Keith Ketterling (*pro hac vice*)
Lydia Anderson-Dana (*pro hac vice*)
Erin Roycroft (*pro hac vice*)
Madeleine Holmes (*pro hac vice*)
STOLL BERNE
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
kketterling@stollberne.com
landersondana@stollberne.com
mholmes@stollberne.com

Kasey J. Curtis (SBN 268173)
kcurtis@reedsmith.com
REED SMITH LLP
355 South Grand Avenue
Suite 2900
Los Angeles, CA 90071-1514
Telephone: +1 213 457 8000
Facsimile: +1 213 457 8080

Attorney for Defendant
UMPQUA BANK

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PETER BAGATELOS, et al., Plaintiffs, vs. UMPQUA BANK, Defendant.	Case No. 3:23-cv-2759-RS Judge Richard G. Seeborg **DEFENDANT UMPQUA BANK'S MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF THE *BAGATELOS* PLAINTIFFS** Trial Date: September 9, 2024 Date: June 20, 2024 Time: 1:30 pm Place: Courtroom 3

Umpqua PFI TIC Investor Lawsuit

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 20, 2024, at 1:30 pm, or as soon thereafter as may be heard in Courtroom 3 of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Umpqua Bank ("Umpqua") will and hereby does move, pursuant to Federal Rules of Civil Procedure 56, for summary judgment on the claims of the *Bagatelos* Plaintiffs.

As set forth in the attached Memorandum of Points and Authorities, summary judgment is warranted for three reasons: (i) because the *Bagatelos* Plaintiffs' tenancy-in-common interests were not part of any alleged Ponzi scheme; (ii) because the *Bagatelos* Plaintiffs lack evidence of cognizable damages; and (iii) because the *Bagatelos* Plaintiffs lack standing to pursue their claims, as they have assigned their claims to the PFI Trust.

This motion is based on this Notice of Motion and Motion, the accompanying Declaration of Kasey J. Curtis, the attached Memorandum of Points and Authorities, and all other pleadings, papers, records and documentary materials on file or deemed to be on file in this action and in the two related cases, those matters of which this Court may take judicial notice, and upon the oral arguments of counsel made at the hearing on this motion.

Dated: April 23, 2024

/s/ Kasey J. Curtis
Keith Ketterling (*pro hac vice*)
Lydia Anderson-Dana (*pro hac vice*)
Madeleine Holmes (*pro hac vice*)
STOLL BERNE
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
kketterling@stollberne.com
landersondana@stollberne.com
mholmes@stollberne.com

Kasey J. Curtis (SBN 268173)
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Telephone: (213) 457-8089
Facsimile: (213) 457-8080
kcurtis@reedsmith.com

Attorneys for Defendant Umpqua Bank

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I. INTRODUCTION

Like the *Camenisch* class action, this follow-on lawsuit accuses Defendant Umpqua Bank ("Umpqua") of "aiding and abetting" an alleged "Ponzi scheme" perpetrated by non-parties Professional Financial Investors, Inc. and Professional Financial Investors Security Fund, Inc. (collectively, "PFI"). However, unlike the *Camenisch* class case, the plaintiffs in this lawsuit (the "*Bagatelos* Plaintiffs") did not send their money to PFI or otherwise invest with PFI. Rather, they each wired funds to an escrow company to purchase percentage ownership interests in specific apartment buildings or commercial office complexes (purchases that the *Bagatelos* Plaintiffs have referred to as "tenancies-in-common" or "TICs"). As explained below, this distinction is both material and dispositive because it demonstrates how and why the *Bagatelos* Plaintiffs' investments were not part of any "Ponzi scheme." It also explains why the *Bagatelos* Plaintiffs' claims are not part of the *Camenisch* class action and still belong to the PFI Trust.

First, summary judgment is warranted because the undisputed evidence demonstrates that the *Bagatelos* Plaintiffs' tenancies-in-common were not part of any alleged Ponzi scheme. This is dispositive of the "aiding and abetting" claims that have been asserted against Umpqua because those claims seek to hold Umpqua derivatively liable for allegedly facilitating PFI's diversion of investor funds to "make monthly payments to previous investors, cover shortages in accounts opened for the benefit of other investors, and to line Casey's and Wallach's personal accounts." *Bagatelos* Compl., ¶¶ 96, 100. But unlike with some of PFI's other types of investments, there is no evidence of diversion of the *Bagatelos* Plaintiffs' funds because their investments were *real*. In each instance, apartment buildings or office parks were purchased utilizing the *Bagatelos* Plaintiffs' money and the *Bagatelos* Plaintiffs were deeded recorded property interests that show up on title. Stated plainly, because the *Bagatelos* Plaintiffs' investments were not part of the fraud that Umpqua that has been accused of helping facilitate, there can be no aiding and abetting liability.

Second, summary judgment is also warranted because the *Bagatelos* Plaintiffs lack a viable damages theory and thus cannot establish an essential element of their aiding and abetting claims. Under California law, it is well settled that out-of-pocket loss is the proper measure of damages for fraud in the connection with the purchase of real estate. Such damages examine the difference in

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value between what the plaintiff gave and what the plaintiff received at the time of the transaction. Yet, here, despite indisputably receiving title to the real properties they agreed to purchase, the *Bagatelos* Plaintiffs have ignored entirely the value of the recorded property interests that they held. Instead, they have impermissibly stated that they intend to adopt a "netting" approach to damages that considers only what they paid to purchase their tenancies-in-common and any distributions they received after voluntarily trading in those interests for an allowed claim in PFI's bankruptcy. Because a claim for fraud is not actionable without proof of recoverable damages, the *Bagatelos* Plaintiffs' claims fail for this reason as well.

Third, the *Bagatelos* Plaintiffs lack standing to pursue their aiding and abetting claims against Umpqua. The evidence adduced during discovery demonstrates that each of the *Bagatelos* Plaintiffs assigned their "aiding and abetting" claims to PFI's bankruptcy trust (the "PFI Trust") in exchange for a 5% increase in the amount of their allowed claims. Although the trustee of the PFI Trust later attempted to disclaim the *Camenisch* class members' claims to allow the *Camenisch* class action to proceed, no such disclaimer was made with respect to claims asserted outside of the *Camenisch* class case, such as the claims at issue in this lawsuit. Therefore, the *Bagatelos* Plaintiffs' claims belong to the PFI Trust and the *Bagatelos* Plaintiffs lack standing to sue Umpqua.

For these three separate and independent reasons, summary judgment is warranted and respectfully urged.

II. RELEVANT BACKGROUND

A. PFI Began as a Legitimate Business and Later Turned into an Alleged "Ponzi Scheme"

The Court is familiar with the historical background related to PFI, its operations, and its investment structures, given those issues were extensively briefed by the parties and addressed in the Court's order on summary judgment and class certification in *Camenisch*. *See* Order Denying Summary Judgment and Granting Class Certification ("*Camenisch* Order on MSJ"), Dkt 144 at 1-3. For that reason, only limited background related to this motion is included here.

