Amy M. Zeman (SBN 273100)
Linda P. Lam (SBN 301461)
E. Wynne Tidwell (SBN 348179)
GIBBS LAW GROUP LLP
1111 Broadway, Suite 2100
Oakland, California 94607
Telephone: (510) 350-9700
amz@classlawgroup.com
lpl@classlawgroup.com
ewt@classlawgroup.com

(Additional counsel on signature page)

Counsel for Plaintiffs and the Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETER A. BAGATELOS, et al. Plaintiffs, v. UMPQUA BANK, Defendant.	Case No. 3:23-cv-2759-RS (AGT) **OPPOSITION TO UMPQUA'S MOTION FOR SUMMARY JUDGMENT** 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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I. INTRODUCTION

Eighteen months ago, the Court reviewed the evidence assembled against Umpqua Bank in the *Camenisch* litigation and decided a jury could reasonably conclude Umpqua aided and abetted the fraud at the heart of this case: a Ponzi scheme perpetrated by Professional Financial Investors (PFI) that used investor money to inflate the returns paid to prior investors, cover up recurring shortages in the company's bank accounts, and personally benefit PFI's executives. At the same time, the Court certified a class of PFI investors who were fraudulently induced to invest with PFI through the company's three most common offerings: LLC memberships, second deeds of trust, and notes.

Following the Court's decision, Umpqua asked to postpone trial in *Camenisch* so that the class claims could be tried alongside the individual claims asserted by the TIC Plaintiffs in this action. The TIC Plaintiffs are eleven individuals who invested money through one of PFI's less common offerings: a tenancy in common (or TIC) investment. Umpqua said at the time that the class case and the TIC case "involve not just common questions of law and fact, but the exact same legal claims arising from the same alleged fraudulent Ponzi scheme." (7/13/23 Mot. to Consol. [Dkt. 20] at 2.) Umpqua now says, however, that the TIC Plaintiffs were not part of the PFI Ponzi scheme and that judgment should be entered in Umpqua's favor prior to the upcoming September trial.

Umpqua attempts to differentiate the TIC Plaintiffs from PFI's other investors by noting that the TIC investors generally deposited their initial investments directly into escrow and claims the TIC Plaintiffs received what they were promised: a recorded ownership interest in real estate. But the TIC Plaintiffs were not just promised a proportional interest in real property; they were promised and were induced to pay for a long-term investment product that would provide a steady stream of passive income due to the active management of a legitimate investment company with a track record of successfully selecting and managing real estate-backed investments. That is why the TIC Agreements gave Plaintiffs a much smaller interest in the TIC investment than if they were simply purchasing a fractional interest in real estate. Peter and Anne Bagatelos contributed 8.3% of the TIC funds used to purchase their TIC's real estate asset, but they only received a 4.8% interest because PFI received a 30% interest in exchange for its expertise and long-term management services, and because PFI credited its LLC with contributing capital reserves that did not actually exist. Had the TIC Plaintiffs known that PFI was not a legitimate investment company and instead created the appearance of success by using investor money to inflate the returns paid to other investors, to cover recurring shortfalls in its bank accounts, and to personally benefit PFI's executives, none of them would have signed the TIC Agreements and invested money with PFI—just like none of the *Camenisch* class members would have invested their money had they known the truth about how PFI used investor funds.

Umpqua also claims that the TIC Plaintiffs have not established they were damaged by PFI's fraud because California law only allows them to recover damages by reference to the fair market value of their TIC's real estate holding at the time of its acquisition. But the California Supreme Court has clearly stated that fraud victims like the TIC Plaintiffs are entitled to receive as damages the difference in value between *everything* with which they parted and *everything* they received, and that post-sale events can and should be taken into consideration when needed to fully compensate fraud victims for their actual out-of-pocket losses.

Lastly, Umpqua urges summary judgment because the TIC Plaintiffs assigned their claims to the PFI Trustee in bankruptcy. But in December 2021, the PFI Trustee disclaimed any interest in claims being pursued in the *Camenisch* action, and at the time of that disclaimer, the TIC Plaintiffs' aiding-and-abetting claims were being pursued as part of the *Camenisch* action. The TIC Plaintiffs accordingly request that the Court deny Umpqua's motion for summary judgment and permit them to continue prosecuting their claims under their own names.

II. SUMMARY OF FACTS

A. The Court previously found that a reasonable jury could conclude that Umpqua aided and abetted PFI's operation of a fraudulent Ponzi scheme.

PFI was a Marin County business that raised money by holding itself out as a legitimate real estate investment company and offering investors the opportunity to help fund the purchase of commercial and multi-unit residential property and earn returns from the rental income. (Zeman Decl., Ex. 1 (Wallach Dep.) at 35:13-36:2.) The company offered investors a variety of investment vehicles over its years of operation, including memberships in limited liability companies (LLC investments); notes secured by second deeds of trusts (DOT investments); unsecured notes or notes secured by limited partnership interests (Note investments); limited partnerships (LP investments); and tenancy in common investments (TIC investments). (*Id.*, Ex. 1 at 31:2-35:12; Ex. 2 (Alfaro Decl.), ¶ 35.)

