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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Paul Bobrowski,  
Plaintiff,  
vs.  
Red Door Group, Inc., et al.,  
Defendants.

No. CV 09-02077-PHX-FJM

**ORDER**

We have before us plaintiff's motion for reconsideration (doc. 113). In our August 10, 2011 order (doc. 112), we granted defendants' motion for summary judgment on the securities and fraud claims. Plaintiff argues that the court overlooked critical facts.

**I**

Under Local Rule of Civil Procedure 7.2(g), a court should deny a motion for reconsideration "absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." Plaintiff has not met his burden. He does not provide us with newly discovered facts or legal authority. Plaintiff simply restates facts that were presented when we considered the parties' motions for summary judgment. In doing so, plaintiff contravenes LRCiv 7.2(g), which also states that "[n]o motion for reconsideration of an Order may repeat any oral or written argument made by the movant in support of or in opposition to the motion that resulted in the

1 Order." Nevertheless, we will briefly address plaintiff's contentions.

## 2 II

3 Plaintiff contends that a common enterprise actually exists. To state a claim for  
4 violation of securities laws, there must be a finding of a common enterprise. SEC v. W.J.  
5 Howey Co., 328 U.S. 293, 301, 66 S. Ct. 1100, 1104 (1946). Under the Ninth Circuit's  
6 interpretation, a common enterprise is present if either horizontal or vertical commonality  
7 exists. SEC v. R.G. Reynolds Ent., Inc., 952 F.2d 1125, 1130 (9th Cir. 1991). We concluded  
8 that the transactions at issue were not securities because there was no horizontal or vertical  
9 commonality. Plaintiff disputes both conclusions.

10 Horizontal commonality occurs through pooling assets and giving up claims to profits  
11 and losses in return for a pro rata share of the enterprise's profits. We correctly found that  
12 neither the express contractual terms nor economic reality provided plaintiff a pro rata share  
13 of the enterprise's profits. Plaintiff owned individual units, and the fact that many or all  
14 investors used the same management company "establishes, at most, a common agency, not  
15 a common enterprise." Revak v. SEC Realty Corp., 18 F.3d 81, 88 (2d Cir. 1994).

16 Vertical commonality occurs when "the fortunes of the investors are linked with those  
17 of the promoters" in a common enterprise. R.G. Reynolds, 952 F.2d at 1130. We  
18 acknowledged that the existence of vertical commonality is a close issue, but decided that  
19 plaintiff's investment fortunes were not directly linked to the defendants' success and  
20 profitability. Plaintiff's only new argument is that the fortunes of the parties are linked  
21 because all parties receive higher profits if the condominium units sell quickly. This is a  
22 tenuous link. Finding a common enterprise from this evidence "would merely collapse the  
23 second prong of the Howey test into the third, which requires that Plaintiffs have expected  
24 profits solely from the efforts of the promoter." Lavery v. Kearns, 792 F. Supp. 847, 854 (D.  
25 Me. 1992). The evidence plaintiff relies on to support his claims of horizontal and vertical  
26 commonality has already been presented to the court and is insufficient to create a factual  
27 issue.

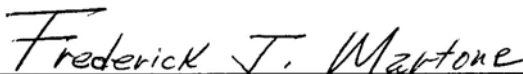
## 28 III

1 Plaintiff also urges us to reconsider our grant of summary judgment on the issue of  
2 fraud. Once again, he fails to submit any newly discovered evidence and relies solely on  
3 evidence earlier submitted. He contends that defendants' statements concerning future events  
4 are actionable fraud because they were made with the present intent not to perform. To show  
5 intent, he points to the defendants' large negative cash flow and discussions of bankruptcy  
6 a month after plaintiff's purchase. As discussed in our order, the timing of the statements is  
7 not enough to support his claim. Similarly, evidence of a large negative cash flow does not  
8 by itself show an intent not to perform.

9 **IV**

10 For the foregoing reasons, **IT IS ORDERED DENYING** plaintiff's motion for  
11 reconsideration (doc. 113).

12 DATED this 31<sup>st</sup> day of August, 2011.

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16 Frederick J. Martone  
17 United States District Judge  
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