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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHELA CAMENISCH, et al. Plaintiffs, v. UMPQUA BANK, Defendant.	Case No. 3:20-cv-5905-RS (AGT) **PLAINTIFFS' OPPOSITION TO UMPQUA'S COMBINED MOTION** Date: June 20, 2024 Time: 1:30 p.m. Dept: Courtroom 3, 17th Floor Judge: Hon. Richard Seeborg Pretrial Conference: August 28, 2024 Trial Date: September 9, 2024

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INTRODUCTION

About a year and a half ago, the Court ruled that Plaintiffs' claims against Umpqua Bank for aiding and abetting a Marin County Ponzi scheme orchestrated by Professional Financial Investors (PFI) could and should be tried on a classwide basis. (*See* 12/16/22 Order [Dkt. 144] at 14-15.) Umpqua had asked the Court to exclude out-of-state residents from any certified class, but the Court found Umpqua had not demonstrated that foreign law should apply to any of the investor's claims and certified a class of over 1,200 investors who lost money in the PFI Ponzi scheme. (*See id.*)

Now, with the class trial scheduled to begin in September, Umpqua asks the Court to reconsider its prior choice-of-law ruling and exclude most of the 311 class members it says reside outside of California. Plaintiffs respectfully ask that the Court affirm its prior ruling and again find that Umpqua has failed to meet its burden of demonstrating that another state or country has a superior interest in applying its aiding-and-abetting law to the facts of this case. The last events necessary to make Umpqua liable for aiding and abetting the PFI Ponzi scheme occurred in Marin County—specifically, at the small bank branch in Novato, California, where Umpqua bankers repeatedly deposited investor money into PFI's accounts despite knowing those funds were being used to benefit prior investors and fund transfers to the personal bank accounts of PFI's executives. Umpqua does not even operate in most of the jurisdictions whose law Umpqua now says should govern the bank's behavior. And it asks the Court to apply those jurisdictions' law to class members who it cannot show lived outside of California when they decided to invest. Umpqua's only evidence tying class claims to foreign jurisdictions is a 2021 mailing list used to communicate with Ponzi scheme victims in PFI's bankruptcy proceedings. That list does not take into account the many class members who moved out of the Bay Area after investing years before, and it does not accurately reflect where class members resided when they decided to invest.

Umpqua also asks the Court to preclude the class from recovering prejudgment interest under California Civil Code section 3287(a) or 3288 if they prevail at the September trial. It says that class members advocated against claims for prejudgment interest in PFI's bankruptcy proceedings and that those claims were eventually disallowed by the bankruptcy court. Umpqua's account of PFI's bankruptcy proceedings is not accurate, however, and there is therefore no basis to find that class members are estopped from asserting claims for prejudgment interest at the upcoming trial. Claims for prejudgment interest were never disallowed in the bankruptcy; instead, those claims were settled on terms that permitted *all investors* to recover their prejudgment interest from the bankruptcy estate if funds permitted. The interest claims were subordinated to claims for restitution as a matter of fairness: it does not make sense to pay some investors full restitution and interest before others recover the full amount of their principal investment. But that does not mean that class claims for prejudgment interest were ever found to lack merit, as would be required before principles of equitable or judicial estoppel would come into play.

Umpqua's final request is for an order precluding class members from recovering damages for pre-2007 investments. Plaintiffs are not seeking any such damages, as they confirmed in a recently exchanged expert report on class damages, and as they would have told Umpqua if the bank had conferred with Plaintiffs before filing its present motion.

ARGUMENT

I. Umpqua still has not demonstrated that foreign law should apply to class claims.

A. The Court previously found that Umpqua had not met its burden because the locus of the alleged aiding-and-abetting activity was in California.

When Plaintiffs moved for class certification, Umpqua argued that applying California law to the claims of out-of-state investors would unduly impair other jurisdictions' governmental interests. (3/29/22 Opp. [Dkt. 184] at 17.) Plaintiffs challenged that assertion, pointing out both (i) that the last events necessary to make Umpqua liable occurred in California, and (ii) that other states had little if any interest in applying their own laws to a fraudulent scheme that involved California real estate, that was run by a California corporation headquartered in California, and that was allegedly aided and abetted by a bank branch in Novato, California. (5/27/22 Reply [Dkt. 161] at 8-10.) When the parties presented oral arguments in favor of their positions, the Court agreed with Plaintiffs, observing that "the locus[] of all the activity is California and these investors are harmed in California," "what the bank is doing is here in California." (9/29/22 Tr. [Dkt. 146] at 40.) The Court subsequently certified a class of investors allegedly harmed by the PFI Ponzi scheme, finding that "[a]t this juncture …

Umpqua has failed to show that out-of-state plaintiffs cannot pursue claims under California law in these circumstances." (12/16/22 Order [Dkt. 144] at 15.)