After PFI was publicly exposed as a fraudulent operation and forced to enter bankruptcy, two of its investors filed a putative class action against Umpqua Bank—the owner of the Novato bank branch PFI allegedly used to defraud investors out of some $450 million. (*Camenisch* Dkt. 1.) The lawsuit was brought on behalf of all PFI investors and asserted claims against Umpqua for aiding and abetting fraud and for aiding and abetting breach of fiduciary duty. (*Id.*, ¶ 39.) Following two years of litigation, the *Camenisch* plaintiffs presented the evidence they had uncovered to the Court in connection with their motion for class certification and Umpqua's simultaneous motion for summary judgment. (*See Camenisch* Dkt. 160, 162.) The *Camenisch* plaintiffs argued that the evidence showed: (i) PFI was running a fraudulent Ponzi scheme where it used investor funds to pay other investors, cover recurring shortages in the company's bank accounts, and personally benefit PFI's executives; (ii) Umpqua knew PFI was using investor money for these illicit purposes; and (iii) Umpqua nonetheless chose to substantially assist PFI's operation of the Ponzi scheme in various ways. (*Camensich* Dkt. 162 at 2-14.) Umpqua, for its part, questioned whether PFI was actually running a Ponzi scheme and argued that, even if it was, the evidence did not show that Umpqua knew about the Ponzi scheme or that it substantially assisted PFI in harming investors. (*Camensich* Dkt. 121 at 1-2, 12-17).)

On December 16, 2022, the Court denied Umpqua's motion for summary judgment and certified the *Camenisch* plaintiffs' aiding-and-abetting claims to be tried on behalf of a class of over 1,200 PFI investors. (*Camenisch* Dkt. 144.) The Court found that a reasonable jury could conclude that Umpqua knew that PFI was engaged in a fraudulent scheme and substantially assisted in that scheme, including through direct participation by bank employees in some of the mechanics of the scheme. (*Id.* at 6, 13.) Trial of the *Camenisch* class's aiding-and-abetting claims is scheduled to begin on September 9. (*Camenisch* Dkt. 197.)

B. The TIC investments were marketed to Plaintiffs as long-term, passive investments that would be managed by an institutional real-estate investor with a strong track record.

This action was filed by 11 PFI investors whose TIC investments are not part of the certified *Camenisch* class. Initially, the *Camenisch* plaintiffs had proposed that the Court certify a class consisting of *all* investors regardless of the investment vehicle they were offered. (*Camenisch* Dkt. 1, ¶ 39; Dkt. 41 (Am. Compl.), ¶ 48.) But the class ultimately certified in *Camenisch* includes only the three most common investment vehicles: LLC, DOT, and Note investments. (*Camenisch* Dkt. 181, ¶ 6.) Some of the plaintiffs in this case invested through LLC, DOT, or Note investments and so are class members with respect to those investments. But they also invested money through one of PFI's less common offerings: a TIC investment.

TIC investments are increasingly popular options for investors looking to sell real estate and move the proceeds into a new investment—while also deferring taxes on any capital gains under the IRS's 1031 exchange rules. Unlike a more traditional tenancy in common, where family or friends may own property together and jointly manage that piece of real estate, modern TIC investments are typically passive investments and are therefore regulated as securities. *See S.E.C. v. TLC Invs. And Trade Co.*, 179 F. Supp. 2d 1149, 1156 (C.D. Cal. 2001). In fact, the passive nature of a TIC investment is one of its strongest selling points: investors can avoid the hassles and headaches of acquiring, renovating, maintaining, and managing real property. (*See* Zeman Decl., Ex. 3 (TIC investment marketing).) An investment manager does all that work for the investors and the investors benefit by collecting steady, low risk returns on their investment. TIC investments are also often marketed as providing retail investors with access to more exclusive, institutional-grade real estate, sophisticated asset management, and the professional expertise of an institutional investor with a track record of success. (*Id.*)

Under the TIC Agreements offered to Plaintiffs, PFI was the sponsoring investment manager. (*See* 9 TIC Pl. Decls., Ex. 1.) PFI had significant responsibilities at every step of the investment process, including:

1. *Organization*: forming the tenancy in common, securing and collecting capital from investors, and acquiring lending commitments. (*Id.* Ex. 1-B at 2.)
2. *Property Acquisition*: locating the property, conducting due diligence, negotiating the purchase, and making all necessary financial arrangements. (*Id.* at 2-3.)
3. *TIC management*: overseeing the business and affairs of the TIC investment, maintaining bank accounts, paying bills, distributing quarterly distributions to investors

from rental proceeds, managing major repair and capital improvement projects, complying with all applicable governmental regulations. (*Id.* at 3.)

4. *Property management*: managing the investment property, including by marketing leases, managing tenant relations, and collecting rents. (*Id.* at 3-4; Ex. 1-C at 3-4.)
5. *Accounting and Recordkeeping*: keeping complete accounting records, filing all necessary tax and business filings, preparing financial statements, and reporting to TIC investors. (*Id.*, Ex. 1-B at 4-5.)
6. *Sale of the property*: ascertaining the most advantageous time to sell the property, establishing the best selling price and financing terms, marketing the property, and negotiating the sale. (*Id.* at 6.)

As compensation for the expertise and asset management services that PFI was providing, the TIC Agreements gave PFI a 30-35% interest in the TIC investment. (*Id.* Ex. 1, ¶ 4, Ex. 1-B, ¶ 4.3.) This 30-35% interest was purely for managing the TIC investment and was separate from the 4-6% fee that PFI deducted from rents as a fee for providing traditional property management services. (*Id.*, Ex. 1-B at 8.)