PFI began as a legitimate real estate investment business with significant property holdings in Marin and Sonoma Counties. *Camenisch* Order on MSJ at 1. Beginning in the early 1980s, PFI solicited investments for the purchase and operation of various properties, with the goal of later

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selling those properties once they had appreciated. *Id*. at 2; Curtis Decl., Ex. 1 ("Wallach Dep.") at 15:8-18, 31:2-14, 148:16-20. By the time it filed for bankruptcy, PFI held interests in 71 properties, worth an estimated $550 million, and employed a significant staff in its property management and operations roles. *Camenisch* Order on MSJ at 2; Wallach Dep. at 26:22-27:16, 29:9-18. Over its thirty plus years in business, PFI offered five distinct investment vehicles: (1) limited partnership interests, (2) second deeds of trusts, (3) unsecured promissory notes, (4) limitability liability company membership interests, and (5) tenancies-in-common or "TICs." *Camenisch* Order on MSJ at 2.

Although PFI began as a legitimate business, at some point it was unable to generate sufficient revenue to pay its debt service to investors and began using new investor funds to help pay off earlier investors. This is the point in time when Plaintiffs contend that PFI became a "Ponzi scheme." *Camenisch* Order on MSJ at 2. It is for allegedly "aiding and abetting" that PFI Ponzi scheme that the *Bagatelos* Plaintiffs have sued Umpqua. *Bagatelos* Compl., ¶¶ 95-103.

B. The *Bagatelos* Plaintiffs' "Tenancies-in-Common" or "TICs" Were Not Part of the Alleged Ponzi Scheme

The *Bagatelos* Plaintiffs are investors in tenancies-in-common sold by PFI. This group of investors—the so-called "TIC Holders"—participated directly in the purchase of specific buildings, together with PFI or an LLC to take advantage of the IRS 1031 exchange provisions. Wallach Dep. at 34:23-35:5. The terms of their purchases and co-ownership were memorialized in "Tenancy-in-Common Agreements," which explained what percentage ownership interest each of the TIC Holders would acquire and provided that "net cash income generated from operations" (i.e., any profit from operations) would be paid in quarterly distributions to the TIC Holders proportionate to their ownership interests in the properties. *See generally* Curtis Decl., Exs. 5-10 ("TIC Agreements"); *see also*, *e.g.*, Curtis Decl., Ex. 5 ("Bagatelos TIC Agreement") at 2-3 (stating terms of ownership, interests and distributions). Because TIC Holders were also direct purchasers of the acquired buildings, TIC Holders acquired ownership interests in their buildings proportionate to their contribution to the purchase and memorialized in grant deeds recorded on title. *See* TIC Agreements; *see also* Curtis Decl., Exs. 11-15 ("Grant Deeds").

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A typical TIC transaction occurred as follows: After selling their pre-existing real estate holding, the TIC Holder would transfer the proceeds of the sale to a qualified intermediary (who was not PFI) that facilitated the 1031 exchange. *See*, *e.g.*, Curtis Decl. Exs. 21-28 (exemplar documents showing 1031 exchange process). Upon execution of the purchase agreement, the intermediary wired the TIC investor's funds to an escrow account. *Id.* At closing, the TIC investor's funds were released to the seller of the building (along with the funds provided by PFI or applicable LLC and lending bank) and the grant deed provided to escrow would be recorded—thereby effectuating the purchase. *See* Curtis Decl. Exs. 16-20 ("Final Settlement Statements").

Again, it bears emphasis that TIC Holders' ownership interests were reflected on title. Grant deeds evidencing their proportionate ownership interests of the buildings they had purchased were recorded. *See generally* Grant Deeds. The allocation of ownership as between the TIC Holders and their co-owners were reflected in the TIC Agreements based on the total capital raised to fund the purchase. *See, e.g.,* Bagatelos TIC Agreement at 1. Each Tenancy-in-Common Agreement provided that PFI would have a percentage ownership interest in exchange for PFI's property management services.[1] *See, e.g., id.* at 2.

C. As TIC Holders, Each of the *Bagatelos* Plaintiffs Received What They Were Promised: Recorded Ownership Interest in Specific Apartment Buildings and Office Complexes

The *Bagatelos* Plaintiffs in this case participated in the purchase of five buildings between 2019 and 2020. *See generally* Final Settlement Statements. With the exception of Plaintiff Daniel Levy,[2] the sums contributed by the *Bagatelos* Plaintiffs were deposited into an escrow account and paid directly to the seller of the building. *See id.* In total, each of the *Bagatelos* Plaintiffs acquired ownership interests in four apartment buildings and one commercial office park:

> **<u>The Hunt Plaza Office Complex:</u>** This 23,728 square foot office park was purchased for $9,550,000 on October 29, 2019 by Plaintiff Jonathan Marmelzat, Plaintiffs Dennis and Susan Green, and Professional Investors 47 LLC. Mr. Marmelzat contributed $300,000, and the Mr. and Ms. Green contributed $1,000,000 toward the purchase price. Curtis Decl., Ex. 167 ("Hunt Plaza Settlement Statement") at 1; Curtis Decl., Ex. 20 ("Hunt Plaza Appraisal") at 2.

[1] In many instances, PFI's percentage ownership interest was not recorded on title—which caused the TIC Holders' recorded interest to be overstated. *Compare* TIC Agreements, *with* Grant Deeds.

[2] Plaintiff Daniel Levy also wired funds to escrow. *See* Curtis Decl., Ex. 27 at 1-2. However, because the apartment building in which he invested had already been purchased, PFI was the seller of the percentage interest he acquired. *See id.*

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The Sycamore Creek Apartments: This 24-unit apartment building was purchased for $9,100,000 on March 22, 2019 by Plaintiff Marian O'Dowd and Professional Investors 44 LLC. Ms. O'Dowd contributed $642,041.73 toward the purchase price. Curtis Decl., Ex. 19 ("Sycamore Creek Settlement Statement") at 1; Curtis Decl., Ex. 53 ("Sycamore Creek Appraisal") at 2.

The Parc Marin Apartments: This 32-unit apartment building was purchased for $20,500,000 on January 31, 2020 by Plaintiffs Peter and Anne Bagatelos, Plaintiff Karen Bagatelos, Plaintiff Michael Bagatelos, Plaintiff 1320 Magnolia, and Professional Investors LLC 48. Peter and Anne Bagatelos, Karen Bagatelos, and Michael Bagatelos each separately contributed $691,657.55 toward the purchase price and 1320 Magnolia contributed $550,000. Curtis Decl., Ex. 16 ("Parc Marin Settlement Statement") at 2; Curtis Decl., Ex. 32 ("Parc Marin Appraisal") at 2.

The Lincoln Redwoods Apartments: This 19-unit apartment building was purchased for $7,600,000 on January 20, 2020 by Plaintiff Carolyn Davis and Professional Investors LLC 49. Ms. Davis contributed $340,000 toward the purchase price. Lincoln Ave. Settlement Statement at 1; Curtis Decl., Ex. 31 ("Lincoln Ave. Appraisal") at 2.