Umpqua petitioned the Ninth Circuit to immediately review and reverse the Court's class certification order, arguing that the Court erred both by failing to conduct a choice-of-law analysis and by requiring Umpqua to justify the imposition of out-of-state law as part of the analysis that it did conduct. (*See* Munroe Decl., Ex. 1 at 2, 11-13.) The Ninth Circuit denied Umpqua's petition (Dkt. 157), but now Umpqua is asking the Court to revisit its ruling for the same reasons. It continues to insist both that the Court deferred its choice-of-law analysis for a later date and that the Court's analysis wrongly "inverted the choice-of-law burdens at certification." (Mot. at 6 & n.3, 7.) Both assertions are incorrect.

Plaintiffs' only burden was to show that California has a significant relationship to the claims of each class member. *Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 589 (9th Cir. 2012). Plaintiffs made that showing and Umpqua itself acknowledged that "[i]t is true, of course, that California has an interest in applying its laws to an alleged scheme headquartered in California." (3/29/22 Opp. [Dkt. 184] at 16; *see also* 5/27/22 Reply [Dkt. 161] at 8 (listing evidence of California connection).) The burden therefore "shift[ed] to the other side"—to Umpqua—"to demonstrate 'that foreign law, rather than California law' should apply to class claims.'" *Mazza*, 666 F.3d at 590 (quoting *Wash. Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 921 (2001)). The Court was correct to find Umpqua had failed to meet its burden at class certification and should find that Umpqua still has not met its burden. As before, Umpqua cannot show that the last event necessary to make Umpqua liable for the PFI Ponzi scheme occurred outside of California or that other jurisdictions have a legitimate interest in applying their aiding-and-abetting law to class claims. Nothing in Umpqua's current motion undermines the Court's prior conclusion that the locus of the activity implicated by this litigation—including, most importantly, the assistance Umpqua allegedly provided to the PFI Ponzi scheme—occurred in California.

B. Umpqua still has not shown that other jurisdictions' interest in enforcing their aiding-and-abetting laws exceeds California's interest.

To meet its burden of demonstrating that foreign law should apply to certain class members' claims, Umpqua would need to show (i) the foreign law is different than California law in a way that could affect the outcome of the trial, (ii) the foreign jurisdiction has a legitimate governmental interest in applying its own law, and (iii) the governmental interest outweighs California's interest in applying its law. *Mazza*, 666 F.3d at 590.

Umpqua focuses its motion on the first step of the governmental interest test, pointing to several differences it sees between California law on aiding and abetting torts and other states' laws. (Mot. at 9-22.) But, as at class certification, it is the second and third steps of the test that provide the strongest basis for the class-wide application of California law. Plaintiffs have never disputed that some states' aiding-and-abetting law may differ from California law. When Umpqua first advocated for the application of foreign law to out-of-state residents, Plaintiffs admitted that Texas may not even recognize claims for civil aiding and abetting. (5/27/22 Reply [Dkt. 161] at 9.)[1] The problem was that Texas had no legitimate governmental interest in applying its own law to the facts of this case, and even if it did, California—as the place of the wrong and locus of both the PFI Ponzi scheme and Umpqua's alleged aiding and abetting of that scheme—would have a significantly stronger interest in applying its own law.

Umpqua's renewed effort to demonstrate that other jurisdictions have superior governmental interests under the facts of this case fares no better than its initial effort. As to the second and third prongs of the governmental interest test, Umpqua presents the same arguments it presented at class certification. It presents no additional evidence, makes no new arguments, and relies on exactly the same cases. (*Compare* Mot. at 22-23, *with* 3/29/22 Opp. [Dkt. 184] at 16-17.) As before, Umpqua notes that "the place of the wrong" typically has the predominant governmental interest, and asserts that here the place of the wrong is where each class member resides and suffered their injuries. But the cases it cites do not involve aiding-and-abetting liability and specify that the place of the wrong is "the state where the last event necessary to make an actor liable for an alleged tort takes place." *See, e.g., Conde v. Sensa*, No. 14-CV-51 JLS WVG, 2018 WL 4297056, at *13 (S.D. Cal. Sept. 10, 2018). Here, the last event necessary to make Umpqua liable took place at the bank's branch in Novato, California—where

[1] Further research has shown, however, that Texas courts do recognize claims for aiding and abetting breaches of fiduciary duty. *See Off. Stanford Invs. Comm. v. Greenberg Traurig, LLP*, No. 3:12-CV-4641-N, 2014 WL 12572881, at *8 (N.D. Tex. Dec. 17, 2014) ("the Court declines to hold that Plaintiffs' aiding and abetting breach of fiduciary duty claims are not recognized in Texas").