After agreeing to invest in TIC investments offered by PFI, Umpqua states that the TIC Plaintiffs "acquired ownership interests in the buildings proportionate to their contributions to the purchase." (Mot. at 3.) But in fact, Plaintiffs' interest in the TIC investment's real-property asset was much smaller than that—owing both to the 30-35% interest that PFI was granted up front for managing the long-term investment and due to capital reserves that PFI had supposedly raised for the TIC investments. The actual ownership interests provided by the TIC Agreements appears in the far right column of the following table:

Investor	TIC Investment	% Equity at Closing	% on Deed	% by TIC Agreement
Daniel Levy	Marin Heights (LLC 41)	9.64%	7.9%	7.9%
Marian O'Dowd	Sycamore Creek (LLC 44)	13.15%	7.1%	7.1%
Jonathan Marmelzat	Hunt Plaza (LLC 47)	7.75%	5.54%	3.82%
Dennis & Susan Green	Hunt Plaza (LLC 47)	25.83%	18.18%	12.73%
Peter & Anne Bagatelos	Parc Marin (LLC 48)	8.33%	6.96%	4.82%
Michael Bagatelos	Parc Marin (LLC 48)	8.33%	6.96%	4.82%

Investor	TIC Investment	% Equity at Closing	% on Deed	% by TIC Agreement
Karen Bagatelos	Parc Marin (LLC 48)	8.33%	6.96%	4.82%
1320 Magnolia (Michaels)	Parc Marin (LLC 48)	8.33%	5.5%	4.82%
Carolyn Davis	Lincoln Redwoods (LLC 49)	9.97%	7.0%	4.76%

(Zeman Decl., ¶¶ 8-9.)

Taking a significantly smaller proportionate interest in the TIC investment in exchange for reserve capitalization and investment management services would make sense if the TIC investment were a long-term investment that was being strategically managed by an institutional real-estate investment manager with a strong track record. (*See* TIC Pl. Decls., ¶ 7.) And in fact, that is how the TIC investment was marketed to Plaintiffs and what the TIC Agreement contemplates: "The Tenants in Common agree[d] that the Property represents a long-term investment," and they also agreed that a principal purpose of the TIC Agreement was "to provide a means to insure the continued success of this common investment and the long-term stability of the ownership and management of the Property." (*Id.*, Ex. 1, ¶ 8.) PFI pledged to "expend substantial money, resources and professional staff time" to provide the promised investment management services, and accepted "the responsibility to provide these services as a multiple year commitment." (*Id.*, Ex. 1-B., ¶ 4.2; *see also* Ex. 1-B, ¶ 3.2 (describing long-term management commitments).) And because the TIC investment was intended to be a long-term managed investment, the TIC investors agreed to surrender certain property rights associated with traditional tenancies in common. For instance, the TIC investors waived the right to reside in the property, the right to make any decisions with respect to the business and affairs of the property, the right to incur expenses or enter into contracts on behalf of the tenancy in common, and the right to seek a partition of the property. (*Id.*, Ex. 1, ¶ 8; Ex. 2, ¶ 2; Ex. 3, ¶¶ 6, 12.) TIC investors would have the right to sell their interest, but the underlying real estate was only to be sold when PFI, consistent with its fiduciary obligations to investors, had ascertained the most advantageous time to sell the real estate asset and dissolve the TIC. (*Id.*, Ex. 1, ¶ 9; *id.*, Ex. 1-B, ¶ 3.2 at 5, ¶ 5.1; *see also id.*, Ex. 1-C, ¶ 3.2.)

C. Unbeknownst to Plaintiffs, PFI was a fraudulent operation that misappropriated investor money, failed to capitalize the TICs as promised, and misappropriated TIC funds.

Plaintiffs entered into the TIC Agreements because they believed that PFI was a legitimate investment company with a track record of successfully managing real estate-backed investments. (TIC

Pl. Decls., ¶ 7.) But the truth was that PFI was a fraudulent operation that misappropriated investor money to pay prior investors, cover recurring shortages in the company's bank accounts, and personally benefit PFI's executives. (*See generally* II.A, *supra*; *see also* Zeman Decl., Ex. 2 (Alfaro Decl.), ¶¶ 40(b)-(e), 54-55.) These illicit and undisclosed uses of investor money created the appearance that PFI's investments were generating much higher returns for investors than they really were, concealed the reality that the enterprise as a whole was insolvent and repeatedly unable to meet monthly expenses, and disguised the fact that PFI's executives were stealing from investors. Had the TIC Plaintiffs known any of these facts, they never would have entered into TIC Agreements. (TIC Pl. Decls., ¶ 8.)

The fact that PFI was operated as a fraudulent Ponzi scheme meant that the company was not a legitimate investment company with a track record of success that would justify an up-front management fee of 30-35% of the TIC investment. It also meant that the TIC investment had not been capitalized as promised. The additional capital that PFI represented it had raised to purchase the property consisted of funds misappropriated from other PFI investors. (Zeman Decl., ¶¶ 10-12; *see also* Ex. 2 (Alfaro Decl.), ¶¶ 57-59.) And much of the capital that PFI represented it had raised and placed in the TIC investments' reserve accounts did not actually exist. (*Id.*, ¶¶ 13-15.) The TIC investments were therefore undercapitalized and their real property assets were effectively purchased with stolen funds.

In managing the TIC investment, PFI used misappropriated funds when needed to operate the undercapitalized TIC properties. (*Id.*, ¶¶ 16-17.) And it misappropriated rental proceeds generated by TIC properties to pay prior investors, cover shortages in other investment accounts, and personally benefit PFI's executives. (*Id.*, ¶¶ 18-20.) This was how PFI generally operated with investor money and the TIC bank accounts were no different. A forensic accounting undertaken by PFI in the aftermath of its fraud confirmed that *every* individual property within the PFI enterprise periodically received transfers to its bank accounts from other PFI accounts consisting of commingled investor funds. (*Id.*, Ex. 2 (Alfaro Decl.), ¶ 40(c)(i)(1); Ex. 4 (Goldberg report), ¶¶ 51-53.) Likewise, *every* individual property within the PFI enterprise periodically transferred funds from its bank account to other PFI accounts, where it was further commingled with other investor funds. (*Id.*, Ex. 2, ¶ 40(c)(i)(2); Ex. 4, ¶¶ 51-53.)