The Marin Heights Apartments: This 18-unit apartment building was appraised at $6,125,000 in December 2017. Plaintiff Daniel Levy did not participate directly in the original acquisition. He later purchased his ownership interest from Professional Investors LLC 41 for $401,247.84 on April 24, 2018 and agreed to assume a portion of the debt. Curtis Decl., Ex. 18 ("Marin Heights Settlement Statement") at 1; Curtis Decl., Ex. 32 ("Marin Heights Appraisal") at 3.

As noted, in each instance, the *Bagatelos* Plaintiffs were deeded interests in title to their specific properties consistent with the purchase terms to which they had agreed in their Tenancy-in-Common Agreements. Thus, when PFI later filed for bankruptcy, each of the *Bagatelos* Plaintiffs were deemed co-owners of estate property and treated as such.

D. In PFI's Bankruptcy Case, The *Bagatelos* Plaintiffs Elect to Surrender Their Ownership Interest in Exchange for an Allowed Claim in PFI's Bankruptcy

After the death of PFI's founder, PFI filed for bankruptcy in July 2020. *See Camenisch* Order on MSJ at 3. Because PFI was a longstanding business with legitimate real estate holdings, complex and varied investment structures, and poor record keeping practices, PFI's bankruptcy estate hired forensic accountants to unravel and assess PFI's business and operations. *See id.* at 3, 13.

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Recognizing that there were a variety of investment types and transactions, the bankruptcy estate formed separate committees to represent the different classes of investors. *See* Curtis Decl., Ex. 38 ("Solicitation Package") at 4 (describing, in summary for investors, representation of investor interests through committees). In developing the bankruptcy plan, the committees and estate agreed to a "single pot" plan, which provided for the consolidation of PFI's assets into a single trust (the PFI Trust) that would make payments to creditors. *Id*. at 4-5 (explaining that bankruptcy plan was a single pot plan and meaning of the same). Under the plan, investors and other unsecured creditors became beneficiaries of the PFI Trust and were entitled to distributions on their allowed claims. *Id*. at 6.

Throughout the bankruptcy proceedings, the bankruptcy professionals and TIC Holders viewed TIC Holders differently. To that end, Michael Goldberg (PFI's independent director and the eventual trustee of the PFI Trust) repeatedly told the TIC Holders that they were in a unique, even superior, position to other PFI investors. *See* Curtis Decl., Ex. 44 (email discussing Michael Goldberg view that TIC Holders had favorable position); Curtis Decl., Ex. 45 (email referencing Goldberg's comment regarding TIC Holders' "golden ticket"); Curtis Decl., Ex. 46 (email discussing Goldberg's view that TIC Holders were like "the banks whose money went directly to escrow and into the pocket of the sellers"). Consistent with this distinction, TIC Holders were excluded from the pool of unsecured creditors for much of the bankruptcy. For instance, a preliminary proposal from January 2021 proposed that TIC Holders would "maintain their current percentage of property ownership" and that "the TIC's interest in the property will not be considered part of the bankruptcy estate." Curtis Decl., Ex. 49 ("Preliminary TIC Proposal") at 2. Various other proposals were also discussed amongst the TIC Holders that would have allowed TIC Holders to retain their ownership interests or consolidate their interests into one property. *See, e.g.,* Curtis Decl., Ex. 47 (email discussing potential consolidation of TIC interests in single building).

Ultimately, the TIC Holders were given the option to join the unsecured creditors pool in exchange for trading in their recorded ownership interests. *See* Curtis Decl., Ex. 56 ("Mod. Bank. Plan") at § 2.7(b); Curtis Decl., Ex. 50 ("March 26 Meeting Min.") at 5. For TIC Holders who did not want to join the general unsecured creditor pool, PFI's bankruptcy professionals offered to have the bankruptcy sales of their properties "set up as another deferred 1031 exchange" to allow them to

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capitalize on the tax deferral that they had originally utilized to acquire title. *See* March 26 Meeting Min. at 6.

Because of the election that they were entitled to make under PFI's Bankruptcy Plan, special ballots were issued to the TIC Holders, which allowed them to elect the "TIC Investor Treatment." *See* Curtis Decl., Exs. 35-37 ("TIC Ballots"). The TIC Holder ballots explained that:

> The Plan provides the option for Holders of TIC Interests to elect to be treated as Investors under the Plan. Pursuant to this election, which may be made on this Ballot or other written agreement with the Debtors or PFI Trustee, the Holder of a TIC Interest shall transfer his or her TIC Interest to the Debtors or PFI Trust. In exchange, the Holder of a TIC Interest shall receive an Investor Claim, subject to the same calculation, netting and aggregation principles applicable to Investor Claims.

See, e.g., Curtis Decl., Ex. 26 ("Davis Ballot") at 2.

Each of the *Bagatelos* Plaintiffs elected the "TIC Investor Treatment," while other TIC Holders did not. *See* Curtis Decl., Ex. 52 ("Claim Summary Spreadsheet") at 25. By electing the TIC Investor Treatment, the *Bagatelos* Plaintiffs agreed to "transfer [their] TIC Interest(s) to the Debtors or PFI Trust and be treated as an Investor under the Plan" and "to take whatever actions the Debtors of PFI Trustee deem necessary and appropriate to effect the transfer of my TIC Interests to the Debtors or PFI Trust." *See*, *e.g.*, Davis Ballot at 3.

E. The *Bagatelos* Plaintiffs Elect to Assign their Claims to the PFI Trust in Exchange for a 5% Increase of Their Allowed Claims

In addition to allowing TIC Holders to trade in their ownership interests for an unsecured claim, PFI's Bankruptcy Plan also allowed TIC Holders making the "TIC Investor Treatment" election to assign their "aiding and abetting" claims to the PFI Trust in exchange for a 5% increase in the value of their allowed bankruptcy claim. *See generally* Curtis Decl., Ex. 56 ("Mod. Bank. Plan").

In relevant part, the operative version of PFI's Bankruptcy Plan provided that "[e]ach Holder of an Investor Claim … may agree, by electing on its Ballot … to contribute its Contributed Claims to the PFI Trust" in exchange for "the Contributing Claimants' Enhancement Multiplier" (defined as a "five percent" increase to the investor's claim amount). *See* Mod. Bank. Plan at §§ 1.41 & 2.5. PFI's Bankruptcy Plan defined "Contributed Claims" as "All Causes of Action (1) that are legally

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assignable . . . including . . . all Causes of Action based on *aiding or abetting*, entering into a conspiracy with, or otherwise supporting torts committed by the Debtors or their agents, and (2) for which a Contributing Claimant elects to contribute such Causes of Action on its Ballot, and which are not later disclaimed by the PFI Trustee in his sole discretion by written notice to the Board of Advisors." *Id.* at § 1.39. The plan further explained that the purpose of allowing such assignments was to "enable the pursuit and settlement of such litigation claims in a more efficient and effective manner." *Id.* at § 2.5

As originally approved by the bankruptcy court, such assignments were supposed to be "irrevocably" made in favor of the PFI Trust. Curtis Decl., Ex. 55 ("Mot. to Mod. Bank. Plan") at 83 (showing redline change striking "irrevocably" in Section 4.3.13 of the plan). Two months before the plan was to become effective, PFI's bankruptcy professional asked the bankruptcy court to modify the terms of PFI's Bankruptcy Plan to allow the PFI trustee to disclaim certain Contributed Claims by providing written notice to the PFI Trust's board of advisors "within fourteen days of the Effective Date" of the Bankruptcy Plan. *Id*. at 1, 83; Mod. Bank. Plan, § 4.3.13. In so doing, PFI's bankruptcy professionals represented that the modifications allowing for a disclaimer of assigned claims were non-substantive in nature. Mot. to Mod. Bank. Plan at 11.