Umpqua bankers deposited investor funds into PFI's accounts despite knowing those funds were being used to benefit prior investors and PFI's executives. *See McNew v. People's Bank of Ewing,* 999 F.2d 540 (6th Cir. 1993) (plaintiff's loss occurred in the state where bank deposited check into fraudster's account).

In fact, nearly every significant aspect of this case occurred in California. The Ponzi scheme at the heart of the case was conducted in California by California investment companies using California real estate to attract investors. (Dkt. 80-5 at 4, 5-6; Dkt. 80-7.) The LLCs that served as the vehicle for many of these investments were organized under California law, their operating agreements include California choice-of-law provisions, and the LLCs specifically represented that they "[do] not intend to do business outside the State of California." (Dkt. 79-3, ¶¶ 4.3, 19.6, 21.8.) The bank accounts that PFI and PISF used to commingle and misappropriate investor funds were located at the Novato, California, branch of Umpqua Bank. (Dkt. 79-32 at 2.) Class members' investments were wired to the Novato branch, deposited by check at the Novato branch, or remotely deposited into the Novato accounts using the remote check scanner at PFI's California office. (Dkt. 79-31.) And Umpqua Bank allegedly aided and abetted the Ponzi scheme from the Novato branch, where it accepted investor funds, worked closely with PFI employees to use those investor funds to cover shortfalls in PFI's various accounts, and regularly transferred investor funds to the personal bank accounts of PFI's executives. (*See, e.g.,* Dkt. 79-13, 79-16, 79-22, 79-24, 79-27, 79-28.)

C. Umpqua's submission of a 2021 mailing list is insufficient to show the jurisdiction from which class members invested their money with PFI in 2007-2020.

Even if Umpqua were correct that the jurisdiction with the greatest interest in applying its aiding-and-abetting law to a class member's claim is the state or country from which that class member "invested and suffered losses," Umpqua still has not met its burden as an evidentiary matter. (Mot. at 22.) Umpqua has submitted a document that it says shows that 311 of the 1,217 class members involved in this case live in jurisdictions outside of California. (Mot. at 6; Fortner Decl., Ex. 14).) But that document only contains contact information for investors as of July 24, 2021. (Camenisch Decl., ¶¶ 2-3, Ex. A.) It does not indicate where investors were when they invested money with PFI, which in many instances occurred over a decade prior to the creation of the 2021 mailing list. A prior analysis conducted by Plaintiffs' counsel found that class members often relocated from the Marin County area after investing with PFI. (5/27/22 Lam Decl. [Dkt. 161-1], ¶¶ 8-10.) In fact, nearly 30% of the class members who then appeared to reside outside of California still lived in California when they decided to invest money with PFI. (*Id.*, ¶ 10.)

Umpqua's description of the document is also incorrect. The document only indicates that 272 class members—not 311 class members—resided outside of California as of 2021, including six who have both California and non-California addresses listed (39 of the out-of-state investors listed are not class members). (Munroe Decl., ¶ 7.) Of those 272 class members, 73 invested with PFI through LLC memberships containing a California choice-of-law provision; "Umpqua thus agrees these investors can invoke California law as to the LLC investments." (*Id.*, ¶ 8; Mot. at 1 n.1.)

D. Umpqua has not demonstrated material differences in aiding-and-abetting laws as to several of the jurisdictions where class members may have resided.

Fifty-two class members are listed with 2021 addresses in states that Umpqua admits "have similar rules for civil aiding and abetting liability as California" and thus "could be tried in a single trial along with California law." (Munroe Decl., ¶ 9; Mot. at 21.) And another 56 class members are listed with 2021 addresses in jurisdictions whose aiding-and-abetting law Umpqua did not address and therefore failed to show is materially different than California law (40 in Oregon, 2 in Australia, 1 in Canada, 4 in France, 2 in Germany, 1 in Japan, 3 in Mexico, 2 in Spain, and 1 in the Netherlands). (Munroe Decl, ¶ 10); *see Mazza*, 666 F.3d at 590. That leaves 164 class members with 2021 addresses in jurisdictions with aiding-and-abetting law that Umpqua claims is materially different than California law, only 120 of whom did not invest through LLC memberships. (Munroe Decl., ¶ 11.)