D. The TIC Plaintiffs were damaged by PFI's fraud and have recovered only 42% of their principal losses through PFI's bankruptcy proceedings.

The over-capitalization and long-term investment management services the TIC investors were promised were supposed to generate stable quarterly distributions over a lengthy period of time. But because of PFI's fraud, Plaintiffs received only a small number of quarterly payments: Levy received only eight payments, O'Dowd received four, Marmelzat and the Greens received two, and the remaining five sets of TIC Plaintiffs received only a single quarterly distribution. (TIC Pl. Decls., ¶ 10.) Only four months after the final two TIC Agreements were signed, PFI was publicly exposed as a fraud and payments to *all* of PFI's investors were suspended indefinitely. (*Id.*) PFI was forced into bankruptcy where its real-estate holdings and other assets were liquidated and used to pay PFI's creditors and make partial restitution to PFI's investors.

Like the LLC, DOT, and Note investors, the TIC Plaintiffs recovered only 42% of their net loss from PFI in bankruptcy. As part of its Chapter 11 Bankruptcy Plan, PFI agreed to settle investor claims for fraud and breach of fiduciary duty, as well as any contract claims or other legal claims investors might have against PFI. (Curtis Decl., Ex. 56, ¶ 2.11.1.) PFI agreed it would be liable to each investor for the total amount invested with PFI—less any funds that PFI paid out to the investor prior to its bankruptcy—and also agreed to liability for prejudgment interest on each investor's principal investments if later-acquired funds permitted. (*Id.*, ¶¶ 1.84-1.85.) Because of the limited size of PFI's bankruptcy estate, the settlement of investor claims has to date resulted in PFI paying only 42% of each investor's net loss. (TIC Pl. Decls., ¶ 12, *see also* Zeman Decl., Ex. 4 (Goldberg report), ¶ 60.)

TIC investors could elect to participate in the investor settlement, but to do so they would need to surrender any remaining property interest they might have in the TIC's real estate asset. (Curtis Decl., Ex. 56 (Bankruptcy Plan), ¶¶ 1.80, 1.158, 2.7(b).) Most of the TIC investors—including all of the TIC Plaintiffs—chose to settle their claims "in order to avoid the delay, risk, and expense of litigation." (*Id.*, Exs. 35-37 at 3 (TIC Ballots); TIC Pl. Decls., ¶ 11.) For the TIC Plaintiffs, recovering certain tort damages from PFI on account of its fraud was a superior option to attempting to stand on the TIC Agreement and recover on any legitimate property interest they might have had under that agreement. (TIC Pl. Decls., ¶ 13.) PFI's fraud had diluted the proportion of the TIC property that

Plaintiffs could be entitled to under the TIC Agreement, and because PFI had stolen from other investors to capitalize and operate the TIC investment, the validity and value of the TIC Plaintiffs' property interests had been further compromised. (*Id.*) The TIC Plaintiffs accordingly decided that they would likely recover more from PFI by settling their claims, and that even if a larger recovery were possible by pursuing property interests through further litigation, the risk and expense of doing so was prohibitive. (*Id.*)

III. ARGUMENT

In moving for summary judgment on the TIC Plaintiffs' claims, Umpqua recognizes that this Court has already determined sufficient evidence exists for a reasonable jury to conclude that PFI was engaged in fraud and that Umpqua aided and abetted that fraud. It therefore limits its arguments to three issues specific to TIC investors: (i) whether PFI's fraudulent scheme constitutes fraud or breach of fiduciary duty with respect to the TIC investors, who Umpqua says did not entrust money or otherwise invest with PFI; (ii) whether the TIC Plaintiffs' alleged damages are legally cognizable under the statutory provision that Umpqua says governs damages when a real estate purchase is involved; and (iii) whether the TIC Plaintiffs' claims were assigned to the PFI Trust during PFI's bankruptcy proceedings. The TIC Plaintiffs respectfully submit that the answer to these questions is that—just like the *Camenisch* plaintiffs—the TIC Plaintiffs were fraudulently induced to invest money they would not have invested had they known the truth; the TIC Plaintiffs are therefore entitled to recover the amounts they were fraudulently induced to invest, less any money that has been repaid by PFI; and the TIC Plaintiffs retained ownership of their aiding-and-abetting claims against Umpqua because the assignment of those claims was disclaimed by the PFI Trustee.

A. A reasonable jury could conclude PFI fraudulently induced the TIC Plaintiffs to invest in TIC investments and breached its fiduciary obligations to TIC investors.

Umpqua first argues that the TIC Plaintiffs are different than other investors because Plaintiffs' investments "were decidedly *not* part of any 'Ponzi scheme.'" (Mot. at 12.) While other investors may have been defrauded by PFI, Umpqua contends the TIC Plaintiffs "received precisely what they had been promised." (*Id.*) Umpqua previously made the same argument with respect to LLC and DOT investors—saying that they too were offered a proportional ownership in a real estate investment and received exactly that. (*See Camenisch* Dkt. 94-1 at 1 ("many categories of PFI investors received exactly what they were promised"); Dkt. 146 at 37 (LLC investors "acquire[d] a proportional ownership interest consistent with what they were promised").) The Court rejected that notion, noting that "if, in fact, the plaintiffs could establish the Ponzi scheme nature of this, it impacted all of the investment vehicles." (*Camenisch* Dkt. 146 (9/29/22 Hr'g Tr.) at 37.) The same is true for the TIC investments; like all PFI investors, they were impacted when the house of cards that was PFI came falling down. In fact, it is precisely that common impact that led Umpqua to push for the rapid acceleration of the TIC Plaintiffs' claims so they could be tried alongside class claims brought by other investors: the two sets of investors' claims "involve not just common questions of law and fact, but the exact same legal claims arising from the same alleged fraudulent Ponzi scheme." (7/13/23 Mot. to Consol. [Dkt. 20] at 2; *see also id.* at 3 (Defendant "believes it to be wasteful to ask two separate juries to resolve overlapping questions about if and when PFI and PISF were frauds").)