Fact discovery has revealed that the *Bagatelos* Plaintiffs each elected to exchange their aiding and abetting claims for the "Contributing Claimants' Enhancement Multiplier" of 5%. *See* TIC Ballots (showing contribution elections on page 4); Curtis Decl., Ex. 39 at 1 (1320 Magnolia distribution summary showing 5% increase for Contributed Claim); Curtis Decl. Ex. 40 at 1 (Marmelzat distribution summary showing same); Curtis Decl., Ex. 41 at 2 (Dennis and Susan Green distribution summary showing same); Curtis Decl., Ex. 42 at 1 (O'Dowd distribution summary showing same); Claim Summary Spreadsheet at 25 (investor claims spreadsheet indicating that Plaintiffs contributed their claims). As explained more fully below, it has also revealed that the only relevant disclaimer that the trustee of the PFI Trust made was specific to the *Camenisch* class action and that the claims asserted by the *Bagatelos* Plaintiffs in this lawsuit therefore belong to the PFI Trust and cannot be pursued by the *Bagatelos* Plaintiffs.

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III. LEGAL STANDARD

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is considered "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). "When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Once the moving party has met its burden, the burden shifts to the nonmoving party to designate specific facts showing a genuine dispute for trial." *Forkum v. Co-operative Adjustment Bureau, Inc.*, 44 F. Supp. 3d 959, 961 (N.D. Cal. 2014) (citing *Celoxtex*, 477 U.S. at 324); *Liberty Lobby, Inc.*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

IV. LEGAL ARGUMENT

A. The *Bagatelos* Plaintiffs' "Aiding and Abetting" Claims Fail Because Their Investments Were Not Part of a "Ponzi Scheme"

As a threshold matter, the "aiding and abetting" claims that the *Bagatelos* Plaintiffs have asserted against Umpqua fail because their TIC interests were not part of the scheme that the *Bagatelos* Plaintiffs have charged Umpqua with aiding and abetting. As explained below, the *Bagatelos* Plaintiffs maintain that Umpqua helped facilitate PFI's alleged "Ponzi scheme." The undisputed facts, however, demonstrate that the *Bagatelos* Plaintiffs' tenancy-in-common investments were not and could not be part of any alleged Ponzi scheme. Summary judgment is therefore warranted.

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1. Under California Law, "Aiding and Abetting" is a Form of Derivative Liability, Under Which the Defendant May Become Liable for Another's Tortious Action

Under California law,[3] aiding and abetting is a form a derivative liability under which a defendant may become secondarily liable for a tort committed by another. *Richard B. LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 579 (2005). Thus, to prevail on an aiding and abetting claim, a plaintiff must prove *both*: (i) the underlying tort committed by the primary tortfeasor; and (ii) the defendant's secondary liability for the same (which requires that the defendant had actual knowledge of the tort, rendered substantial assistance to its commission, and that the defendant's conduct was a substantial factor in bringing about the plaintiff's harm). *See Casey v. U.S. Bank Nat. Ass'n*, 127 Cal. App. 4th 1138, 1146 (2005); CACI No. 3610 (elements of aiding and abetting under California law).

Accordingly, the first step in evaluating the merit of the *Bagatelos* Plaintiffs' aiding and abetting claims is to "identify precisely" the specific tortious conduct that Umpqua allegedly acted to facilitate. *Casey*, 127 Cal. App. 4th at 1149. The reason for this is twofold. First, because "aiding and abetting" is a form a derivative liability, the plaintiff is *required* to prove that it was injured by the primary tortfeasor's tortious act. *See Richard B. LeVine,* 131 Cal. App. 4th at 579; CACI No. 3610. Second, as *Casey* explains, "a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is." *Id.* at 1146. Absent such particularized knowledge, the defendant cannot be said to have "acted with the intent of facilitating the commission of that tort."[4] *Gerard v. Ross*, 204 Cal. App. 3d 968, 983 (1988). Nor can it be said that the defendant "reach[ed]

[3] Because the *Bagatelos* Plaintiffs are all California residents, and their tenancy-in-common agreements state that they are governed by California law, *see generally* TIC Agreements, there are no choice-of-law concerns to resolve with respect to their claims. Rather, Umpqua agrees with the *Bagatelos* Plaintiffs that California law controls their claims.

[4] In a case like this one brought against a depository bank, for aiding and abetting liability to attach, California law is clear that the bank must have "actual knowledge" *of the specific intentional tort being committed*. *See Casey*, 127 Cal. App. 4th at 1146. Constructive knowledge, such as a general suspicion of wrongdoing, is legally insufficient. *See id.* at 1151; Black's Law Dictionary, *Actual Knowledge* (10th ed. 2014) (actual knowledge is "[d]irect and clear knowledge, as distinguished from constructive knowledge"). This is because "aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct." *Casey*, 127 Cal. App. 4th at 1146 (quoting *Howard v. Superior Court*, 2 Cal. App. 4th 745, 748-49 (1992)) (alterations and internal quotation marks omitted).

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a *conscious decision to participate in tortious activity* for the purpose of assisting another in performing a wrongful act." *Casey*, 127 Cal. App. 4th at 1146 (emphasis in original).

2. The *Bagatelos* Plaintiffs' Aiding and Abetting Claims Seek to Hold Umpqua Liable for PFI's "Ponzi Scheme"

In their complaint, the *Bagetelos* Plaintiffs identified two distinct PFI torts they say Umpqua allegedly aided and abetted: (i) fraud; and (ii) breach of fiduciary duty. *Bagatelos* Compl., ¶¶ 95-103. Although these are distinct claims with different elements, the *Bagatelos* Plaintiffs allege that both arise from the same wrongful conduct: PFI's alleged operation as a "Ponzi scheme." *Bagatelos* Compl., ¶¶ 96-98, 100-02.

