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UMPQUA BANK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHELA CAMENISCH, et al.,

Plaintiffs,

vs.

UMPQUA BANK,

Defendant.

Case No. 3:20-CV-05905-RGS

Judge Richard G. Seeborg

REPLY IN SUPPORT OF COMBINED MOTION TO DETERMINE APPLICABLE LAW AND PARTIALLY DECERTIFY CLASS AND FOR PARTIAL SUMMARY JUDGMENT

Trial Date: September 9, 2024

Date: June 20, 2024
Time: 1:30 pm
Place: Courtroom 3

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I. INTRODUCTION

In response to Umpqua's combined motion to determine applicable law and to partially decertify class and for partial summary judgment, Plaintiffs adopt a "nothing to see here" refrain. They urge the Court to disregard the differences between applicable law of the 48 different jurisdictions implicated by their multi-jurisdictional class and to overlook the way their claims were calculated in PFI's bankruptcy case. Controlling law, however, requires that the Court undertake a choice-of-law analysis before there can be a class-wide trial. Controlling law also requires that the Court account for how class member's claims were calculated in PFI's bankruptcy case and prevent class members from recovering prejudgment interest on their *derivative* against Umpqua that was not awarded on class members' claims *direct* against PFI.

First, while Plaintiffs suggest that the Court can simply decline to undertake a choice-of-law analysis based upon some perceived notion of how it is Umpqua's "burden" to prove different jurisdictions' laws apply, that argument is plainly contrary to case law. Under *Mazza v. American Honda Motor Company*, 666 F.3d 581 (9th Cir. 2012) and *Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906 (2001), choice-of-law issues *must be* resolved before there can be a class-wide trial. *See, e.g., Wash. Mut.*, 24 Cal. 4th at 924 ("[T]he court cannot accept 'on faith' an assertion that variations in state laws relevant to the case do not exist or are insignificant; rather, the party seeking certification must affirmatively demonstrate the accuracy of the assertion"). And, after conducting a choice-of-law analysis, the Court should find that the differences in applicable law among the myriad of jurisdictions implicated by this case require the Court to decertify the class as to non-California investors.

Second, controlling law also mandates that the Court enter partial summary judgment precluding Plaintiffs from recovering prejudgment interest from Umpqua given such interest was not allowed in PFI's bankruptcy case. Plaintiffs do not dispute the legal proposition that, because this is an aiding and abetting case in which Umpqua may only be held secondarily liable for *PFI's tortious conduct*, they cannot recover more from Umpqua than they are entitled to recover from PFI. That is because, in aiding and abetting cases, "the damages determined against the primary tortfeasor in the . . . judgment would be applicable as an upper limit to the one secondarily liable." *Ponce v. Tractor*

Supply Co., 29 Cal. App. 3d 500, 505 (1972). Plaintiffs nonetheless attempt to argue that they are not bound by the bankruptcy court's rulings limiting them to the principal amount of their investments and precluding them from recovering prejudgment interest because PFI's bankruptcy plan would have given then subordinated claims that included interest had there been sufficient funds in the PFI trust to pay all allowed restitution claims in true. Umpqua agrees that is, in fact, what PFI's bankruptcy plan says—but that *never happened* and those hypothetical subordinated claims were *never calculated or allowed*. Further, in that circumstance class members would not have been able to claw back payments from so-called "net winners" (something that indisputably happened) because, in such a circumstance, PFI's interest payments would not have been fictious interest that class members sought to recoup. Given it is undisputed the hypothetical subordinated investor claims were never calculated or allowed—and class members did, in fact, claw back interest payments from their co-investors who were "net winners" by calling the interest they received fraudulent transfers—class members are precluded from recovering prejudgment interest from Umpqua.

Finally, although Plaintiffs concede that they have no evidence that Umpqua aided and abetted fraud as to any pre-2007 investments and thus that they are "not requesting an award of damages on pre-2007" investments, Plaintiffs downplay the significance of that concession and the judgment that must be rendered as a result. The certified class includes investors who had only pre-2007 investments. Thus, as Plaintiffs' damages expert conceded as his deposition, there are now class members who have no damages and thus have lost their lawsuit against Umpqua. Umpqua is entitled to judgment as to these class members and partial summary judgment as to any class members who have both pre-2007 and post-2007 investments. Because a class has been certified, Plaintiffs cannot just decline to "request[] an award of damages" as to certain class members or certain investments. That is not how class litigation works. Plaintiffs' approach to this issue also presents serious concerns with how zealously these class representatives (who invested late in the alleged scheme), and class counsel, will represent the interests of earlier investors—some of whom they just abandoned.