1. The fraudulent conduct at issue is PFI's use of investor money to pay prior investors, cover recurring shortages, and personally enrich PFI's executives.

In arguing that the TIC Plaintiffs were not impacted by the PFI Ponzi scheme, Umpqua sets forth an overly restrictive definition of a Ponzi scheme. It suggests that a Ponzi scheme can exist only when the perpetrators' business ventures are wholly illusory. (*See* Mot at 11-12.) But in fact, "[a] 'Ponzi' scheme is *any sort* of fraudulent arrangement that uses later acquired funds or products to pay off previous investors." *In re Bullion Rsrv. of N. Am.*, 836 F.2d 1214, 1219, n. 8 (9th Cir. 1988) (emphasis added); *see also Ponzi scheme*, *Black's Law Dictionary* (11th ed. 2019) ("A fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments"); *S.E.C.,* 179 F. Supp. 2d at 1150 (discussing "nationwide real estate Ponzi scheme"). As Plaintiffs' expert in Ponzi schemes explains in his recent report, some Ponzi schemes are wholly illusory, but most include some level of legitimate revenue-generating activity to help disguise the fraud. (Zeman Decl., Ex. 4 (Goldberg report), ¶ 29.)

Whether a given fraudulent scheme is also a "Ponzi scheme" can make a difference when a litigant is seeking to void a fraudulent conveyance (as occurred in PFI's bankruptcy proceedings). *See*

In re Slatkin, 525 F.3d 805, 814 (9th Cir. 2008) (existence of Ponzi scheme establishes actual intent to hinder, delay, or defraud creditors under fraudulent transfer statutes). But here, the legal claims for which Plaintiffs are seeking to hold Umpqua secondarily liable are not claims to void fraudulent conveyances—they are claims for fraud and breach of fiduciary duty. So whether labeled as the "PFI Ponzi scheme," or more generally as the "PFI fraudulent scheme," the specific conduct at issue in this case is PFI's practice of using investor money to pay prior investors, personally enrich Ken Casey and Lewis Wallach, and cover recurring shortages of funds. (*See* Compl. [Dkt. 1], ¶¶ 23, 96, 100.) These practices are what both the Class Plaintiffs and the TIC Plaintiffs claim make PFI liable for fraudulent concealment as well as for breach of fiduciary duty—whether those practices are referred to as a Ponzi scheme or simply as a fraudulent scheme.

2. PFI's fraudulent conduct induced the TIC Plaintiffs to invest; had they known the truth about PFI, Plaintiffs never would have invested.

When PFI failed to disclose to prospective investors that it uses investor money to inflate the returns it pays to other investors, to line its executives' pockets, and to cover recurring shortages associated with other investments, PFI withheld material information and caused TIC investors to invest with PFI when they otherwise would not have—just as it caused LLC, DOT, and Note investors to invest with PFI when they otherwise would not have. (*See* Zeman Decl., Ex. 1 (Wallach Dep.) at 57:12-60:21, 65:3-23, 69:3-15, 165:14-166:8 (admitting PFI concealed from all investors how the company was using investor money).)

Umpqua attempts to differentiate the TIC Plaintiffs from other investors by asserting that the TIC Plaintiffs did not "invest with PFI." (Mot. at 1, 12.) But that is exactly what the TIC Plaintiffs did. They signed a TIC Agreement that gave them a percentage interest in all investment proceeds—with the remaining percentage going to PFI and to an LLC managed by PFI. (*See* TIC Pl. Decls., ¶ 6, Ex. 1.) PFI obtained its percentage interest because it was responsible for organizing the investment, acquiring the investment property, operating the TIC investment, managing the property, keeping accounting and tax records, and selling the property when most advantageous for the investors. (*See* II.B, *supra.*) Under these circumstances, a TIC agreement like the one signed by Plaintiffs is considered an investment contract and an unregistered security. *See San Francisco Residence Club, Inc. v. Amado,* No. C 09-2054 RS, 2010 WL 2300987, at *4 (N.D. Cal. June 4, 2010). Plaintiffs were therefore not only literally investing *with PFI*, since the TIC Agreements gave PFI a 30% interest in the investment's proceeds, Plaintiffs were also investing *in PFI*, since the investment's continued success depended on PFI's stability and expertise.

