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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ALBERT CALDERON, an individual on
12 behalf of himself and all others similarly
13 situated, et al.,

14 Plaintiffs,

15 v.

16 TOTAL WEALTH MANAGEMENT,
17 INC. et. al,

18 Defendants.

Case No.: 3:15-cv-01632-BEN-NLS

**ORDER GRANTING DEFENDANT
JED COOPER'S MOTION TO
DISMISS**

19 Before the Court is Defendant Jed Cooper's Motion to Dismiss Plaintiff's Third
20 Amended Complaint. (Docket No. 122.) The motion is fully briefed. For the reasons
21 that follow, Defendant's motion is **GRANTED**, and the Plaintiff's claims against
22 Defendant are **DISMISSED**.

23 **BACKGROUND**

24 Plaintiffs allege that investors were solicited to invest in Total Wealth Management
25 ("TWM") and its affiliated companies, Altus Capital Opportunity Fund, LLC ("ACOF")
26 and Altus Capital Portfolio Series ("ACPS"), primarily through a weekly radio program,
27 financial awareness seminars, and community engagement. Investors were allegedly
28 misled into believing their funds were being safely invested based on investment

1 portfolio risk when in fact, investments were being channeled primarily to Private
2 Placement Capital Notes LLC II (“PPCN”), LJL Secured High Yield Income Fund I,
3 LLC (“LJL”), and Aegis Retail Group LLC (“AEGIS”) in exchange for fees paid by the
4 entities, without disclosure to investors.

5 TWM was allegedly under the control or direction of the following defendants by
6 virtue of their ownership or positions as officers: Jacob Cooper,¹ co-founder and majority
7 owner of TWM; Nathan McNamee (“McNamee”), TWM’s president and chief
8 compliance officer for relevant periods; and David Shoemaker (“Shoemaker”), co-
9 founder and former chief compliance officer. Plaintiffs assert that at all relevant times
10 Defendant Jed Cooper was a TWM Associate Planner and Client Services Manager, and
11 served as some of the Plaintiffs’ contact at TWM.

12 PROCEDURAL HISTORY

13 The procedural history of this case is well known to the parties and detailed in the
14 Court’s *January 19, 2017 Order* granting dismissal of other defendants from this action
15 and *October 11, 2017 Order* denying the Plaintiffs’ request for entry of default judgment,
16 denying Cooper’s motion to dismiss for want of prosecution, and denying the parties’
17 joint motion to stay the action, which the Court incorporates by reference herein. (*See*
18 *Docket No. 81 at pp. 2-3; Docket No. 118 at pp. 2-3.*)

19 Plaintiffs’ operative Third Amended Complaint (“TAC”) alleges five claims for
20 relief against Cooper: (1) control of party making fraudulent sale of securities in
21 violation of California Corporations Code² §§ 25501, 25504; (2) fraudulent sale of
22 securities in violation of § 25504.1; (3) suppression of material fact in violation of
23 California Civil Code § 1710; (4) aiding and abetting suppression of material fact; (5)
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26 ¹ Defendant Jacob Cooper is Defendant Jed Cooper’s brother. To avoid confusion,
27 the Court refers to Jacob Cooper by his full name, and Jed Cooper as “Cooper.”

28 ² All further code section references are to the California Corporations Code unless
otherwise noted.

1 aiding and abetting breach of fiduciary duty. Cooper now moves for dismissal of all
2 claims against him pursuant to Federal Rule of Civil Procedure 12(b)(6).

3 **LEGAL STANDARD**

4 “[A] complaint must contain sufficient factual matter, accepted as true, to state a
5 claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78
6 (2009). “A claim is facially plausible ‘when the plaintiff pleads factual content that
7 allows the court to draw the reasonable inference that the defendant is liable for the
8 misconduct alleged.’” *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting
9 *Iqbal*, 556 U.S. at 678).

10 When considering a Rule 12(b)(6) motion the court must “accept as true facts
11 alleged and draw inferences from them in the light most favorable to the plaintiff.” *Stacy*
12 *v. Rederite Otto Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010) (citing *Barker v.*
13 *Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009)). On the other hand,
14 bare, conclusory allegations, including legal allegations couched as factual, are not
15 entitled to be assumed to be true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
16 (2007). “[T]he tenet that a court must accept as true all of the allegations contained in a
17 complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678. “While legal
18 conclusions can provide the framework of a complaint, they must be supported by factual
19 allegations.” *Id.* at 664.