There is no operative legal definition of a "Ponzi scheme." Nonetheless, in the *Hayes v. Palm Seedling Partners-A (In re Agric. Research & Tech Grp., Inc.)*, 916 F.2d 528 (9th Cir. 1990), the Ninth Circuit described a "Ponzi scheme" as "an arrangement whereby an enterprise makes payments to investors from the proceeds of a later investment rather than from profits of the underlying business venture, as the investors expected." *Id.* at 531. It went on to explain that "[t]he fraud consists of transferring proceeds received from the new investors to previous investors, thereby giving other investors the impression that a legitimate profit making business opportunity exists, where in fact no such opportunity exists." *Id.* at 531.

Other decisions likewise emphasize that a "Ponzi scheme" refers to a type of "fraud" in which investors are misled into believing a *legitimate* profit-making enterprise exists when there is no such enterprise. *See, e.g., Donell v. Kowell*, 533 F.3d 762, 767, n.2 (9th Cir. 2008) ("The fraud consists of funneling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment."); *In re Fox Ortega*, 631 B.R. 425, 442 (Bankr. N.D. Cal. 2021) ("Ponzi Schemes have two important characteristics which distinguish them from other types of fraud: (1) the promise of profit that is disconnected from any legitimate business activity, such as no actual investments being made in the stock, or no actual purchase of postal order, and (2) use of new investor funds, instead of legitimate profit, to provide a return to earlier investors.")

Thus, it is PFI's alleged status as a fraudulent "Ponzi scheme" rather than a legitimate

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business, and the injury that the *Bagatelos* Plaintiffs allegedly suffered as a result of their investments being used as part of that "Ponzi scheme," that forms the basis of the *Bagatelos* Plaintiffs' aiding and abetting claims. This is revealed by Paragraphs 96 & 100 of the *Bagatelos* Complaint, in which the *Bagatelos* Plaintiffs allege that it was the alleged fraudulent use of *their funds* to "make monthly payments to previous investors, cover shortages in accounts opened for the benefit of other investors, and to line Casey's and Wallach's personal accounts" that is the specific tortious conduct that Umpqua supposedly aided and abetted. *Bagatelos* Compl., ¶ 96 (alleging such conduct was how the *Bagatelos* "Plaintiffs were each victimized by the PFI Ponzi scheme"); *Bagatelos* Compl., ¶ 100 (alleging such conduct was how "PFI breached its fiduciary duties" to the *Bagatelos* Plaintiffs). This is also the specific tortious conduct of which they contend Umpqua had "actual knowledge" and to which Umpqua allegedly rendered "substantial assistance" via its processing of PFI's banking transactions in alleged furtherance of the scheme. *Bagatelos* Compl., ¶¶ 25-54.

The actual evidence adduced in this case reveals, however, that the *Bagatelos* Plaintiffs' tenancy-in-common investments were decidedly *not* part of any "Ponzi scheme." It demonstrates that, contrary to what the *Bagatelos* Plaintiffs have alleged, their funds were used to acquire the very ownership interests in actual buildings that the *Bagatelos* Plaintiffs were promised.

3. The *Bagatelos* Plaintiffs' Tenancy-in-Common Investments Were Not Part of PFI's Alleged Ponzi Scheme

There is no evidentiary support for the *Bagatelos* Plaintiffs' aiding and abetting a "Ponzi scheme" claims as applied to their tenancy-in-common interests. The *Bagatelos* Plaintiffs' allegations fall apart when applied to the actual factual circumstances surrounding their investments, including how those investments were made and what the *Bagatelos* Plaintiffs acquired.

As an initial matter, contrary to what is alleged in their pleading, the *Bagatelos* Plaintiffs did not "invest in" or "with" PFI. *Bagatelos* Compl., ¶¶ 56, 63, 67, 72, 76, 80, 84, 88, 92. They instead purchased ownership interests in buildings and were put on title as co-owners of their buildings. The evidence is undisputed and unequivocal. In each instance, every single one of the *Bagatelos* Plaintiffs received precisely what they had been promised: the percentage ownership interest in the specific

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commercial building or apartment complex in which they had been offered the opportunity to acquire a percentage ownership interest. More specifically, the evidence shows:

- **Peter and Anne Bagatelos:** Were offered the opportunity to acquire 4.842% of 1441 Casa Buena Drive in Corte Madera, California (a 32-unit apartment building known as "Parc Marin") for an investment of $691,657.55. *See* Bagatelos TIC Agreement at 2; Parc Marin Appraisal at 2. Upon investing, they were deeded a percentage interest in that apartment building. *See* Parc Marin Grant Deed. The Parc Marin apartment building was estimated to be worth $20,050,000 when PFI filed for bankruptcy in July 2020. *See* Curtis Decl., Ex. 57 ("Hogan Decl.") at Ex. B.

- **Karen Bagatelos:** Was offered the opportunity to acquire 4.842% of 1441 Casa Buena Drive in Corte Madera, California (a 32-unit apartment building known as "Parc Marin") for an investment of $691,657.55. *See* Bagatelos TIC Agreement at 2; Parc Marin Appraisal at 2. Upon investing, she was deeded a percentage interest in that apartment building. *See* Parc Marin Grant Deed. The Parc Marin apartment building was estimated to be worth $20,050,000 when PFI filed for bankruptcy in July 2020. *See* Hogan Decl. at Ex. B.

- **Michael Bagatelos:** Was offered the opportunity to acquire 4.842% of 1441 Casa Buena Drive in Corte Madera, California (a 32-unit apartment building known as "Parc Marin") for an investment of $691,657.55. *See* Bagatelos TIC Agreement at 2; Parc Marin Appraisal at 2. Upon investing, he was deeded a percentage interest in that apartment building. *See* Parc Marin Grant Deed. The Parc Marin apartment building was estimated to be worth $20,050,000 when PFI filed for bankruptcy in July 2020. *See* Hogan Decl. at Ex. B.

- **Daniel Levy:** Was offered the opportunity to acquire 7.9% of 19 Merrydale Road, San Rafael, California (an 18-unit apartment building known as "Marin Heights") for an investment of $400,000. *See* Curtis Decl., Ex. 8 at 2; Marin Heights Appraisal at 3. Upon investing, he was deeded a 7.9% interest in that apartment building. *See* Curtis Decl., Ex. 13. The Marin Heights apartment building was estimated to be worth $6,037,500 when PFI filed for bankruptcy in July 2020. *See* Hogan Decl. at Ex. B.

- **1320 Magnolia, LLC (Mary Michaels and Andrew Michaels):** Was offered the opportunity to acquire 3.85% of 1441 Casa Buena Drive in Corte Madera, California (a 32-unit apartment building known as "Parc Marin") for an investment of $550,000. *See* Curtis Decl., Ex. 6 at 2; Marc Marin Appraisal at 2. Upon investing, it was deeded a percentage interest in that apartment building. *See* Parc Marin Grant Deed. The Parc Marin apartment building was estimated to be worth $20,050,000 when PFI filed for bankruptcy in July 2020. *See* Hogan Decl. at Ex. B.