Umpqua also contends that each of the TIC Plaintiffs received what they were promised: ownership interests in real estate. (Mot. at 4.) But the TIC Plaintiffs were not simply acquiring real estate; they were investing in a TIC investment that was dependent on both the underlying real estate and on PFI's management expertise to generate steady quarterly distributions over a lengthy period of time. That is why Plaintiffs agreed to a percentage interest in the TIC investment that was significantly smaller than the percentage they contributed to the underlying property's purchase price. (*See* TIC Pl. Decls., ¶ 7.) And because of PFI's fraudulent concealment, the TIC Plaintiffs did *not* receive the TIC investment they thought they were getting. That TIC investment was premised on a stable investment manager with a successful track record managing real estate-backed investments. What Plaintiffs got instead was a TIC investment that was organized and managed by a criminal enterprise that had made money by defrauding other investors rather than the savvy management of investment real estate. The capitalization of the TIC was fraudulent, as much of it was never delivered by PFI as promised or was funded by money that PFI had misappropriated from other investors. (*See* II.C, *supra*.) And portions of the revenue generated by TIC investments were in turn misappropriated by PFI and used to pay other investors or cover recurring shortages in its other investment accounts. (*Id.*)

Had the TIC Plaintiffs known that PFI was not a legitimate company and was instead running a fraudulent enterprise that regularly used new investor money to inflate the returns paid to existing investors, to cover recurring shortages in its investment accounts, and to fund transfers to PFI's executives, none of the TIC Plaintiffs ever would have invested in a PFI TIC investment. (TIC Pl. Decls., ¶ 8.) In fact, no reasonable investor would have put money into an investment managed by PFI under these circumstances. The information PFI concealed from investors altered the fundamental nature of its investment offerings, the lawfulness of its operations, and the returns investors could expect. Nobody invested with PFI after the truth about its operations was publicly exposed. And had the truth been publicly known earlier, nobody would have invested then either. It would have made no sense to give money to a criminal enterprise that was misappropriating its investors' money—regardless of the investment vehicle that PFI was offering. *See Gonzales v. Lloyds TSB Bank*, No. CV 06-1433-VBF(JTLX), 2007 WL 9711433, at *8–9 (C.D. Cal. May 2, 2007) (investors' uniform reliance on a companies' fraudulent omissions can be presumed when the "fundamental nature" of the company's operations was not disclosed); *Audet v. Fraser*, 332 F.R.D. 53, 81 (D. Conn. 2019) ("no reasonable investor would have purchased [an investment product] if the Companies disclosed the fact they were being sold as part of a Ponzi scheme").

The evidence before the Court shows that all the elements of fraudulent concealment are met. A reasonable jury could find that PFI intentionally failed to disclose how it uses investor money; that PFI intended to deceive the TIC Plaintiffs by concealing that information; and that the TIC Plaintiffs never would have put their money in TIC investments managed by PFI had they known the truth. *See Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 248 (2011) (setting forth elements of claim for fraudulent concealment). Summary judgment is therefore inappropriate on the TIC Plaintiffs' claims against PFI for fraud. And because the Court has already found that sufficient evidence exists for a reasonable jury to conclude that Umpqua knew how PFI was using investor money and substantially assisted PFI in misusing investor funds, summary judgment is also inappropriate on the TIC Plaintiffs' claims against Umpqua for aiding and abetting PFI's fraud.

3. PFI's fraudulent conduct also constitutes breach of the fiduciary duties it owed to TIC investors.

A jury could also reasonably conclude that PFI's fraudulent conduct constituted a breach of its fiduciary duties. As the manager of the TIC investment vehicle, PFI had a fiduciary obligation to act with the utmost good faith in the best interests of its investors and to make a full accounting to investors. (*See* TIC Pl. Decl, Ex. 1-B, ¶ 5.1, Ex. 1-C, ¶ 3.2 (recognizing fiduciary duties in TIC Agreements).) PFI breached those obligations when it failed to inform TIC investors that the capitalization it was charged with securing for the TIC investment included funds misappropriated from PFI's other investors and was less than represented. (*See* II.C, *supra*.) PFI further breached its fiduciary obligations by using funds from its other investors to operate the TIC investment and by misappropriating proceeds from the TIC investment. (*Id.*)

Umpqua claims that PFI did not commingle the TIC investors' funds and misappropriate their money—that it only commingled and misappropriated other PFI investors' money. (Mot. at 14.) But a review of the Umpqua bank accounts where PFI was supposed to keep the TIC investors' money shows that PFI deposited commingled money into those accounts when needed and transferred proceeds generated by the TIC investment from those accounts to investor clearing accounts—where the funds were used as needed to pay PFI's other investors, to cover recurring shortages in PFI's other investment accounts, and to personally benefit PFI's executives. (Zeman Decl., ¶¶ 16-20; Ex. 2 (Alfaro Decl.), ¶ 40(c)(i)(1)-(2); Ex. 4 (Goldberg report), ¶¶ 51-53.) Certain funds deposited directly into escrow by TIC investors may not have been misappropriated, but money generated by the TIC investment and rightfully belonging to the TIC investors was indeed misappropriated. And the funds that TIC investors deposited directly into escrow were not used as expected because the money was combined with misappropriated funds to purchase real estate under conditions far different than what had been represented to the TIC investors.

B. A reasonable jury could award the TIC Plaintiffs the amounts they invested with a fraudulent operation as damages.

Umpqua's second basis for seeking summary judgment against the TIC Investors concerns their ability to prove damages. (Mot. at 15-18.) Even if the TIC Investors can otherwise establish liability against PFI for fraudulent concealment and breach of fiduciary duty, Umpqua contends the TIC Plaintiffs cannot show they were harmed. Umpqua says this even though PFI's fraud led the TIC Plaintiffs to invest in TIC investments they otherwise would not have invested in, and even though the TIC investors ended up losing the majority of their principal investment—just like most of the Class Plaintiffs. (*See* TIC Pl. Decl., ¶ 9-10, 12.)

The TIC investments were supposed to provide steady quarterly distributions under the management of a legitimate investment company with a track record of success. And the underlying real estate that was intended to be a long-term asset that was to be sold only when the investment manager determined the market conditions made it advantageous for the investors to sell. (*See* II.B, *supra*.) But after the TIC Plaintiffs received only a small number of quarterly distributions, PFI was publicly exposed as a fraudulent operation and further quarterly distributions were frozen indefinitely.