20 Allegations of fraud must be stated with particularity. Fed. R. Civ. P. 9(b). “In
21 order to plead fraud with particularity, the complaint must allege the time, place, and
22 content of the fraudulent representation; conclusory allegations, do not suffice.” *Shroyer*
23 *v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1042 (9th Cir. 2010) (citing *Moore*
24 *v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)); *Kearns v. Ford*
25 *Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (requiring plaintiffs plead who, what,
26 when, where, and how). “Rule 9(b) does not allow a complaint to merely lump multiple
27 defendants together, but ‘requires plaintiffs to differentiate their allegations when suing
28 more than one defendant . . . and to inform each defendant separately of the allegations

1 surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 759,
2 765 (9th Cir. 2007) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F. Supp. 1437,
3 1439 (M.D. Fla. 1998)). “[G]eneral allegations that the ‘defendants’ engaged in
4 fraudulent conduct” with only specific allegations as to some, “patently fail[s] to comply
5 with Rule 9(b).” *Id.* at 765.

6 DISCUSSION

7 A. Cooper’s Motion to Dismiss

8 Cooper argues that each of Plaintiffs’ claims against him are subject to the
9 heightened pleading standards of Federal Rule of Civil Procedure 9(b), and that dismissal
10 is appropriate due to the TAC’s dearth of specific factual allegations to support each of
11 the claims against him. The Court agrees.

12 1. Control of Party Making Fraudulent Sale of Securities (§§ 25501, 25504)

13 The TAC’s Second Claim for Relief alleges Cooper is liable for misrepresenting or
14 omitting material facts in connection with the purchase or sale of a security in violation §
15 25501 as a secondary actor under § 25504.

16 Under . . . section 25504 the following persons are jointly and
17 severally liable for selling unqualified securities, with those
18 who have engaged in the unlawful practice: “Every person who
19 directly or indirectly controls a person liable under Section
20 25501 or 25503, every partner in a firm so liable, every
21 principal executive officer or director of a corporation so liable,
22 ... unless the other person who is so liable had no knowledge of
or reasonable grounds to believe in the existence of the facts by
reason of which the liability is alleged to exist.”

23 *Hellum v. Breyer*, 194 Cal. App. 4th 1300, 1306 (1st Dist. 2011) (quoting § 25504).

24 As Cooper accurately points out, the 79-page TAC contains minimal *specific*
25 factual allegations about his alleged wrongful conduct, including his alleged control over

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1 TWM. Indeed, Plaintiffs' TAC only generally alleges that "the Coopers"³ and four other
2 defendants associated with TWM

3 controlled TWM, ACOF, and ACPS through ownership, as
4 officers, board of director members, as principal executive
5 officers or directors, or as persons occupying a similar status or
6 performing similar functions or as an employee of TWM,
7 ACOF, or ACPS because they are employees who materially
8 aided the acts or transactions constituting the violations.

8 (TAC ¶ 267.) Yet in spite of this allegation, Cooper is not identified as an owner or
9 officer of TWM or any of its affiliated companies. Rather, the TAC alleges Cooper was
10 "a TWM Associate Planner and Client Services Manager" and "served as several plaintiff
11 investors' contact at TWM at relevant times." (TAC ¶ 70.)

12 In a single paragraph in their opposition, Plaintiffs contend they "stated facts from
13 which the inference can be drawn that Jed Cooper had the power to control the general
14 affairs of the entity violated the securities laws [sic]. Moreover, Jed Cooper directly or
15 indirectly controlled or influence [sic] the specific corporate policy which results in
16 primary liability." (Opp'n at p. 10.) However, they do not cite any specific allegations in
17 the TAC to support their conclusion. And the Court's review of the TAC indicates there
18 are none. Thus, even if the Court assumed a violation of § 25501 occurred, Plaintiffs'
19 have not met their pleading burden to plausibly allege Cooper's control over any person
20 or any entity. Accordingly, this claim against Cooper is **DISMISSED**.