II. LEGAL ARGUMENT

A. Foreign Law Controls the Aiding and Abetting Claims of Non-Resident Class Members

1. Choice-of-Law Issues Must be Resolved Before There is a Class-Wide Trial in This Case

Plaintiffs begin their opposition by again arguing that it is not their burden to address the choice-of-law concerns presented by their multi-jurisdictional class. As before, they invite the Court to decline to conduct a choice-of-law analysis based upon their view that it is Umpqua's burden to show that foreign law, rather than California law, should apply. Opp. 2-3. In support of this proposition, Plaintiffs cite *Mazza* (Opp. 3), which recognizes that California's choice-of-law rules apply in diversity cases brought in California (*Mazza*, 666 F.3d at 590-91), and cites the California Supreme Court's decision in *Washington Mutual* as supplying the controlling legal framework under California's choice-of-law principles. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590-91 (citing *Wash. Mut.*, 24 Cal. 4th at 921), *overruled in part on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, n.32 (9th Cir. 2022) (en banc).

The problem with this argument is the California Supreme Court's *Washington Mutual* decision states the exact opposite of what Plaintiffs argue. In no uncertain terms, *Washington Mutual* establishes that "a class action proponent *must credibly demonstrate*, through a thorough analysis of the applicable state laws, that state law variations will not swamp common issues and defeat predominance." *Wash. Mut.*, 24 Cal. 4th at 926 (emphasis added). It further "reject[s]" the argument that a defendant is required to "show[] the existence of outcome-determinative differences among applicable state laws" to defeat certification. *Id.* Based upon that allocation of burdens, *Washington Mutual* reversed an erroneous grant of certification of a nationwide class because the certification order was "premised upon the faulty legal assumption that choice-of-law issues need not be resolved as part of the certification process." *Id.* at 927. In so doing, the high court reiterated that "the *burden rests upon the party seeking nationwide class certification* to identify any variations of applicable state law and to meaningfully demonstrate how a trial on the class causes of action can be conducted fairly and efficiently in light of those variations." *Id.* at 928 (emphasis added). Considering *Mazza* and *Washington Mutual*, Plaintiffs' burden argument plainly lacks merit and there can be no

legitimate dispute that choice-of-law issues must be resolved before this case can be tried on a class-wide basis.

In any event, even assuming, *arguendo*, that the burden rests on Umpqua as Plaintiffs argue, Umpqua has carried its burden by demonstrating the precise type of dispositive differences between applicable state law that would necessitate underlying a choice-of-law analysis. *Cf. Wash. Mut.*, 24 Cal. 4th at 926 (rejecting argument "defendant should not be able to defeat nationwide class certification without affirmatively showing the existence of outcome-determinative differences among applicable state laws"). Indeed, Umpqua has submitted no less than 12 pages of briefing analyzing the applicable law of each of the jurisdictions implicated and explaining how and why those differences are material to the issues at hand. Beyond that, Umpqua has also conducted a thorough analysis under the remaining parts of California's governmental interest analysis and explained why, under controlling case law, the law of the "place of the wrong" (i.e., where class members reside and were defrauded) should control,[1] as those states have a superior interest in the application of their laws and those state's interests will be most substantially impaired by the application of California law in this case.

It is evident that the Court must undertake a choice-of-law analysis and that Plaintiffs' arguments to the contrary are supported by neither the law, nor the record, in this case.

2. There are Material Differences in the Law of the 39 Different States in Which Class Members Reside

In its moving papers, Umpqua explained why the "aiding and abetting" law of the 39 different states in which class members reside materially differs from California's aiding and abetting law in

[1] Plaintiffs argue it is Umpqua's burden to show which specific class members resided in which jurisdiction when they invested. *See* Opp. 5-6. That is incorrect. Under *Mazza* and *Washington Mutual*, it is Plaintiffs' burden to affirmatively resolve any choice-of-law issues. *See Mazza*, 666 F.3d at 590-91; *Wash. Mut.*, 24 Cal. 4th at 928. In any event, to the extent Plaintiffs' overbroad multi-jurisdictional class presents individualized fact questions about which class members resided where when they invested—those are *certification problems* that may require decertification of the entire class. For instance, if the Court needs to undertake individualized discovery and mini-trials about where each investor resided when they invested, that would destroy commonality and predominance. Alternatively, if the class were limited to class members who invested when they were California residents, there would be ascertainably problems because, according to Plaintiffs, the class list does not accurately reflect where class members resided when they invested.

many significant respects.[2] Mot. 9-20. Plaintiffs do not dispute that their multijurisdictional class involves class members that implicate each of these 39 different states. Opp. 6-7. Instead, they superficially take issue with whether the 2021 class list accurately depicts where investors resided when they invested in PFI[3] (Opp. 5-6), while also suggesting that the number of class members who reside in states with material differences is applicable law is not that significant (Opp. 6-7). None of that, however, absolves the Court of its duty to resolve the choice-of-law conflict as to class members who indisputably exist and indisputably resided outside of California when they invested. *See Mazza*, 666 F.3d at 590-91; *Wash. Mut.*, 24 Cal. 4th at 922-28.