The TIC Plaintiffs did not receive any further investment proceeds, the TIC investment's long-term asset was liquidated at an inopportune time, and the TIC Plaintiffs had no choice but to pursue recourse against PFI in bankruptcy court. (*See* II.D, *supra*.) PFI ultimately agreed to settle the TIC Plaintiffs' claims in bankruptcy court. But that settlement amounted to only about 42% of the TIC Plaintiffs' principal investment, meaning that the TIC Plaintiffs still have lost the majority of the money they were fraudulently induced to invest in a PFI TIC investment, as well as the time-value of that money. (TIC Pl. Decls., ¶ 12.) The TIC Plaintiffs are now seeking recovery of their remaining damages from Umpqua—who as an alleged aider-and-abettor is potentially liable for all uncompensated damages caused by PFI's fraud and breaches of fiduciary duty. (Zeman Decl., Ex. 5 (Salah damages report).)

Umpqua contends, however, that under Civil Code section 3343, the only way the TIC Plaintiffs can establish they suffered damage is by showing that the real estate purchased in connection with the TIC Agreements was overvalued as it was purchased. (Mot. at 17-18.) It points to two Court of Appeal decisions and says that in the absence of a pronouncement by the California Supreme Court, this Court is obliged to follow their lead. (*Id*. at 16.) But the California Supreme Court *has* spoken on this issue and explained that section 3343 indicates a "plaintiff should receive as damages the difference in value between *everything* with which he parted and *everything* he received." *Garrett v. Perry*, 53 Cal. 2d 178, 184 (1959) (emphasis added). That is what the TIC Plaintiffs are proposing here: they have submitted an expert report that calculates the difference in value between everything with which they parted when they entered into the TIC Agreement and everything they received in the aftermath of PFI's exposure as a fraudulent operation. (*See* Zeman Decl., Ex. 5 (Salah damages report), ¶ 36.) Whether damages are awarded under California Civil Code section 3343 (which provides for an award of out-of-pocket damages to those defrauded in the purchase of property) or section 3333 (which provides for an award of damages that fully compensates injured parties for the loss sustained), Plaintiffs' measure of damages is appropriate and could reasonably be awarded by the jury following trial. *See Strebel v. Brenlar Invs., Inc.*, 135 Cal. App. 4th 740, 750 (2006) (finding that "[a]lthough of little consequence," section 3333 and not section 3343 applied to claim involving fraud perpetrated by a fiduciary).

Umpqua's contention that the difference in value between what the TIC Plaintiffs gave and received can only be calculated at the time of purchase was categorically rejected by the California

Supreme Court in *Garrett*: section 3343 "contains nothing to show that the difference must be calculated solely on the basis of facts existing at the time [a] contract was made or performed"; instead, section 3343 "must be applied realistically so as to give the defrauded person his actual out-of-pocket loss, and where necessary to reach that result, the court must consider subsequent circumstances." *Garrett*, 53 Cal. 2d at 184. That means, for instance, that when a fraud victim purchases real estate at fair market value but later loses any interest in the property due to a foreclosure or other supervening event associated with the fraud, the finder of fact can conclude that the fraud victim received nothing of value in the transaction. *Garrett*, 53 Cal. 2d at 184 (citing *Feckenscher v. Gamble*, 12 Cal. 2d 482, 500 (1938)); *see also Bowser v. Ford Motor Co.,* 78 Cal. App. 5th 587, 623 (2022) (same).

Here, the principle espoused in *Garrett* means that a jury would be justified in awarding the TIC Plaintiffs the full difference between the price they paid for their TIC investment and the limited amount the received in return from PFI and from PFI's subsequent bankruptcy proceedings. *See OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.,* 157 Cal. App. 4th 835, 876 (2007) (affirming jury award of nearly the entire amount defrauded investors had paid for notes in a company that subsequently went bankrupt). Even if the real estate that PFI acquired in connection with the TIC investments was purchased at fair market value, the TIC Plaintiffs still lost a great deal due to PFI's fraud and breaches of fiduciary duty—which caused the TIC Plaintiffs to surrender a sizable percentage of their real estate interest under the terms of the TIC Agreement, required that a long-term real estate investment be sold immediately and at an inopportune time, and that led to bankruptcy proceedings where the TIC Plaintiffs surrendered any interests they still had in the real estate to secure a partial return of their principal investment from PFI. *See Strebel*, 135 Cal. App. 4th at 750 ("measuring Strebel's damages at the time of the sale would provide no compensation for the most significant portion of the loss he suffered as a result of defendants' fraud").

Umpqua suggests that the TIC Plaintiffs should have recovered more from the bankruptcy proceedings, but that is akin to blaming the fraud victims in *Feckenscher* and *Garrett* for failing to make a better deal for themselves prior to or during foreclosure proceedings, or blaming the fraud victims in *OCM Principal* for failing to obtain more for their promissory notes in bankruptcy. The TIC Plaintiffs were placed in a bad situation precisely because of the fraud, and Umpqua should not be permitted to complain about the outcome—particularly when the outcome is a settlement with a joint tortfeasor. Umpqua is entitled to an offset of the amounts that PFI paid to the TIC Plaintiffs in settlement of their fraud claims, but no more. *See* Cal. Civ. Proc. Code § 877(a). Plaintiffs' damages methodology takes into account all amounts paid by PFI to the TIC Plaintiffs—both before and after PFI's fraud was exposed and the company entered bankruptcy—and as such, it is a valid measure of damages under *Garrett* and can reasonably support a jury verdict of the full amount requested.