- **Marian O'Dowd**: Was offered the opportunity to acquire 7.065% of 100 Sycamore Avenue in San Anselmo, California (an apartment building known as "Sycamore Creek Apartments") for an investment of $643,091.73. *See* Curtis Decl., Ex 9 at 9; Sycamore Creek Appraisal at 2. Upon investing, she was deeded a 7.1% interest in that apartment building. *See* Curtis Decl., Ex. 14. The Sycamore Creek Apartments were estimated to be worth $9,175,000 when PFI filed for bankruptcy in July 2020. *See* Hogan Decl. at Ex. B.

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- **Carolyn Davis:** Was offered the opportunity to acquire 4.76% of 1732 Lincoln Avenue in San Rafael, California (a 19-unit apartment building) for an investment of $340,000. *See* Curtis Decl., Ex. 10 at 2; Lincoln Ave. Appraisal at 2. Upon investing, she was deeded a percentage interest in that apartment building. *See* Curtis Decl., Ex. 15. The building was estimated to be worth $7,137,500 when PFI filed for bankruptcy in July 2020. *See* Hogan Decl. at Ex. B.

- **Dennis and Susan Green:** Were offered the opportunity to acquire 12.73% of 240 Tamal Vista in Marina County, California (a commercial building known as "Hunt Plaza") for an investment of $1,000,000. *See* Curtis Decl., Ex. 7 ("Hunt Plaza TIC Agreement") at 2; Hunt Plaza Appraisal at 2. Upon investing, they were deeded a percentage interest in that apartment building. *See* Curtis Decl., Ex. 12 ("Hunt Plaza Grant Deed"). Hunt Plaza was estimated to be worth $8,350,000 when PFI filed for bankruptcy in July 2020. *See* Hogan Decl. at Ex. B.

- **Jonathan Marmelzat**: Was offered the opportunity to acquire 3.82% of 240 Tamal Vista in Marina County, California (a commercial building known as "Hunt Plaza") for an investment of $300,000. *See* Hunt Plaza TIC Agreement at 2; Hunt Plaza Appraisal at 2. Upon investing, he was deeded a percentage interest in that apartment building. *See* Hunt Plaza Grant Deed. Hunt Plaza was estimated to be worth $8,350,000 when PFI filed for bankruptcy in July 2020. *See* Hogan Decl. at Ex. B.

Moreover, all the *Bagatelos* Plaintiffs wired or otherwise deposited their funds into escrow accounts that were utilized to close the sale of their respective ownership interests. Those funds were then paid directly to the sellers (which, in all but one instance, were arms-length third parties with no connection to PFI). *See* Final Settlement Statements; Curtis Decl., Exs. 21-29. Stated plainly, there is no evidence that Wallach, Casey, or PFI ever had access to the *Bagatelos* Plaintiffs' money or that their investments were used to make payments to earlier investors, "commingled" with other funds, used to cover shortages in accounts, or used for any other purpose than to fund their proportionate ownership interest in the buildings. Given this undisputed evidence, the aiding and abetting claims pled against Umpqua clearly fail. For that straightforward reason, summary judgment is warranted.[5]

[5] At various points, the *Bagatelos* Plaintiffs have pointed to other torts that PFI allegedly perpetrated. For instance, at his deposition, when confronted with how his funds were never sent to PFI, Plaintiff Marmelzat attempted to explain how he was victimized by a "capitalization scheme" that reduced his percentage interest. *See* Marmelzat Second Depo at 171:15-20 ("The TIC agreements had a capitalization scheme by which investors were assigned a percentage ownership. And the capitalization scheme was set up in a way so as to create excess funds, more than the money needed to purchase the building."). Unpled theories such as this are not before the Court. *See Earth Island Institute v. United States Forest Service*, 87 F.4th 1054, 1072 (9th Cir. 2023) ("Summary judgment is not a procedural second chance to flesh out inadequate pleadings"); *Cole v. CRST, Inc.*, 150 F. Supp. 3d 1163, 1169 (C.D. Cal. 2015) ("It is well-settled that the issues on summary judgment are framed by the Complaint"). Furthermore, there is no evidence that Umpqua had "actual knowledge"

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B. Because They Received What They Were Promised, The *Bagatelos* Plaintiffs Cannot Show Actionable Damages

Under California law, damage is an essential element of a fraud claim. *Service by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1818 (1996) ("In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the 'detriment proximately caused' by the defendant's tortious conduct.") (quoting Cal. Civ. Code § 3333). "'Deception without resulting loss is not actionable fraud.'" *Moncada v. West Coast Quartz Corp.*, 221 Cal. App. 4th 768, 776 (2013) (quoting *Service by Medallion*, 44 Cal. App. 4th at 1881); *see also Hill v. Wrather*, 158 Cal. App. 2d 818, 825 (1958) ("'It is fundamental, of course, that no matter what the nature of the fraud or deceit, unless detriment has been occasions thereby, plaintiff has no cause of action.'") (quoting *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 571 (1912)).

"'There are two measures of damages for fraud: out of pocket and benefit of the bargain." *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1240 (1995) (citing *Stout v. Turney*, 22 Cal. 3d 718, 725 (1978)). "The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received.'" *Id.* (quoting *Stout*, 22 Cal. 3d at 725). "The 'benefit-of-the-bargain' measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.'"[6] *Id.* (quoting *Stout*, 22 Cal. 3d at 725).

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of or rendered "substantial assistance" to any such ancillary tortious conduct. *See Casey*, 127 Cal. App. 4th at 1149. This is important given the circumscribed nature of aiding and abetting liability under California law and what a plaintiff must show to prove such liability.

[6] There is an unresolved split in the California Court of Appeal case law regarding whether the "benefit-of-the bargain" measure of damages applies in the context of fraud by a fiduciary in the sale of real property. *See Moore v. Teed*, 48 Cal. App. 5th 280, 291 (2020) (discussing the split in the case law and how "*Alliance Mortgage* left unresolved the split of authority concerning the appropriate measure of damages for a fiduciary's fraud"). It is Umpqua's position that, under cases like *Hensley v. McSweeney*, 90 Cal. App. 4th 1081 (2001), such damages are not available in the case of fiduciary fraud because they are, among other things, inconsistent with California Civil Code § 3343. Nonetheless, this split is immaterial considering the *Bagatelos* Plaintiffs have disclaimed "benefit-of-the-bargain" damages in their operative Rule 26 disclosures. *See* Curtis Decl., Ex. 4 at 7. Given that fact discovery has closed, those Rule 26 disclosures are binding and cannot be amended. *See*

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Here, because the evidence shows that the *Bagatelos* Plaintiffs' tenancies-in-common were not part of PFI's "Ponzi scheme" and that the *Bagatelos* Plaintiffs received the ownership interests they were promised, the *Bagatelos* Plaintiffs will be unable to establish that they have any viable fraud damages. The California Court of Appeal's decisions in *Saunders v. Taylor*, 42 Cal. App. 4th 1538 (1996) and *Goodwin v. Wolpe*, 240 Cal. App. 2d 874 (1966) are both instructive and controlling on this point of California law. *See Wolfson v. Watts (In re Watts)*, 298 F.3d 1077, 1083 (9th Cir. 2002) ("In the absence of a pronouncement by the highest court of a state, the federal courts must follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently").