Another 55 class members have 2021 addresses in one of the 12 jurisdictions that Umpqua says has aiding-and-abetting law that differs from California law because it lacks a "substantial factor" requirement. (*Id.*, ¶ 12; Mot. at 17-20.) Those states do require that the assistance provided by an alleged aider-and-abettor be "substantial," however, and so a "substantial factor" requirement is already built into those states' laws. *See Sender v. Mann*, 423 F. Supp. 2d 1155, 1176 (D. Colo. 2006) (substantial assistance element requires that the assistance be a substantial factor in causing the tort);

see also Casey v. U.S. Bank Nat. Assn., 127 Cal. App. 4th 1138, 1144 (2005) (stating elements of California claim as requiring only knowledge and substantial assistance). The addition of a "substantial factor" requirement to a claim that already requires "substantial assistance" is not a material change, and Umpqua has not demonstrated how, under the facts of this case, a jury could find that Umpqua substantially assisted a Ponzi scheme that bilked class members out of more than $450 million, but that its assistance was not a substantial factor in causing harm to the Ponzi scheme's victims. *See Mazza*, 666 F.3d at 590-91 (differences in state law are only material if they could have a significant effect on the outcome of trial). Nevertheless, the special verdict form used for the upcoming class trial will likely ask a jury to answer both whether Umpqua substantially assisted PFI and whether its conduct was a substantial factor in causing harm to the class. *See* CACI 3610. If the two questions generate different answers, the final judgment entered by the Court could take those disparate findings into account without generating intractable manageability problems.

Another 47 class members have 2021 addresses in Hawaii, Florida, or Idaho—three states that Umpqua claims may not recognize a claim for aiding and abetting. (Munroe Decl., ¶ 13; Mot. at 12-14.) But Umpqua is unable to point to any case that has declined to recognize an aiding-and-abetting claim under any of those states' laws, and the consensus is that Hawaii, Florida, and Idaho law do indeed permit aiding-and-abetting claims. *David Sansone Co., Inc. v. Waiaha Ridge LLC*, No. CV 20-00411 HG-RT, 2022 WL 1212922, at *4 (D. Haw. Apr. 25, 2022) (citing cases "finding that Hawaii law permits liability under the aiding and abetting theory"); *Caledonian Bank & Tr. Ltd. v. Fifth Third Bank*, No. 8:13-CV-1470-T-30TGW, 2013 WL 5272807, at *3 (M.D. Fla. Sept. 17, 2013) ("Courts that have considered the sufficiency of a claim for aiding and abetting fraud under Florida law have consistently assumed that the claim exists under Florida law."); *Zazzali v. Ellison*, 973 F. Supp. 2d 1187, 1203 (D. Idaho 2013) (assuming that Idaho would recognize a cause of action for civil aiding and abetting); *see also SRM Arms, Inc. v. GSA Direct, LLC*, 169 Idaho 196, 200 (2021) (reviewing remittitur on jury verdict awarding damages for aiding and abetting fraud).

Umpqua also questions whether Virginia recognizes a separate cause of action for aiding and abetting. The only two class members with a Virginia address are Plaintiffs Shela Camenisch and Dale Dean, whose claims Umpqua twice tried to dismiss using California law before unsuccessfully moving for summary judgment on the same claims based on California law. (Munroe Decl., ¶ 14; 10/30/20 Mot. [Dkt. 23] at 5; 7/28/21 Mot. [Dkt. 45] at 7; 6/2/22 Mot. [Dkt. 121] at 9.) Having advocated for the application of California law to Camenisch and Dean's claims at least three times over the past four years, Umpqua should be precluded from now seeking to apply Virginia law instead. *See In Re J.T. Thorpe, Inc.*, 870 F.3d 1121, 1124 (9th Cir. 2017) (choice-of-law arguments are usually waived unless timely raised). But even if Virginia law were now applied to Camenisch and Dean's claims, it is unlikely to make a difference. Several courts have held that Virginia does indeed recognize a separate cause of action for aiding and abetting. *See Keil v. Seth Corp.*, No. 3:21CV153 (DJN), 2021 WL 5088242, at *13 (E.D. Va. Nov. 2, 2021) (collecting cases). And even when courts have declined to consider aiding and abetting to be a separate tort under Virginia law, they recognize that Virginia law allows for joint tortfeasor liability when a party knows of a wrong and participates in it for its own benefit. *Id.* at 14. The same proof of knowledge and substantial assistance that Camenisch and Dean presented in opposition to Umpqua's summary judgment motion could therefore establish either aiding-and-abetting liability under California law or joint tortfeasor liability under Virginia law.

E. The Court can find Umpqua has failed to meet its burden on any of several alternate grounds.

To briefly summarize Plaintiffs' position with respect to Umpqua's renewed choice-of-law arguments: Umpqua has not carried its burden of demonstrating that foreign law should be applied to any class member's claims for several reasons. The most straightforward is that even if Umpqua were correct that the aiding-and-abetting laws of 32 states are materially different than California law, California would still lay claim to the superior governmental interest because it is the locus of both Umpqua's alleged aiding-and-abetting activities and the underlying PFI Ponzi scheme. (*See* Sections A-B, *supra*.) In particular, the last events necessary to make Umpqua liable to class members occurred at Umpqua's branch in Novato, California. (*Id.*)

Alternatively, the Court can first assess each of the 32 states with aiding-and-abetting laws that Umpqua contends are materially different than California law. Plaintiffs believe Umpqua is wrong with respect to at least 16 of those states. (*See* Section D, *supra*.) The remaining 16 states potentially implicate the claims of only 60 class members—24 of whom have LLC investments and so would still be entitled to proceed under California law as to at least those investments. (Munroe Decl., ¶ 15.) But Umpqua has presented no evidence that those 60 class members invested in PFI while in those states; its only evidence is a 2021 mailing list that does not reflect where the class members were located when they invested with PFI years before. (*See* Section C, *supra*.)