Further, as to those 39 different states in which class members reside, Plaintiffs do not contest Umpqua's analysis of how 18 states' "aiding and abetting" law different materially from California's "aiding and abetting" law: Alabama, Alaska, Arizona, Arkansas, Connecticut, Georgia, Iowa, Louisiana, Minnesota, Missouri, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Texas, Vermont. *Compare* Mot. 10-21, *with* Opp. 6-8. Thus, as to these 18 states, there is no dispute that a sufficiently material conflict exists as to necessitate that the Court undertake the required choice-of-law analysis. *See id.* There is also no dispute that, to the extent the Court concludes that the law of these class members' jurisdictions of residence applies, the class would need to be decertified as to at least these jurisdictions. *See Mazza*, 666 F.3d at 590-91; *Wash. Mut.*, 24 Cal. 4th at 922-28.

[2] Umpqua's motion inadvertently omitted discussion of Oregon, which some class members reside in. It also does not discuss the foreign countries implicated by Plaintiffs' multijurisdictional class, given the cumbersome process that would be required to do so and would likely need to resort to expert evidence. *See* Fed. R. Civ. P. 44.1. However, as explained, given it is Plaintiffs' burden to show there are not choice-of-law issues before there is a class-wide trial, that is not germane to this motion. In any event, Plaintiffs concede the remaining jurisdictions have been adequately briefed.

[3] Plaintiffs have not submitted any admissible evidence in support of this proposition. Counsel's declaration purporting to summarize counsel's investigation into where investors resided when they invested is plainly inadmissible hearsay and improper expert testimony as it relies on counsel's summarization and analysis of other documents. *See* Fed. R. Evid. 701, 802. Counsel's declaration is also inadmissible because it relies on documents that were excluded by the Court. *Compare* Lam Decl., Dkt. 151-1 ¶ 8 (citing to PFI_012594 to PFI_613234) *with* Order Granting Motion to Exclude, Dkt. 179 (excluding over 700,000 pages of PFI records produced after close of discovery). Moreover, the fact that counsel felt the need to submit a declaration in lieu of declarations from class members (presumably because there are too many class members from which declarations would need to be obtained), reinforces how the question of where invested resided when they invested present individualized issues that cannot be resolved on a class-wide basis.

As to the other states beyond those 18, Plaintiffs first attempt to argue that the jurisdictions that do not include a "substantial factor" element in the state's aiding and abetting law (Colorado, Illinois, Kentucky, Maryland, Massachusetts, New Jersey, Pennsylvania, South Carolina, Tennessee, Utah, Washington D.C., Wisconsin) do not differ from California law because these states "do require that the assistance provided by an alleged aider-and-abettor be 'substantial,' . . . so a 'substantial factor' requirement is already built into those states' laws." Opp. 6. But Plaintiffs go on to acknowledge that under California law, a plaintiff must show *both* that a defendant "substantially assisted" the tort *and* that the defendant's conduct was a "substantial factor" in causing harm to the plaintiff. CACI 3610; Opp. 7. Thus, California law treats "substantial assistance" and "substantial factor" as two distinct elements of aiding and abetting liability, and Plaintiffs' argument that the "substantial assistance" requirement encompasses the "substantial factor" requirement is nothing more than unsupported *ipse dixit*. At bottom, the fact remains that these 12 states have *different elements* for their aiding and abetting claims than does California. That is a material difference that prevents the Court from instructed the jury uniformly on this issue.

Plaintiffs next argue that the law in Hawaii, Florida, and Idaho is not unsettled—rather, "the consensus is that Hawaii, Florida, and Idaho law do indeed permit aiding-and-abetting claims." Opp. 7. In support of this sweeping proposition, Plaintiffs include only a string cite of non-precedential federal district court decisions, two of which were unpublished. *See id.* (citing *David Sansone Co., Inc. v. Waiaha Ridge LLC*, 2022 WL 1212922, at *4 (D. Haw. Apr. 25, 2022), *Caledonian Bank & Tr. Ltd. v. Fifth Third Bank*, 2013 WL 5272807, at *3 (M.D. Fla. Sept. 17, 2013); *Zazzali v. Ellison*, 973 F. Supp. 2d 1187, 1203 (D. Idaho 2013)). None of this is responsive to Umpqua's moving papers—in which Umpqua explained that the law is *unclear* whether these jurisdictions recognize aiding and abetting liability or the contours of such aiding and abetting law (should it be recognized), because there are cases going both ways on the issue. Mot. 12-15. As Umpqua has persuasively explained, "[t]he uncertainty as to these cases is meaningful because the absence of any clear recognition in these states' laws of the tort of aiding and abetting is reason for the Court to find such a claim cannot be pursued." Mot. 15.