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25 ³ While the TAC contains some allegations against Jed specifically, the majority of
26 the TAC sets forth allegations attributable to "the Coopers," which Plaintiffs do not
27 expressly define, but the Court infers means both Jacob and Jed Cooper. Although this
28 fact alone could be grounds for dismissal, in the interest of justice and to preserve judicial
economy, the Court shall construe the collective allegations as an individual allegation
against Cooper where appropriate for resolution of the motion. Fed. R. Civ. P. 1.

1 2. Materially Assisting Fraudulent Sale of Securities (§ 25401.1)

2 The TAC’s Sixth Claim for Relief alleges Cooper violated § 25401.1, which
3 “makes a person jointly and severally liable for a violation of section 25401 if that person
4 ‘materially assists in the violation of . . . Section 25401 . . . with the intent to deceive or
5 defraud.’” *Arei II Cases*, 216 Cal. App. 4th 1004, 1014 (1st Dist. 2013). The material
6 assistance must be to “the scheme that constituted a violation of the securities laws”
7 because the underlying violation “is selling or offering to sell a security by means of false
8 and misleading statements.” *Id.* “[A]llegations demonstrating how the defendant
9 assisted in the act of selling or offering to sell securities *by means of false and misleading*
10 *statements*” are required. *Id.* at 1015 (emphasis added). Because Plaintiffs allege Cooper
11 engaged in a course of fraudulent conduct, they must also allege the “who, what, when,
12 where, and how of the misconduct charged.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120,
13 1124-25 (9th Cir. 2009).

14 Plaintiffs’ opposition again offers a single-paragraph retort. Plaintiffs argue, in a
15 conclusory fashion, that “Jed Cooper acted in pursuance of a common plan to obtain
16 client/plaintiff funds for TWM and then to hide the revenue sharing fees and true value of
17 the funds. . . . The liability of the defendants is thus joint and several. . . . Each participant
18 in a conspiracy is responsible as a joint tortfeasor for all damages ensuing from the
19 underlying wrong, regardless of whether he or she was a direct actor or of the degree of
20 his or her activity.” (Opp’n at p. 10.) But again they fail to point to any specific factual
21 allegations in the TAC to support the inference they wish the Court draw.

22 Based on the Court’s review of the TAC, Plaintiffs allege Cooper “owed a
23 fiduciary duty to plaintiff investors for whom he served as a contact at TWM,” and
24 “knew, but did not disclose, the alleged scheme to plaintiffs and members of the class for
25 whom he served as the primary contact at TWM.” (TAC ¶ 69.) But the TAC only
26 specifically alleges that Cooper communicated with three plaintiffs: Lead Plaintiff Albert
27 Calderon, and Plaintiffs Donald Clugston and Choyuun Cornell. As to Mr. Calderon,
28 Plaintiffs allege that, on 12 November 12, 2009, Mr. Calderon “entered into a written

1 Investment Advisory Contract with TWM signed by [Jacob Cooper].” (*Id.* ¶ 18.)
2 Subsequently, Jacob Cooper relocated to Utah, and Cooper thereafter “served as Mr.
3 Calderon’s contact at TWM.” (*Id.*) As to Mr. Clugston, the TAC alleges Cooper referred
4 him to former defendant Mark Dionne.⁴ (*Id.* ¶ 203.)

5 Noticeably absent from these allegations are specific allegations as to how Cooper
6 assisted in selling or offering to sell securities to Mr. Calderon and Mr. Clugston *by*
7 *means of false and misleading statements.* *Arei II Cases*, 216 Cal. App. 4th at 1015. The
8 TAC is completely devoid of any allegations of specific statements Cooper made to Mr.
9 Calderon. As to Mr. Clugston, the only statement that can be inferred from the facts is
10 Cooper’s referral of former defendant Mark Dionne, who in turn merely “promoted
11 investing TWM [sic].” (TAC ¶ 203.) As the Court has explained, merely alleging a
12 person promotes or advises use of an investment company or an agent does not, in it of
13 itself, constitute fraud under the heightened pleading standards of Federal Rule of Civil
14 Procedure 9(b). Plaintiffs must at least specify statements they claim were misleading.
15 Fed. R. Civ. P. 9(b). (Docket No. 81, *January 19, 2017 Order* at p. 13.)