Even if the Court were to assume that the addresses on a 2021 mailing list reflect class member's place of investment, Umpqua cannot show that any of the remaining 16 states have a legitimate interest in seeing their aiding-and-abetting laws applied to the class members' claims in place of California law. Umpqua contends that 10 of the 16 states either do not or may not recognize a claim for civil aiding and abetting and 2 more impose additional requirements that could make it more difficult to prove aiding-and-abetting liability. (Munroe Decl., ¶ 16; Mot. at 10-15, 20-21.) The bank posits that these states have a governmental interest in prescribing "what conduct is permitted or proscribed within its borders" and "being able to assure … commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available" to those entities in the event of litigation. (Mot. at 22 (quoting *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) and *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 97-98 (2010)). But Umpqua does not operate in any of these states, and PFI has never operated in any state other than California. (Munroe Decl., ¶ 17.) So whatever interest those 12 states may have in permitting Ponzi schemes or safeguarding their corporate residents from litigation for aiding and abetting Ponzi schemes would not be impaired by the application of California law in this case.

As for the final 4 states, their aiding-and-abetting laws are arguably more favorable than California because they do not require actual knowledge or require a lesser showing in certain circumstances. (Mot. at 20 (AZ, IA, MN, and NV.) Those states may have a governmental interest in ensuring that their residents are compensated for their economic losses. But those interests will suffer relatively little impairment by the application of California law, which likewise authorizes fraud victims to hold corporate abettors liable for economic injuries—particularly under the facts of this case, which features only a small number of victims from the 4 states in question and hundreds of California victims. (Munroe Decl., ¶ 18.) In addition, almost all of the Ponzi scheme victims have a substantial amount of money at stake and each was afforded an opportunity to opt out of this class action and assert claims under their own state's laws if they so chose.

There is no reason, now that a class trial under California law is only months away, to decertify the claims of any out-of-state residents. The nucleus of this case has always been in Marin County, California, where the PFI Ponzi scheme was hatched and allegedly aided and abetted by a small bank branch in Novato, California. California therefore has a strong governmental interest in applying its own aiding-and-abetting law to corporate conduct that took place within its borders, and however the question is analyzed, Umpqua has failed to show that there is a legitimate reason to depart from California law at this late juncture, apply foreign law to a small number of class member claims, and then decertify those claims so they cannot be adjudicated at the same time as the rest of the case against Umpqua.

II. The class should not be estopped from requesting an award of prejudgment interest.

If the class prevails at the upcoming trial and the jury decides to award them out-of-pocket damages, Plaintiffs may request that jurors exercise their discretion to award the class prejudgment interest as well. *See* CACI No. 3935. In cases involving fraud or other non-contractual matters, California Civil Code section 3288 specifically authorizes juries to award prejudgment interest, which is an element of damages that is intended to compensate successful litigants for the loss of use of their money over a significant period of time. *Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1586 (1994). In the alternative, Plaintiffs could seek a post-trial award of prejudgment interest under California Civil Code section 3287(a), which authorizes the Court to award prejudgment interest on liquidated damages. *See also Beijing Huanqiu Zhonglian Inv. Consulting Co. v. Bar Works Cap., LLC*, No. 20-CV-01903-KAW, 2021 WL 6205827, at *6 (N.D. Cal. Dec. 13, 2021) (awarding prejudgment interest to Ponzi scheme victim under Cal. Civ. Code § 3287(a)), *report and recommendation adopted*, No. 20-CV-01903-JD, 2022 WL 19765 (N.D. Cal. Jan. 3, 2022); *Handley v. Melza*, No. 2:22-cv-00797-MCS-MAR, 2023 WL 5505899, at *2 (C.D. Cal. May 12, 2023) (awarding prejudgment interest to fraud victim under Cal. Civ. Code § 3288).

Umpqua does not deny that the statutory requirements for an award of prejudgment interest are met here. But it asks the Court to nevertheless find that class members are both collaterally and judicially estopped from recovering prejudgment interest because they supposedly advocated for the disallowance of prejudgment interest claims during PFI's bankruptcy proceedings. As explained in greater detail below, however, neither theory of estoppel applies here. Class members never took the position during bankruptcy proceedings that they were not entitled to an award of prejudgment interest from PFI. Moreover, they ultimately *agreed* with PFI on a joint bankruptcy plan that recognized their claims for prejudgment interest and provided for payment from the bankruptcy estate if funds allowed.