Finally, as to Virginia, Plaintiffs argue that the issue has been "waived" by Umpqua's motions to dismiss and motion for summary judgment directed at two of the named plaintiffs who live in Virginia. Opp. 7-8. As a threshold argument, this "waiver" argument finds no basis in the law. *See Drover v. LG Elecs. USA, Inc.*, No. 2:12-CV-510 JCM (VCF), 2014 U.S. Dist. LEXIS 147428, at *8-9 (D. Nev. Oct. 15, 2014) ("The Ninth Circuit has not clearly established that choice of law claims may be waived, and has actually indicated the contrary. *See Gen. Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1505 (9th Cir. 1995) (finding that defendant did not waive right to application of choice of law provision despite initially failing to assert it and citing other state's law)."); *Banco de Mexico v. Orient Fisheries, Inc.*, No. CV 07-07043 GAF (AJWx), 2009 U.S. Dist. LEXIS 139077, at *20 (C.D. Cal. July 1, 2009) ("courts in the Ninth Circuit are not apt to find waiver of such provisions where, as here, the choice-of-law issue arises before summary judgment and the Court has not already ruled on the matter"). It is also not supported by Plaintiffs' citation to *In Re J.T. Thorpe, Inc.*, 870 F.3d 1121 (9th Cir. 2017), which addressed *appellate* waiver based upon a failure to raise an issue in the trial court or until "the last two pages of their brief" to the appellate court. *Id.* at 1124. Further, Plaintiffs' argument ignores that the motions to dismiss were filed at the pleading stage—before discovery was conducted about where those named plaintiffs resided when they invested—and that Umpqua had raised the choice-of-law issue at certification (months before filing for summary judgment).

Turning then to the substance of their contention that Virginia law "does indeed recognize a separate cause of action for aiding and abetting," Plaintiffs again cite to a sole unpublished, non-precedential federal district court decision to support that assertion. Opp. 8 (citing *Keil v. Seth Corp.*, No. 3:21cv153 (DJN), 2021 U.S. Dist. LEXIS 212042 (E.D. Va. Nov. 2, 2021)). That is insufficient to show Virginia recognizes aiding and abetting as a form of liability given the published Virginia appellate authority suggesting Virginia may not. Mot. 14 (citing *Sellman v. FloranceGordonBrown, P.C.*, 82 Va. Cir. 59, 62 (Va. Cir. Ct. 2010) and *Halifax Corp. v. Wachovia Bank*, 604 S.E.2d 403 (Va. 2004)). In any event, *Keil* found: "Virginia does not recognize a separate tort for aiding and abetting a breach, but it does recognize joint tortfeasor liability." *Keil*, 2021 U.S. Dist. LEXIS at *39 (capitalizations and bold omitted). That is significant because the statement that aiding and abetting

may be recognized as a form of *direct liability* is fundamentally different than the derivative liability claims that Plaintiffs have pled in this case—which do not aver that Umpqua committed a tort on its own and instead seek to hold Umpqua liable for *PFI's* tortious conduct. For example, as the *Keil* court explained, "Virginia allows for joint tortfeasor liability when a party knows of a breach of trust and participates in it for his own benefit." *Id.* at *45. That is just fundamentally different from how California law treats aiding and abetting liability—under which there is no such requirement that the defendant have direct liability itself. *See Casey v. U.S. Bank Nat'l Ass'n.*, 127 Cal. App. 4th 1138 (2005); CACI 3610.

