter provided by the group's attorneys.

Write to Kristina Peterson at kristina.peterson@wsj.com, Jack Gillum at jack.gillum@wsj.com and Kate O'Keeffe at kathryn.okeeffe@wsj.com

EXHIBIT B

Paragraph(s)	Property APN and/or Name	Seller	Date of Sale	Price	Miscellaneous Allegations
99, 185	APN 0048-010-490 “Emigh 45 Property”	Emigh Land LP	June 4, 2021	\$560,000 (approximately \$12,400/acre)	
100, 183-202	APNs 0042-110-440, 0042-110-450, 0042-100- 290, 0042-110-430, 0042-110-420, 0048-020- 560, 0048-020-550, 0048-020-580, 0048-020- 590, 0048-010-430, 0048-010-470, 0048-010- 460 “Emigh Industrial Property”	Emigh Land LP	April 20, 2023	~ \$50 million (\$43,560/acre)	
102	APN 0048-010-170 “Antenna Property”	Mahoney LP	May 11, 2023	N/A	Alleged to be a swap in connection with Emigh Industrial Property sale (¶¶ 199-201)
103	APNs 0090-190-190 and 0090-190-200 “Marianno Property”	Mahoney LP	May 11, 2023	N/A	Alleged to be a swap in connection with Emigh Industrial Property sale (¶¶ 199-201)
105	APNs 0048-020-070, 0048-020-080, 0048-020- 300, 0048-020-370 “Denverton Property”	Mahoney LP	May 11, 2023	N/A	Alleged to be a swap in connection with Emigh Industrial Property sale (¶¶ 199-201)
106	APNs 0048-010-290, 0048-010-300, 0048-010- 440, 0048-010-450, 0048-050-040 “Souza Property”	Mahoney Trust	May 11, 2023	N/A	Alleged to be a swap in connection with Emigh Industrial Property sale (¶¶ 199-201)

Exhibit B

Paragraph(s)	Property APN and/or Name	Seller	Date of Sale	Price	Miscellaneous Allegations
111, 278	“Ila Property”	Richard Anderson, Carol Hoffman, Deborah Workman, and David Anderson	May 10, 2023	\$17,200/acre	Immediately sold to Mahoney Trust, via swap. (¶ 111)
113, 127, 226, 279	“McKinnon 18 Property”	Carol Hoffman, Deborah Workman, and David Anderson	Under contract	\$17,200/acre	Will be swapped upon completion of sale. (¶ 112)
303	Orciuoli property	Non-conspirators Nick and Enina Orciuoli	December 5, 2022	\$7 million (\$17,500/acre)	
140	Certain “Hamilton Properties”	Hamilton Conspirators	Unknown	Unknown	
295	Unknown	Dozens of unidentified, non-conspirator landowners who demanded higher prices to sell to Flannery than they would have otherwise	Unknown	Unknown	

EXHIBIT C

Paragraph(s)	Property APN and Name	Owner	Miscellaneous Allegations
94, 290	APN 0042-100-160 “Barnes Property”	Barnes LLC	
95, 290	APNs 0048-010-110, 0048-010-220, 0048-010-240, 0048-020-430, 0048-020-510, 0048-020-520, 0048-020-530 “Lambie Property”	Lambie LLC	
96, 290	APNs 0046-180-070, 0046-180-080, 0048-070-20 “Kirby Property”	Kirby LLC	
101, 291	APNs 0042-110-210 and 0048-010-030 “Goosehaven Property”	Mahoney LP	
107, 291	APNs 0048-120-400, 0048-120-410, 0048-130-200 “Mahoney 607 Property”	Mahoney Trust	
108, 291	APNs 0048-160-210 and 0048-160-220 “Nielsen Property”	Mahoney LP	
109, 291	APN 0048-130-210 “Mahoney 370 Property”	Mahoney Trust	Flannery did purchase this property but then swapped it (¶ 109)
110, 291	APNs 0048-100-150, 0048-100-420, 0048-160-200 “Currie Property”	Mahoney LP	Flannery did purchase this property but then swapped it (¶ 110)
111, 291	APN 0090-190-050 “Ila Property”	Mahoney Trust	Flannery did purchase this property but then swapped it (¶ 111)
112, 291	APN 0090-190-240 “McKinnon 18 Property”	Anderson Defendants	Flannery is under contract to purchase this property and then swap it (¶ 112)

Paragraph(s)	Property APN and Name	Owner	Miscellaneous Allegations
116, 292	APNs 0048-060-220, 0048-060-230, 0048-060-240, 0048-060-250, 0048-060-260, 0048-070-350, 0048-070-360 “Mason Property”	Ian and Margaret Anderson	
117, 292	APN 0048-070-440 “Zadwick Property”	Ian and Margaret Anderson	
118, 292	APN 0090-070-310 “Neil Anderson Property”	Neil Anderson	
119, 292	APN 0090-090-350 “Maryn Anderson Property”	Ian, Margaret, and Maryn Anderson	
120, 292	APN 0090-090-230 “Russell Property”	Ian and Margaret Anderson	
121, 292	APNs 0048-130-220, 0048-160-350, 0048-160-360 “Dietrich Property”	William and Paul Dietrich	
122, 292	APNs 0048-100-200, 0048-160-240, 0048-160-370 “Alsop Property”	John Alsop, Nancy Roberts, Janet Zanardi	
123, 292	APNs 0048-160-230, 0048-160-250, 0048-160-290, 0090-190-020 “Gurule Property”	Ronald Gurule	
124, 292	APNs 0090-200-100 and 0048-130-203 “Richard Anderson Property”	Richard Anderson	
125, 292	APNs 0090-190-250 and 0048-130-240 “Irwin Anderson Property”	David Anderson Carol Hoffman, Deborah Workman	

Paragraph(s)	Property APN and Name	Owner	Miscellaneous Allegations
128, 292	APNs 0090-090-170, 0090-110-080, 0090-090-100, 0090-090-110, 0090-100-140, 0090-100-150 “Anderson 1,005 Property”	Ned Anderson, Neil Anderson, Glenn Anderson, Janet Blegen, Robert Anderson, Stan Anderson, Lynne Mahre, Sharon Totman, Amber Bauman, Christopher Wycoff	
129, 292	APNs 0090-090-300, 0090-090-310, 0090-100-020 “Anderson 153 Property”	Janet Blegen, Robert Anderson, Stan Anderson	
132, 293	APN 0049-310-060 “Hamilton 235”	Hamilton Conspirators	Flannery did purchase this property but then swapped it
133, 293	APN 0049-310-050 “Hamilton 200”	Hamilton Conspirators	Flannery did purchase this property but then swapped it
134, 293	APNs 0049-320-040 and 0049-0360-010 “Hamilton 265”	Hamilton Conspirators	Flannery did purchase this property but then swapped it
309	Unknown	Jeanne McCormack and Albert Medvitz	Third parties allegedly influenced by conspirators, on information and belief
310	Unknown	Dexter Mayhood	Third party allegedly influenced by conspirator, on information and belief
311	Unknown	Cathey Ranch LLC	Third party allegedly influenced by conspirator, on information and belief
312	Unknown	Marilyn Riley	Third party allegedly influenced by conspirator, on information and belief