A. Class claims for prejudgment interest were not actually litigated and disapproved in the PFI bankruptcy; they were settled and included in the distribution plan.

Umpqua first argues that the class should be collaterally estopped from seeking prejudgment interest because class members' right to recover interest was previously adjudicated in PFI's bankruptcy proceedings. As the party advocating for collateral estoppel, Umpqua bears the burden of showing "with clarity and certainty" that the bankruptcy court entered a final judgment finding class members were not entitled to prejudgment interest under California Civil Code sections 3287-3288. *Hydranautics v. FilmTec Corp.,* 204 F.3d 880, 885 (9th Cir. 2000). The issue decided by the bankruptcy court's judgment must be identical to the one before this Court; the issue must have been actually litigated and decided; there must have been a full and fair opportunity for class members to litigate the issue in the bankruptcy court; and the issue must have been necessary to decide the merits of the bankruptcy proceeding. *Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019). "Any reasonable doubt as to what was decided by a prior judgment should be resolved against giving it collateral estoppel effect." *In re Berr*, 172 B.R. 299, 306 (B.A.P. 9th Cir. 1994).

Umpqua points out that the allowance or disallowance of a creditor claim in bankruptcy court can constitute a final judgment for purposes of collateral estoppel. *See In re Los Gatos Lodge, Inc*., 278 F.3d 890, 894 (9th Cir. 2002). And it contends "the only allowed claims in PFI's bankruptcy are 'Investor Restitution claims,' which were limited to [each investor's] 'total Outstanding Principal Amount minus the Prepetition Distribution." (Mot. at 26; *see also* Curtis Decl., Ex. 10, ¶ 1.84 (defining Investor Restitution Claim to include any right to a return of principal investment).) But that does not mean that investor claims for prejudgment interest were actually litigated by the parties and ultimately disallowed by the bankruptcy court. To the contrary, the parties settled investors' claims for prejudgment interest, agreeing that investors' claims for prejudgment interest *would* be paid from the bankruptcy estate if funds permitted, and the Court approved that settlement when it confirmed PFI's Bankruptcy Plan. (Curtis Decl., Ex. 10, ¶¶ 1.85, 2.11.1; Munroe Decl., Ex. 2 at 5, Sec. H.)

A settled claim is generally not considered to have been actually litigated and decided on the merits—even if it is subject to court approval or otherwise reduced to a judgment. *See In re Berr*, 172 B.R. 299, 306 (B.A.P. 9th Cir. 1994) ("The very purpose of a stipulated or consent judgment is to avoid litigation, so the requirement of actual litigation will always be missing"). A stipulated judgment is therefore afforded preclusive effects only when "it is clear that the parties intended the stipulation of settlement and judgment entered thereon to adjudicate once and for all the issues raised in that action." *United States v. Real Prop. Located at 22 Santa Barbara Drive*, 264 F.3d 860, 873 (9th Cir. 2001). The intent of the parties controls, and while parties to a settlement may wish to end their own dispute, they seldom wish for the result to be binding in other litigation involving third parties. *See* 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4443 (3d ed. 2023 Update) ("consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented"). Here, the parties' agreement specifically provides that "[t]he treatment of any and all Investor Claims under the Plan *is not intended to* and will not reduce, impair, satisfy, limit, or otherwise affect any rights that any Investor may have against any Person that is not a Released Party." (Curtis Decl., Ex. 10, ¶¶ 2.5, 2.6 (emphasis added).) Umpqua is not a Released Party and therefore cannot claim that the treatment of investor claims in the PFI bankruptcy was intended to preclude investors from pursuing similar claims in a separate action against Umpqua.

Even if the treatment of investor claims in the PFI bankruptcy were afforded preclusive effects in this case, that would not help Umpqua. The PFI bankruptcy plan recognizes investors' claims for prejudgment interest and agrees to pay them. (*Id.*, ¶¶ 1.85, 4.3.10(a)(ii)-(iii)).) Those claims are subordinated to claims for restitution, meaning that all investors must first be repaid their principal investments from the bankruptcy estate before PFI's limited assets can be used to pay investor claims for prejudgment interest. (*Id.*) Given the limited size of the bankruptcy estate, it is unlikely that investors will ever collect on the prejudgment interest claims that PFI agreed to pay. But PFI is wrong to suggest that investor claims for prejudgment interest were ever disallowed; those claims were simply required to be paid *after* other claims were paid first. And because investor claims for prejudgment interest were never disallowed in the PFI bankruptcy, they should not be disallowed in this action either.