3. The Class Members' Places of Residence Have a Greater Interest in Enforcing Their Aiding and Abetting Laws

In arguing that the myriad of other different jurisdictions implicated by this case do not have a greater interest than California in enforcing their aiding and abetting laws, Plaintiffs primarily argue 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'" and that the "last event necessary to make Umpqua liable took place at the bank's branch in Novato, California . . . ." Opp. 4-5 (citing *Conde v. Sensa*, No. 14-cv-51 JLS WVG, 2018 U.S. Dist. LEXIS 154031, at *42 (S.D. Cal. Sept. 10, 2018)). This is a misstatement of the law and the very case cited by Plaintiffs supports Umpqua's position that the "place of the wrong" would be the jurisdictions in which class remembers resided when they invested. Citing to the Restatement (First) of Conflict of Laws, section 377, *Conde* explained that "Note 4 to the Restatement further elaborates that '[w]hen a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made.'" *Conde*, 2018 U.S. Dist. LEXIS 154031, at *42. For that reason, the *Conde* court concluded that "the 'place of the wrong' occurs where the potential class members sustain[ed] their loss." *Id.*

That rationale is further confirmed by the more recent version of the Restatement of Conflict of Laws, which specifically addresses how choice-of-law issues should be analyzed in the context of joint liability cases like this and rejects Plaintiffs advocated-for approach. As explained by the Restatement (Second) of Conflict of Laws, with respect to "joint torts," "[t]he applicable law will

usually be the local law of the state where the injury occurred."[4] Restatement (Second) of Conflict of Laws, § 172. Comment b to Section 172 of the Restatement (Second) further elaborates that "[i]n the rare case where the acts of the defendants take place in a different state than that where the plaintiff suffered injury, the local law of the state of injury will be applied unless some other state, which would usually be the state where the defendants acted, has a more significant relationship to the occurrence and the parties with respect to the particular issue." *Id.*

For this reason, Plaintiffs' attempt to shift focus from where class members were injured—to where Umpqua's alleged conduct occurred—is unpersuasive. As explained in the moving papers, under California's approach to conflict-of-law issues, "with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest." *Hernandez v. Burger*, 102 Cal. App. 3d 795, 802 (1980). And California law recognizes that the "place of the wrong" occurs where the plaintiffs sustain their loss. *See Conde*, 2018 U.S. Dist. LEXIS 154031, at *42; *see also Guzman v. Bridgepoint Educ., Inc.*, 305 F.R.D. 594, 617 (S.D. Cal. 2015) (same); *Zinn v. Ex-Cell-O Corp.*, 148 Cal. App. 2d 56, 80 n.6 (1957) (same); *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 93-94 & n.12 (2010) (same). In contrast, California has relatively little interest in applying its laws to non-residents, such as the class members present here. *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 603 (N.D. Cal. 2015) ("California's interest in applying its law to nonresidents who send or receive emails from Yahoo Mail subscribers in other states is more attenuated"); *Mazza*, 666 F.3d at 594 ("California's interest in applying its law to residents of foreign states is attenuated"); *Edgar v. Mite Corp.*, 457 U.S. 624, 644 (1982) ("While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders.").

Plaintiffs next attempt to make much of both PFI's and Umpqua's connection to California, arguing that California is where PFI was located, where PFI's properties were located, where Umpqua's Novato branch is located, and where investor funds were deposited. Opp. 5. But this downplays the transitory nature of PFI's fraud. To begin, it is undeniable that PFI's "fraud" (i.e., the

[4] Restatement (Second) of Conflict of Laws § 172 provides a helpful illustration about how, even though conduct may occur in state X (where the defendants act), the law of state Y (where the plaintiff resides) will usually nonetheless control—although there is no hard-and-fast rule. *Id.* at cmt. B, illus. 1.

concealment and misrepresentations to investors) were directed towards investors at their states of residence. *See Mazza*, 666 F.3d at 594; *McCann*, 48 Cal. 4th at 93-94 & n.12. *That fraud* (which occurred outside of California in many instances) is the tort at issue for which Plaintiffs are attempting to hold Umpqua *derivatively* liable. *See Casey*, 127 Cal. App. 4th at 1138; CACI 3610. Further, Umpqua is itself an Oregon-based, and Oregon-chartered bank—which lessens California's interest in whatever it did or did not do. FAC, ¶ 9. Further, because Umpqua is based in Oregon, nearly all of the back-office operations with which Plaintiffs take issue (including the processing of transactions and Bank Secrecy Act alerts on which Plaintiffs based their claims), happened in Oregon—not California. *See id.* at ¶ 9, 27-29.

In sum, reasoned analysis of the governing choice-of-law principles requires the Court to find that the law of class members' state of residence controls. That is even more undeniably true given Plaintiffs have conceded that the law of several of class members' jurisdiction of residence would be *more favorable* than California's aiding and abetting law. *See* Opp. 9 (conceding Arizona, Iowa, Minnesota, and Nevada have more favorable aiding and abetting laws than California). In such a circumstance, the law of these class members' states of residence is clearly adversely impacted, and such states undeniably have a greater interest in the application of their laws.