Saunders was a real estate dispute in which the buyers of a residential property sued the sellers, alleging the sellers had fraudulently represented that the property was up to code and fully permitted. *Saunders*, 42 Cal App 4th at 1540-41. After their purchase closed, the buyers discovered an addition had been unpermitted, which their contractor estimated would cost $25,000 to remedy. *Id.* At trial, however, the buyers offered no evidence of their "out-of-pocket" loss—i.e., "no evidence of what the market value of the house would have been had the true facts been known regarding the lack of permits." *Id*. at 1543. As a result, the trial court granted the sellers' (who were the defendants) motion for nonsuit "on the grounds that there had been no evidence of what damages, if any, had been suffered as a result of the alleged misrepresentations." *Id.* at 1541.

On appeal, the California Court of Appeal affirmed. Summarizing the law on out-of-pocket damages arising from the sale of property, the California Court of Appeal explained that "to establish a common law cause of action for deceit in the sale of a piece of property, a buyer must offer evidence that the price he or she paid for the property was greater than the actual value of the property." *Id*. at 1543. Because the plaintiffs had failed to do that, the buyers had "failed to show that they had suffered any damages." *Id*. The buyers thus had failed to prove an element of their fraud claim and the judgment in favor of the sellers had been properly rendered. *Id.* at 1544-55.

Grouse River Outfitters Ltd v. Oracle Corp., 2019 U.S. Dist. LEXIS 112869, *10-*11 (N.D. Cal. July 8, 2019).

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Goodwin was a lawsuit over the sale of a bar and hotel in Indio, California. *Goodwin*, 240 Cal. App. 2d at 875. The buyers alleged that, prior to the sale, the sellers had fraudulently misrepresented that "there were 'no violations or conditions' against the building wherein the business was situated" when, in truth, the sellers knew that the building was about to be condemned. *Id.* After the building was condemned shortly after the buyers acquired the businesses and the bar and hotel were forced to close, the buyers filed suit against the sellers for fraud. *Id.* at 875-76. The trial court rendered judgment to the sellers, finding that there had been no fraud. *Id.*

On appeal, the California Court of Appeal affirmed based upon the buyers' failure to introduce viable evidence of damages. Noting that the proper measure of fraud damages in connection with the sale or property is governed by California Civil Code § 3343, the California Court of Appeal held that the buyers' failure to introduce evidence of "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received" was fatal to the buyers' fraud claim. *Id.* at 879. More specifically, it held that "there was no proper proof to permit a recovery for fraud" because "[t]here was no proper proof of the actual value of the whole or any part of the business sold, and, therefore, no ground for the award of general damages." *Id*. at 879.

Together *Saunders* and *Goodwin* demonstrate how, absence evidence of out-of-pocket loss, a plaintiff bringing a fraud claim for the sale of real property cannot recover. They also show how the timing and the nature of the transaction are controlling factors in assessing the permissibility of damages sought and the kind of evidence required to show cognizable injury. That is because the measure of damages for fraud involving the purchase of property is statutorily prescribed. Under California Civil Code § 3343 "[o]ne defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received." Cal. Civ. Code § 3343(a). And, in applying that statute, the *Saunders* and *Goodwin* decisions make clear that the "actual value" of that which an allegedly defrauded party received is its value at the time of the alleged fraud.

Here, despite what California law requires, the *Bagatelos* Plaintiffs have no evidence of out-of-pocket loss. Indeed, while the undisputed evidence shows that they received what they were promised and were deeded actual ownership interests in the various buildings in which they invested,

see Section IV.A.3, *supra*, they have no evidence that those buildings were overvalued at the time of the purchase, or in what amount, as would be required by the out-of-pocket loss rule. Instead, in their Rule 26 disclosures, they have expressly disclaimed such a theory of damages and instead stated that they intend to adopt the same type of "net loss" approach to damages as the *Camenisch* class members. *See* Curtis Decl., Ex. 4 at 7. But, as *Saunders* and *Goodwin*, the *Bagatelos* Plaintiffs' inability to come up with legally viable damages means that they cannot prove an essential element of the underlying claim and summary judgment is required.

C. The *Bagatelos* Plaintiffs Lack Standing to Pursue This Lawsuit

Once a person assigns his or her rights to a cause of action against a defendant to another, the assignor loses his or her rights to sue the defendant on that cause of action. *See In re WellPoint, Inc. Out-Of-Network "UCR" Rates Litig.*, 903 F. Supp. 2d 880, 897 (C.D. Cal. 2012) ("Once a claim has been assigned, however, the assignee is the owner and the assignor generally lacks standing to sue on it.") (citations omitted); *Rubenstein v. Smith*, 132 F. Supp. 3d 1201, 1206 n.4 (C.D. Cal. 2015) ("Because [assignor] made a full, unequivocal, and complete assignment of both legal and equitable title in its . . . claims to [assignee] . . . [assignor] no longer has standing to sue or recover on such claims.") (collecting cases); *see also Johnson v. Cty. of Fresno*, 111 Cal. App. 4th 1087 (2003) ("Once a claim has been assigned, the assignee is the owner and has the right to sue on it" and "the assignor lacks standing to sue on the claim"). Under this well-settled rule, the *Bagatelos* Plaintiffs do not have standing to bring the claims they assert against Umpqua because, as discussed below, those claims were assigned to the PFI Trust as part of PFI's bankruptcy case.

1. Fact Discovery Revealed that the *Bagatelos* Plaintiffs Assigned their Claims Against Umpqua to the PFI Trust

Under the terms of PFI's Bankruptcy Plan, TIC Holders who elected to trade in their recorded ownership interests in the real property in which they had invested for an allowed unsecured claim, were given the opportunity to assign their claims against those who might have "aided and abetted" PFI in exchange for a 5% increase to their claim amount.

In relevant part, the operative version of PFI's Bankruptcy Plan stated that "[e]ach Holder of an Investor Claim … may agree, by electing on its Ballot … to contribute its Contributed Claims to

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the PFI Trust" in exchange for "the Contributing Claimants' Enhancement Multiplier" (defined as a "five percent" increase to the investor's claim amount). Mod. Bank. Plan, §§ 1.41 & 2.5. PFI's Bankruptcy Plan defined "Contributed Claims" as "All Causes of Action (1) that are legally assignable . . . including . . . all Causes of Action based on *aiding or abetting*, entering into a conspiracy with, or otherwise supporting torts committed by the Debtors or their agents, and (2) for which a Contributing Claimant elects to contribute such Causes of Action on its Ballot, and which are not later disclaimed by the PFI Trustee in his sole discretion by written notice to the Board of Advisors." Mod. Bank. Plan, § 1.39. The plan further explained that the purpose of allowing such assignments was to "enable the pursuit and settlement of such litigation claims in a more efficient and effective manner." Mod. Bank. Plan, § 2.5

As originally approved by the bankruptcy court, such assignments were supposed to be "irrevocably" made in favor of the PFI Trust. *See* Mot. Mod. Bank. Plan at 83. However, at the eleventh-hour, the professionals overseeing PFI's bankruptcy case asked the bankruptcy court to modify the terms of PFI's Bankruptcy Plan to allow the PFI trustee, in his sole discretion, to disclaim certain Contributed Claims by providing written notice to the PFI Trust's board of advisors "within fourteen days of the Effective Date" of the Bankruptcy Plan. *Id.* at 83; Mod. Bank. Plan, § 4.3.13. In asking the bankruptcy court to approve this modification to the plan permitting such disclaimers, PFI's bankruptcy professionals represented that the provisions allowing for a disclaimer of assigned claims were non-substantive in nature. *See id.* at 11.