B. The Unsecured Creditors Committee did not argue that net-winner investors are not entitled to recover prejudgment interest from PFI or any joint tortfeasor.

Umpqua next contends that class members should be judicially estopped from seeking an award of prejudgment interest because the Official Committee of Unsecured Creditors supposedly took the position in PFI's bankruptcy proceedings that "net winner" investors are not entitled to an award of prejudgment interest. The Unsecured Creditors Committee acted as a fiduciary for *all* unsecured creditors in the PFI bankruptcy—which included both net-winner investors and net-loser investors (some of whom are class members in this case). *See In re Pierce*, 237 B.R. 748, 758 (Bankr. E.D. Cal. 1999). And contrary to Umpqua's arguments, the Committee did not advocate on behalf of net-loser investors that net-winner investors should not recover prejudgment interest from the bankruptcy estate. As stated in the Bankruptcy Plan jointly proposed by the Debtors and the Unsecured Creditors Committee, *all* investors are entitled to recover prejudgment interest from PFI's bankruptcy estate. (Curtis Decl., Ex. 10, ¶ 1.85.) Because claims for prejudgment interest are subordinated to claims for restitution, none of the investors have collected interest from PFI. But they remain entitled to that interest and the Plan specifically stated that it was not intended to affect investors' rights to recover from third parties. (*Id.*, ¶¶ 2.5, 2.6.) A class of net-losing investors are seeking just that in this case. And at least two net-winning investors are also seeking recovery of pre-judgment interest through a state court action currently pending against Umpqua in Marin County. (*See* Munroe Decl., ¶ 4.) Umpqua tried, unsuccessfully, to dismiss that case on the grounds that Umpqua lacked the requisite knowledge for aiding-and-abetting liability. (*Id.*, Ex. 3.) But Umpqua notably did not argue that, as a result of the PFI bankruptcy, net-winner investors were not entitled to an award of prejudgment interest damages (the only damages a net-winning investor could potentially recover, as by definition, net winners have already recovered their principal investments).

In arguing that the Unsecured Creditors Committee took the position that net-winner investors are not entitled to recover prejudgment interest from PFI, Umpqua points to a motion to approve settlement procedures filed by the Debtors and joined by the Unsecured Creditors Committee. (Mot. at 28.) The motion itself explains that the Debtors were not seeking to disallow any creditor claims to prejudgment interest; they were seeking permission to settle claims that the Debtors had against net-winning investors for receipt of fraudulent transfers. (*See* Curtis Decl., Ex. 7.) The only thing that those fraudulent transfer claims have to do with interest is that the Ponzi operators falsely labeled some of their fraudulent transfers as monthly interest payments (while falsely labeling others as quarterly distributions). (*See id*. at 2.) Investors believed these payouts were legitimate returns on their investments generated by rental income, but as the motion explains, "in reality [they] were payments from subsequent principal investments made by other victims of the Debtors' fraud in furtherance of the Ponzi scheme and therefore potentially avoidable as 'actual' fraudulent transfer." (*Id.*) Under Ninth Circuit law, Ponzi scheme victims who receive fraudulent transfers are permitted to retain those payments as restitution. *Donell v. Kowell*, 533 F.3d 762, 772 (9th Cir. 2008). But if the amount of the fraudulent transfers exceeds the amount originally invested, the investors are considered net winners and may be required to return their "fictitious profits" to the bankruptcy estate. *Id.*

The Debtors' motion proposed that the bankruptcy court authorize it to offer net-winning investors uniform settlement proposals that would allow the net-winners to retain up to 50% of their fictitious profits. (Curtis Decl., Ex. 7 at 5.) And the Unsecured Creditors Committee, acting as fiduciaries for those net-winning investors, joined the motion to "ensure that all Net Winners are provided with the same settlement options." (*Id*. at 2.) None of the settlement procedures the Unsecured Creditors Committee asked the bankruptcy court to approve were inconsistent with investors' ultimate right to recover prejudgment interest from PFI or any joint tortfeasors. Where Debtors were able to reverse fraudulent transfers previously made to net-winner investors, whether through court-approved settlement offers or adversary actions, the returned funds were fictitious profits, not prejudgment interest. But even if those funds could be considered prejudgment interest, the Bankruptcy Plan permits net-winning investors to re-obtain those same funds (along with an additional award of pre-judgment interest) from PFI if sufficient funds become available to the bankruptcy estate.