B. The Bankruptcy Court's Adoption of the "Netting" Approach to Claims Precludes Class Members from Recovering Prejudgment Interest from Umpqua

In arguing that they should be entitled to recover prejudgment interest from Umpqua, class members do not dispute two key legal points. First, class members do not dispute that their claims against Umpqua—which seek to hold Umpqua secondarily liable for PFI's alleged misconduct—are necessarily capped by the amount of whatever PFI's liability represents. *See generally* Opp. That is because, as explained by Umpqua, the liability of the primary tortfeasor—here, PFI—acts as the "upper limit" of liability as to the alleged secondary tortfeasor—here, Umpqua. *Ponce*, 29 Cal. App. 3d at 505. Second, class members similarly do not dispute that the allowance or disallowance of claims in bankruptcy court has a preclusive collateral estoppel effect. Opp. 11 (citing *Poonja v. Alleghany Props. (In re Los Gatos Lodge, Inc.)*, 278 F.3d 890, 894 (9th Cir. 2002)).

As a result of these concessions, class members concede that in no event can Umpqua's liability in this case exceed PFI's liability as previously adjudicated in the bankruptcy case. What class members misguidedly argue is that the issue of their entitlement to prejudgment interest was *not* actually litigated by the parties and was instead resolved through settlement. Opp. 11-13. However, as discussed below, that is incorrect. Under the terms of PFI's Bankruptcy Plan, class members were never awarded prejudgment interest. That is why interest payments to "net winners" were called fraudulent transfers and clawed back for the benefit of class members. Given what the record indisputably shows about what happened in PFI's bankruptcy case, prejudgment interest is simply not recoverable in this case because class members waived their right to recover prejudgment interest against PFI.

1. Class Members are Collaterally Estopped from Seeking Prejudgment Interest

In arguing that collateral estoppel does not bar them from seeking prejudgment interest, class members make two arguments: (i) investor claims for prejudgment interest were not actually litigated and decided on the merits because they were settled claims; and (ii) PFI's Bankruptcy Plan recognizes investor claims for prejudgment interest and agrees to pay them. Opp. 11-13. Neither argument has merit.

First, it is "well-settled that a bankruptcy court's confirmation order is a binding, final order, accorded full *res judicata* effect and precludes the raising of issues which could or should have been raised during the pendency of the case . . . ." *Heritage Hotel Ltd. P'ship I v. Valley Bank (In re Heritage Hotel Ltd. P'ship I)*, 160 B.R. 374, 377 (B.A.P. 9th Cir. 1993). To that end, "[t]he binding effect of the confirmed plan is specifically set out in the Bankruptcy Code. Section 1141(a) provides that 'the provisions of a confirmed plan bind the debtor . . . and any creditor . . . .'" *Knupfer v. Wolfberg (In re Wolfberg)*, 255 B.R. 879, 882 (B.A.P. 9th Cir. 2000).

For that reason, PFI's Bankruptcy Plan indisputably *has* preclusive effect as between class members and PFI. The fact that the investor claims were, in a broader sense, the result of a compromise that is the plan provisions does not change this analysis. Even if, as the class members contend, certain claims are the result of settlement, those settlements have preclusive effect by virtue of their incorporation into the confirmed bankruptcy plan. *Deere Credit, Inc. v. Wiley (In re Wiley)*,

No. 10-12007-SDB, 2014 Bankr. LEXIS 320, at *15 (Bankr. S.D. Ga. Jan. 24, 2014) (stipulation that "settle[d] all issues regarding the payment, priority, and treatment of [creditor's] claims and rights to payment under the Plan" and "was incorporated by reference into the Plan" barred creditor from raising preconfirmation issues); *Cook v. Campbell*, No. 2:01cv1425-ID (WO), 2008 U.S. Dist. LEXIS 38337, at *3, 8 (M.D. Ala. May 12, 2008) (creditor's claim for additional payment under employee stock ownership plan barred by doctrine of res judicata because confirmed bankruptcy plan provided settlement payment for employee stock ownership plan).

Second, class member's contention that the bankruptcy plan "recognizes" investor claims for prejudgment interest is nothing more than an artifice meant to misdirect. It is certainly true that under PFI's Bankruptcy Plan, investors had a *hypothetical* "Investor Subordinated Claim" that was "comprised of . . . seven percent (7%) interest, compounded annually, on the Investor's principal investments from the Ponzi Start Date until July 26, 2020 . . . ." *See* Curtis Decl., Ex. 10 ¶ 1.85. As previewed in the moving papers, and demonstrated in the materials Umpqua already submitted, the *reality* is that these hypothetical subordinated claims never came into existence because the assets of the PFI Trust were insufficient to pay off the Investor Restitution Claims. To that end, the record reveals that when claims packets went out, investors were told that subordinated claims were not being calculated or addressed because there were insufficient funds in the PFI Trust to pay Investor Restitution Claims and "[i]f Investor Subordinated Claims are later projected to receive a recovery, [investors] will be notified and a separate process will be set up." Curtis Decl., Ex. 16 at PABAGATELOS_004161. In other words, those hypothetical subordinated claims including interest were neither calculated nor allowed.