16 With respect to Plaintiffs’ allegations that Cooper “persuaded [Ms. Cornell] to
17 move her money to TWM with the lure of high returns and monthly interest payments”
18 and told her that “her investments would be safe” (TAC ¶ 40), Plaintiffs’ do not allege
19 *specific* facts as to the amount Cooper said Ms. Cornell would receive in “returns and
20 monthly interest payments,” or when, where, or how this statement was made. Nor do
21 Plaintiffs specify the when, where, or how Cooper’s statement that Ms. Cornell’s
22 “investments would be safe” was made. Instead, Plaintiffs merely provide their own
23 legal conclusion that Cooper owed Ms. Cornell (and the other plaintiffs) a duty to
24 disclose the alleged scheme that Cooper was allegedly aware of, and an accusation that
25 Cooper failed to perform that duty.

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28 ⁴ The Court previously dismissed Mark Dionne as a defendant on January 19,
2017. (Docket No. 81.)

1 Additionally, the TAC lacks factual allegations from which the Court may draw a
2 plausible inference that Cooper intended to deceive or defraud Mr. Calderon, Mr.
3 Clugston, or Ms. Cornell (or any other plaintiff). The Court reiterates that just knowing
4 or having “reason to know the facts constituting the violation” is not enough for liability
5 under § 25504.1. *Arei II Cases*, 216 Cal. App. 4th at 1015 (contrasting the liability for a
6 broker-dealer under § 25504). It might be that Cooper was aware of a scheme, but
7 “[a]ssisting in a violation is not the same as assisting someone achieve a violation, which
8 can presumably be accomplished without having any involvement in the violation itself.”
9 *Id.* at 1017. This claim is **DISMISSED**.

10 3. Suppression of Material Fact (California Civil Code § 1710)

11 The TAC’s Eleventh Claim for Relief alleges Cooper violated California Civil
12 Code section 1710. Section 1710 defines the elements of actionable deceit and provides
13 for four kinds of deceit, including concealment – “suppression of a fact, by one who is
14 bound to disclose it, or who gives information of other facts which are likely to mislead
15 for want of communication of that fact.” Cal. Civ. Code § 1710(3) “The elements of an
16 action for fraud and deceit based on concealment are: (1) the defendant must have
17 concealed or suppressed a material fact, (2) the defendant must have been under a duty to
18 disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or
19 suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been
20 unaware of the fact and would not have acted as he did if he had known of the concealed
21 or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the
22 plaintiff must have sustained damage.” *Marketing West, Inc. v. Sanyo Fisher (USA)*
23 *Corp.*, 6 Cal. App. 4th 603, 612-13 (2d Dist. 1992).

24 As discussed above, because this claim sounds in fraud, Plaintiffs’ must allege the
25 “who, what, when, where, and how of the misconduct charged.” *Kearns*, 567 F.3d at
26 1124-25. Plaintiffs’ opposition generally argues:

27 Jed Cooper worked closely with his brother and designated
28 clients as part of a tight-knit group of close friends and

1 associates who agreed to obtain plaintiffs funds[sic] for
2 themselves and each other by misrepresenting and omitting
3 material facts from communications TWM directed to
4 plaintiffs. . . . Once investors were hooked TWM induced them
5 to transfer their investment funds, pension money, and savings
6 to TWM’s control. When investors needed personal investment
7 services from a financial planner, and when TWM wanted to
8 induce more investors to give their money, Jed Cooper used his
9 wife and children and free food and gift to seal the deal at
10 dinner meals [sic].

11 (Opp’n at pp. 10-11) (internal citations omitted.) However, a review of the TAC
12 demonstrates Plaintiffs have not alleged any particular allegations as to what Cooper
13 misrepresented, when he made any misrepresentation, where he made any
14 misrepresentation, how he conveyed any representation, or when he should have
15 disclosed something.