(*Id.*, Ex. 10 at 1.85(ii).) The dispute over payments previously made to net-winner investors was never over their legal right to recover prejudgment interest; it was simply over the order in which investor claims against PFI should be paid and how the limited funds available to the bankruptcy estate should be distributed among Ponzi scheme victims as a whole. "Courts have long held that it is more equitable to attempt to distribute all recoverable assets among the defrauded investors who did not recover their initial investments rather than to allow the losses to rest where they fell." *Donell*, 533 F.3d at 776. That meant that PFI's limited funds should not be used to pay investor claims for prejudgment interest until PFI had first fully compensated investors on their restitution claims. But it did not mean that PFI and any joint tortfeasors were not ultimately liable for prejudgment interest, and nothing in the joint motion referenced by Umpqua indicates that the Unsecured Creditors Committee was attempting to derive an unfair advantage by arguing otherwise. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782–83 (9th Cir. 2001) (judicial estoppel applies when a party undermines the integrity of the court system by "gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position").

C. Class members were not permitted to make claims for postpetition interest in PFI's bankruptcy; those unasserted claims thus cannot have any preclusive effect.

The investor claims for prejudgment interest authorized in PFI's Bankruptcy Plan begin at the time of each investment and end at the filing of PFI's bankruptcy petition on July 26, 2020. (Curtis Decl., Ex. 10, ¶ 1.85; *see also* ¶ 6.5.) No claims for postpetition interest were submitted or allowed, and so Umpqua argues that the class should be collaterally estopped from seeking postpetition interest in this case as well. (Mot. at 29.) But the reason that claims for postpetition interest were not submitted or allowed in the PFI bankruptcy is that they are *never* allowed in bankruptcy proceedings (except in rare cases where the debtor is not actually insolvent). *In re PG&E Corp.*, 46 F.4th 1047, 1053 (9th Cir. 2022). As the Bankruptcy Appellate Panel for the Ninth Circuit has explained, a creditor is not required to submit a claim for postpetition interest or object to a plan provision that does not purport to pay postpetition interest "because any attempt to collect postpetition interest through the bankruptcy estate is precluded under [11 U.S.C.] § 502(b)(2)." *In re Pardee*, 218 B.R. 916, 922 & n.7 (B.A.P. 9th Cir. 1998).

Because class claims for postpetition interest were not litigated in the PFI bankruptcy, the defense of collateral estoppel is not available to Umpqua. *See Janjua*, 933 F.3d at 1065 (collateral estoppel requires actual litigation and a full and fair opportunity to litigate the identical issue). In addition, because PFI's debts were not discharged as part of the bankruptcy, class members have retained all claims for postpetition interest against PFI. (Munroe Decl., Ex. 2 at 27-28, Sec. O); *In re Artisan Woodworkers,* 225 B.R. 185, 190 (B.A.P. 9th Cir. 1998) (postpetition interest on nondischargeable debts survive bankruptcy); *see also In re Minor*, No. 21-55360, 2022 WL 1135391, at *2 (9th Cir. Apr. 18, 2022) (no collateral estoppel where settlement of bankruptcy claim did not resolve the identical issue raised in subsequent litigation—namely, the "*full* amount of … interest" that the creditor may pursue).

Finally, the provision in the Bankruptcy Plan stating that postpetition interest would not accrue or be paid is part of a settlement and stipulated judgment between the parties. And as discussed previously, the preclusive effects of a stipulated judgment is governed by the intent of the parties. Here, that intent was clearly stated: the treatment of any and all investor claims was not intended to reduce, impair, or otherwise affect any rights that investors have against third parties like Umpqua. (Curtis Decl., Ex. 10, ¶¶ 2.5, 2.6.)

III. Class members are not requesting an award of damages on pre-2007 investments.

Umpqua also requests summary judgment as to damages arising from investments that class members made with PFI prior to 2007. Umpqua claims there is no evidence of PFI's business operations before 2007, and while that is not quite true, it is true that much of those records are not in electronic form. As a result, a comprehensive forensic investigation was not conducted for the years prior to 2007, and the adversary judgment entered in PFI's bankruptcy found only that PFI's "businesses were all part of an overarching Ponzi scheme that began no later than January 1, 2007." (Munroe Decl., Ex. 4 at 5.)

Because it is unclear how long before January 1, 2007, PFI was operated as a Ponzi scheme, Plaintiffs do not intend to request damages resulting from pre-2007 investments. The parties recently exchanged expert reports, and the classwide damages calculated by Plaintiffs' damages expert do not include any money invested by class members with PFI prior to 2007. Had Umpqua conferred with

Plaintiffs prior to filing its motion, Plaintiffs could have informed them that it was not necessary. But as matters lie, Plaintiffs respectfully request that the Court deny Umpqua's motion for partial summary judgment on pre-2007 investments as moot.

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court deny Umpqua's request to apply foreign law to certain class claims, deny Umpqua's request to decertify those claims, deny Umpqua's request for partial summary judgment on class claims for prejudgment interest, and deny as moot Umpqua's request for partial summary judgment on class claims for damages on pre-2007 investments.

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