Fact discovery reveals that the *Bagatelos* Plaintiffs each elected to exchange their aiding and abetting claims for the "Contributing Claimants' Enhancement Multiplier" of 5%. More specifically, in discovery, Umpqua obtained copies of the *Bagatelos* Plaintiffs' claims ballots and claims summaries, which reflect that the *Bagatelos* Plaintiffs elected to contribute their claims to the PFI Trust. *See* TIC Ballots; Curtis Decl., Ex. 39; Claim Summary Spreadsheet at 25. Thus, under the clear terms of PFI's Bankruptcy Plan, the PFI Trust is the holder of the aiding and abetting claims the *Bagatelos* Plaintiffs assert here against Umpqua *unless* the PFI trustee made a written disclaimer of these claims. As Umpqua shall explain, there was no such written disclaimer of the *Bagatelos* Plaintiffs' tenancy-in-common claims.

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2. The PFI Trustee's Disclaimer Was Limited to the *Camenisch* Class Action and Did Not Cover the Follow-on *Bagatelos* Lawsuit

According to the sworn deposition testimony of the sole trustee of the PFI Trust (Michael Goldberg), the only written disclaimer of Contributed Claims relevant to Umpqua is contained in a December 23, 2021 email that Mr. Goldberg sent to the PFI Trust's board of advisors.[7] *See* Curtis Decl., Ex 3 at 136:18-137:7, 138:3-139:10 (Mr. Goldberg's deposition testimony). The full and complete text of that disclaimer was as follows:

> Dear BOA:
>
> Pursuant to Section 4.4.13 of the Modified Plan in PFI's bankruptcy case, this is to advise you of my decision as PFI Trustee to disclaim any and all Contributed Claims that are pursued in the lawsuit pending in the United States District Court for the Northern District of California styled as *Camenisch v. Umpqua Bank*, Case No. 20-cv-05905-RS. Accordingly, there will be no risk of "double-dipping" that might otherwise occur if the PFI Trust retained the Contributed Claims. My decision in this regard was shared with the Official Committee of Unsecured Creditors some time ago, and I encourage you to reach out to Keith Merron or me if you have further questions.
>
> Please let me know if you wish to discuss this decision. Wishing each of you and your families happy holidays.

See Curtis Decl. Ex. 51.

On its face, this disclaimer only disclaims the claims asserted in *Camenisch*—it does not disclaim the claims made in *Bagatelos*. For that reason, the *Bagatelos* Plaintiffs lack standing to pursue this lawsuit and summary judgment should be granted. To the extent that Plaintiffs attempt to argue that the disclaimer should be read more broadly to encompass the *Bagatelos* action, that argument would fail.

To start, the cardinal rule of contract interpretation is "[i]f contractual language is clear and explicit, it governs." *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). Here, the plain language of the disclaimer could not be more clear or explicit. Mr. Goldberg's email disclaims the claims being *pursued* in *Camenisch*, with specific reference to the court in which it is pending and the case number. Given the specificity in his disclaimer, there is no room to interpret it as applying

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[7] At class certification, Mr. Goldberg submitted a sworn declaration in support of the *Camenisch* Plaintiffs' motion for class certification, in which he incorrectly stated that "[n]o investors assigned their claim against Umpqua Bank to the PFI Trust." *Camenisch v. Umpqua Bank*, Case No. 3:20-cv-05905-RS, Dkt. No. 80-75 ¶ 11. In truth, the claims were assigned.

to anything other than the *Camenisch* case. There is no qualifying language in the disclaimer that warrants a broader interpretation and the disclaimer does not make any mention of other actual or future claims against Umpqua that are being disclaimed.

Second, the principle "*expressio unius est exclusio alterius*; i.e., that mention of one matter implies the exclusion of all others" further confirms that the *Bagatelos* claims were not disclaimed. *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1234 (9th Cir. 2013). Given that the disclaimer expressly mentions *Camenisch* (and only *Camenisch*), that implies that all other claims have not been disclaimed. To the extent the disclaimer was intended to apply more broadly, it should have so stated—for example, by disclaiming all claims against Umpqua. That silence in the face of the express inclusion of *Camenisch* confirms that *Bagatelos* claims were not disclaimed. *Id.* (holding that where agreement "never mentions Best Buy" but "specifies that TiVo, Inc. is a third-party beneficiary of the agreement," Best Buy was not a third-party beneficiary "in light of the fact that DirecTV clearly knew how to provide for a third-party beneficiary if it wished to do so").

Finally, the extremely limited power of the PFI trustee to disclaim Contributed Claims further militates against a broad reading of the disclaimer. In the original version of PFI's Bankruptcy Plan, the PFI Trustee had no power to disclaim a Contributed Claim at all. Rather, the plan provided that such claims were deemed "*irrevocably* contributed to the PFI Trust." *See* Mot. Mod. Bank. Plan at 83. The PFI Trust subsequently moved to modify the bankruptcy plan to include a power to disclaim Contributed Claims, but limited that power by requiring such written disclaimers to be made within fourteen days of the effective date of the bankruptcy plan. *See id.* In explaining the effect that this modification would have, the PFI Trust argued that it would not "affect the Plan's mandatory Plan provisions or its key mechanics" and did not "make any material changes to implementation of the Plan or distributions under it." *Id.* at 11. That the PFI Trust took the position that disclaimer power was not material is further reason why this disclaimer should be construed narrowly.

For these reasons, the evidence is undisputed that the *Bagatelos* claims were assigned to the PFI Trust and not disclaimed.

Umpqua PFI TIC Investor Lawsuit

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

V. CONCLUSION

For the reasons discussed above, Umpqua respectfully requests that the Court grant summary judgment in its favor on the claims brought by the plaintiffs in the follow-on *Bagatelos* case.

DATED: April 23, 2024

REED SMITH LLP

By: /s/ Kasey J. Curtis
Kasey J. Curtis
Keith Ketterling (*pro hac vice*)
Lydia Anderson-Dana (*pro hac vice*)
Erin Roycroft (*pro hac vice*)
Madeleine Holmes (*pro hac vice*)
Attorneys for Defendant
UMPQUA BANK

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A limited liability partnership formed in the State of Delaware