16 In particular, Plaintiffs’ argument that the TAC alleges Cooper “used his wife and
17 children and free food and gift to seal the deal at dinner meals [sic]” is not a reasonable
18 inference the Court may draw. First, Ms. Cornell is the only plaintiff alleged to have met
19 Cooper’s wife and children. Second, at best these allegations establish Ms. Cornell
20 discussed her nursing profession with Cooper’s wife, and may have received a “gift-
21 pack.” (TAC ¶ 41.) In other words, it is not clear to the Court how Ms. Cornell’s
22 meeting Cooper’s family, talking about an unrelated subject with Cooper’s wife, and
23 receiving a gift establishes a plausible inference that Cooper suppressed a material fact.

24 Moreover, Plaintiffs failed to address Cooper’s argument that the TAC fails to
25 sufficiently plead the requisite elements of intent. Thus, the Court concludes Plaintiffs
26 concede the TAC lacks specific allegations that Cooper acted with the intent to defraud.
27 *Marketing West*, 6 Cal. App. 4th at 612-13 (2d Dist. 1992). As a result, this claim is
28 **DISMISSED.**

29 4. Aiding and Abetting Claims

30 Cooper moved to dismiss Plaintiffs’ claims for aiding and abetting suppression of
31 material fact and aiding and abetting breach of fiduciary duty. Plaintiffs did not address

1 these claims in their opposition.⁵ Furthermore, the TAC does not include any specific
2 allegations as to how or when Cooper aided and abetted. Accordingly, these claims are
3 **DISMISSED.**

4 **B. Whether to Grant Leave to Amend**

5 After a responsive pleading is served, a “court should freely give leave [to amend]
6 when justice so requires.” Fed. R. Civ. P. 15(a)(2). In determining whether to grant
7 leave, a court considers “the presence of any of four factors: bad faith, undue delay,
8 prejudice to the opposing party, and/or futility.” *Id.* In the absence of these factors, leave
9 should be freely given. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1072-73 (9th Cir.
10 2012) (reversing district court’s denial of leave for failure to meet and confer).

11 The Court finds Plaintiffs have not shown good cause to grant leave to file a fourth
12 amended complaint. Plaintiffs’ opposition requested leave to amend stating only that:
13 “Plaintiffs would, and could, allege fraud and unfair practices in more detail as to Jed
14 Cooper.” (Opp’n at p. 11.)

15 First, Plaintiffs filed their initial complaint on May 16, 2014. (Docket No. 14-1 at
16 4.) Since then, Plaintiffs have amended their complaint three times, including
17 amendment of claims for the same violations advanced against Defendant Cooper.
18 Second, Plaintiffs did not identify any new facts that could cure the deficiencies in a
19 fourth amended complaint. As a result, Plaintiffs have not shown “a reasonable
20 possibility” that the defects could be cured by an amendment. *Blank v. Kirwan*, 39 Cal.
21 3d 311, 318 (1985). Third, in this case, Defendant would be prejudiced if Plaintiffs were
22 allowed to file a fourth amended complaint, where, as here, Plaintiffs’ TAC failed to cure
23 the deficiencies identified by this Court for the identical claims alleged against other
24 defendants in its *March 9, 2016* and *January 19, 2017 Orders* granting other defendants’
25 motions to dismiss their previous pleadings (Docket Nos. 50, 81, respectively), and
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28 ⁵ The Court notes Plaintiffs have failed to address arguments for dismissal of these
claims in previous motions to dismiss. (*See* Docket No. 50 at p. 8; Docket 81 at p. 20.)

1 nevertheless failed to demonstrate the existence of new facts to justify a fourth
2 amendment of their claims.

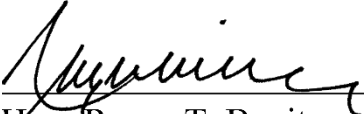
3 Therefore, Plaintiffs' request for leave to amend as to the claims against Defendant
4 Cooper is **DENIED**.

5 **CONCLUSION**

6 For all of the foregoing reasons, Defendant's motion to dismiss is **GRANTED**,
7 and Plaintiff's claims against Defendant Jed Cooper are **DISMISSED without leave to**
8 **amend**.

9 **IT IS SO ORDERED.**

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11 Dated: April 4, 2018

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13 Hon. Roger T. Benitez
14 United States District Judge
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