C. The TIC Plaintiffs can pursue their own legal claims because the PFI Trustee disclaimed any assignment of claims asserted in *Camenisch*—which at the time included TIC claims.

Umpqua's final argument is that the TIC Plaintiffs lack standing because their legal claims were assigned to the PFI Trust and were not subsequently disclaimed by the PFI Trustee. (Mot. at 18-21.) Under the terms of the PFI's Chapter 11 Bankruptcy Plan, certain investor claims against third parties could potentially be contributed to the PFI Trust "unless later disclaimed by the PFI Trustee (in his sole discretion) within fourteen days of the Effective Date by written notice to the Board of Advisors." (Curtis Decl., Ex. 56, ¶ 4.3.13; *see also* ¶¶ 1.39, 1.62.) The Plan's Effective Date was December 15, 2021, and eight days later, the PFI Trustee wrote to the Board of Advisors to advise them of his "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." (Curtis Decl., Ex. 51.)

Umpqua acknowledges that the PFI Trustee's written notice was effective to disclaim the claims asserted in *Camenisch*, but argues that because the PFI Trustee only mentions the *Camenisch* case, "there was no such written disclaimer of the *Bagatelos* Plaintiffs' tenancy-in-common claims." (Mot. at 19-20.) The flaw in Umpqua's logic is that the *Bagatelos* Plaintiffs' tenancy-in-common claims were being pursued in *Camenisch* at the time. In December 2021, *Camenisch* involved aiding-and-abetting claims against Umpqua Bank on behalf of "[a]ll persons who invested money with [PFI]"—a definition that includes TIC Plaintiffs. (*Camenisch* Dkt. 41, ¶ 48.) It was not until February 2022 that the *Camenisch* plaintiffs proposed that their aiding-and-abetting claims should proceed only on behalf of LLC, DOT, and Note investors. (*See Camenisch* Dkt. 79-1 at 12-13.) That is why the *Bagatelos*

Plaintiffs then elected to re-assert their aiding-and-abetting claims through a separately filed individual action.

The PFI Trustee's written notice of his disclaimer refers to "all Contributed Claims that are pursued in the lawsuit … styled as [*Camenisch*]," and because the TIC Plaintiffs' aiding-and-abetting claims were being pursued in *Camenisch* at that time, the PFI Trustee's written notice was sufficient to disclaim those claims as well. The fact that those same claims were also later asserted as part of a separate action entitled *Bagatelos* does not change the identity of the claims that the PFI Trustee disclaimed in December 2021. (*See* 7/13/23 Mot. to Consol. [Dkt. 20] at 2 ("*Camenisch* and *Bagatelos* involve … the same exact legal claims arising from the same alleged fraudulent Ponzi scheme.").) When asked to testify about his disclaimer, the PFI Trustee agreed, stating that he was disclaiming "[a]ny claims that are pursued in the [*Camenisch*] lawsuit … inclusive of everyone." (Zeman Decl., Ex. 6 (Goldberg Dep.) at 141:4-19.)

The PFI Trustee's disclaimer of the aiding-and-abetting claims pursued in *Camenisch*, which at the time included TIC claims, means that the TIC Plaintiffs retain standing to pursue their own legal claims. If the Court were to disagree, however, the remedy would not be summary judgment in Umpqua's favor. Rule 17 of the Rules of Federal Civil Procedure provides the Court may not dismiss an action for failure to proceed in the name of the real party in interest until a reasonable time has been allowed the real party in interest to ratify, join, or be substituted in the action. Fed. R. Civ. P. 17(a)(3). Rule 17 generally requires that a cause of action be prosecuted in the name of the real party in interest, but even if the Court determines that is the PFI Trustee, that would "not preclude the trustee from ratifying plaintiffs' continued pursuit of their cause of action. *Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 448 (N.D. Cal. 2012). The purpose of Rule 17 is "simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." *Id.* at 447 (*quoting U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1039 (9th Cir. 1986). And here the PFI Trustee has testified that "it was not my intent to pursue Umpqua with any assignment of claims." (Zeman Decl., Ex. 6 (Goldberg Dep.) at 141:18-19.) Accordingly, even if the PFI Trustee were the real party in interest, he should be given an opportunity to fulfill his intent and officially ratify the continued prosecution of this action in the name of the TIC Plaintiffs.

IV. CONCLUSION

For the reasons stated above, the TIC Plaintiffs respectfully request that the Court deny Umpqua's motion for summary judgment and permit the TIC Plaintiffs' claims to proceed to trial alongside the Class Plaintiffs' claims on September 9, 2024, as scheduled.

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By: */s/ Amy M. Zeman*

Amy M. Zeman (SBN 273100)
Linda P. Lam (SBN 301461)
E. Wynne Tidwell (SBN 348179)
GIBBS LAW GROUP LLP
1111 Broadway, Suite 2100
Oakland, California 94607
Telephone: (510) 350-9700
amz@classlawgroup.com
lpl@classlawgroup.com
ewt@classlawgroup.com

Scott L. Silver (*pro hac vice*)
Peter M. Spett (*pro hac vice*)
Ryan A. Schwamm (*pro hac vice*)
SILVER LAW GROUP
11780 W. Sample Road
Coral Springs, FL 33065
Telephone: 954-755-4799
ssilver@silverlaw.com
pspett@silverlaw.com
rschwamm@silverlaw.com

Geoffrey A. Munroe (SBN 228590)
LAW OFFICE OF
GEOFFREY A. MUNROE
1435 Broad Street
San Luis Obispo, CA 93401
Telephone: 925-788-8493
gam@munroe-law.com

Counsel for Plaintiffs and the Camenisch Class