This is significant because PFI's Bankruptcy Plan is clear that, to be allowed, the Investor Subordinated Claims would have had to have been calculated and submitted—which they were indisputably not. To that end, when investors were provided notice of the procedures for submitting proofs of claim that provided a schedule of allowed restitution claims (but not subordinated claims) and told that to the extent an investor sought an amount greater than the amount set forth in the schedule, the investor was required to timely submit a proof of claim by the investor bar date.[5] Curtis

[5] The investor bar date was August 20, 2021. Curtis Decl., Ex. 16 at PABAGATELOS_004145.

Decl., Ex. 16 at PABAGATELOS_004147. If the investor failed to submit a timely proof of claim by the investor bar date, the notice made clear (in all capital letters) that the investor "SHALL BE FOREVER BARRED, ESTOPPED, AND ENJOINED TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW FROM ASSERTING, IN ANY MANNER, A CLAIM AMOUNT DIFFERENT OR GREATER THAN THE AMOUNT SET FORTH IN SCHEDULE A TO THE NETTING ANALYSIS NOTICE AGAINST THE DEBTORS. . . ." *Id.* Class members *did not* submit proofs of claim for prejudgment interest by the investor bar date. Thus, these unsubmitted Investor Subordinated Claims were expressly disallowed under the terms of PFI's Bankruptcy Plan, which defines "Disallowed Claim" as "[a]ny Claim that (a) is not Scheduled, or is listed thereon as contingent, unliquidated, disputed, or in an amount equal to zero, and whose Holder ***failed to timely File a proof of claim by the applicable Claims Bar Date***. . . ." Curtis Decl., Ex. 10 ¶ 1.47 (emphasis added).

At this point, for the Investor Subordinated Claims to be allowed, PFI's bankruptcy would have to be reopened and a new claims process initiated—so that, among other things, the "net winners" could be allowed to participate. *See* 11 U.S.C. 502(j) ("A claim that has been allowed or disallowed may be reconsidered for cause."); *Nations First Capital, LLC v. Decembre (In re Nations First Capital, LLC)*, BAP No. EC-19-1201-GLB, 2020 Bankr. LEXIS 1541, at *11 (B.A.P. 9th Cir. June 5, 2020) ("Section 502(j) allows a bankruptcy court to reconsider an order disallowing a claim for cause, and allow or disallow the reconsidered claim according to the equities of the case."). But the trustee for the PFI Trust has made clear that this will never happen. At his deposition, Mr. Goldberg testified that net winners do not have claims and have not been allowed to participate in distributions from the PFI Trust (instead, they have been obligated to pay claw backs to it). He also testified that he expects the PFI Trust to "wind up sometime in [20]25" and that the only claims that the PFI Trust is currently pursuing are "some minor fraudulent transfer claims against net winners." Curtis Decl., Ex. 9 ("Goldberg Dep.") at 108:1-21. In other words, the Investor Subordinated Claims are not just disallowed—they will *never* be allowed.

Again, the class members do not dispute that the allowance and disallowance of claims by a bankruptcy court has a collateral estoppel effect. *See* Opp. 11 (citing *Poonja*, 278 F.3d at 894).

Because the Investor Subordinated Claims (which include claims for pre-judgment interest) were disallowed, the class members are collaterally estopped from seeking prejudgment interest in this action. And because claims for interest were never allowed, PFI was never determined to be liable for these amounts. Accordingly, Umpqua—which class members are seeking to hold secondarily liable for PFI's misconduct—cannot be held liable for prejudgment interest.

2. Class Members are Also Judicially Estopped From Seeking Prejudgment Interest

In arguing against the application of judicial estoppel to prevent them from seeking prejudgment interest, class members primarily point to the provision in PFI's Bankruptcy Plan that allows investors to seek prejudgment interest in the form of a subordinated investor claim if the PFI Trust has sufficient funds to pay such claims. Opp. 13-15. But as discussed above, those subordinated investor claims were disallowed by the bankruptcy court, thereby collaterally estopping the class members from seeking prejudgment interest now.

But even if the class members were not collaterally estopped from seeking prejudgment interest, they are plainly judicially estopped. In opposition, the class members start off by arguing "[t]he 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." Opp. 13. That is precisely the point. Despite owing that fiduciary duty, the Unsecured Creditors Committee successfully took the position that PFI owed no interest to investors because it was a "Ponzi scheme" and that any payments to investors above the net amount of their principal investment were fraudulent transfers that needed to be clawed back. As discussed in the moving papers, the "netting" calculation adopted by the bankruptcy court did not credit the "net winners" with prejudgment interest on their initial investments. *See* Curtis Decl., Ex. 7 ("Mtn. Approve Settlement Proc.") 2, 10-11. That fact alone provided net-losers with an advantage based upon the *exact opposite* of the position that class members are now attempting to advance. It did so regardless of whether net-winners maintained a hypothetical subordinated claim for prejudgment interest (which as explained above, was disallowed in any event). That is because by failing to credit the net-winners with prejudgment interest, the pool of funds from which net-losers could take recovery was artificially increased.

Take for example an investor who made a principal investment of $100,000 one-year before the filing of the bankruptcy petition and received $105,000 in payments from PFI. Under PFI's Bankruptcy Plan, this investor would be a "net-winner" by virtue of the $5,000 received in excess of the investor's $100,000 principal investment and thereby entitled to only an investor subordinated claim. However, if this investor was instead credited with 7% interest on the principal investment of $100,000, that investor would have been entitled to receive $107,000, which after subtracting the $105,000 already received from PFI, would make this investor a "net-loser" with an investor restitution claim in the amount of $2,000. But that, of course, is not what happened. In this scenario, by failing to credit this investor with prejudgment interest, an investor that was really a "net-loser" was instead categorized as a "net-winner," thereby increasing the pool of available funds from which "net-losers" could recover by $7,000. That is an unfair advantage, plain and simple.

In the bankruptcy case, class members took the position that any and all gains in excess of the principal amount of investments (which would necessarily include any accrued interest) were "*fictitious profits*" subject to avoidance. *See* Mtn. Approve Settlement Proc. 2, 10-11; *see also* Curtis Decl.., Ex. 8. Class members now want to take to exact opposite position. By seeking prejudgment interest, class members are taking the position that they should receive not only the principal amount of their investment, but prejudgment interest on top of that to compensate them for the time value of their money. "Net Winners"—who again, like class members were also investors in PFI—were previously told such time value of money had to be disregarded when their claims were disallowed.

Finally, it is undeniable that class members were *successful* in persuading the bankruptcy court to accept its position that "netting" or avoidance claims were not subject to prejudgment interest. For one, the bankruptcy court approved the creditors' and PFI's settlement procedures, thereby adopting their definition of "Net Winning Claim"—which as discussed, ignores entitlement to interest. *See* Mtn. Approve Settlement Proc. What is more, the fact that the PFI Trust pursued and settled many of these types of claims (Goldberg Dep. at 86:16-87:25), independently satisfies the success element, *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133-34 (9th Cir. 2012) (settlement is a basis for judicial estoppel to apply).

3. Alternatively, Prejudgment Interest Must be Limited by the Date the Bankruptcy Petition Was Filed

Class members argue the issue of post-petition interest was not actually litigated in PFI's bankruptcy case because claims for post-petition interest are precluded under 11 U.S.C. § 502(b)(2) and therefore the express exclusion of post-petition interest in PFI's Bankruptcy Plan does not have any preclusive effect. This argument fails.

As discussed above the class members do not dispute that their claims against Umpqua, which seek to hold Umpqua secondarily liable for PFI's misconduct, are strictly limited by the amount of PFI's liability. *See generally* Opp. Further, as likewise discussed above, it is clear that the provisions of PFI's Bankruptcy Plan constitute a final adjudication of any matters set forth therein. *See Wiley*, 2014 Bankr. LEXIS 320, at *15; *Cook*, 2008 U.S. Dist. LEXIS 38337, at *3. Thus, on its face, the fact that PFI's Bankruptcy Plan itself disallows post-petition interest means that class members cannot recover such interest from Umpqua—class members have no argument or law suggesting otherwise.

In any event, the fact that class members are precluded, under the provisions of the bankruptcy code, from seeking post-petition interest from PFI only reinforces why such post-petition prejudgment interest cannot be recovered from Umpqua. Even assuming, *arguendo*, there was no final adjudication of this issue in PFI's bankruptcy case, the fact that class members are legally precluded from recovering prejudgment interest from PFI under bankruptcy law is again reason why that same disallowed pre-judgment interest cannot be recovered from Umpqua. At bottom, as class members have conceded, aiding and abetting is a form of derivative liability in which Umpqua's prospective liability is *capped* at the amount of PFI's liability. *See Ponce,* 29 Cal. App. 3d at 505. Accordingly, if PFI cannot be liable for a particular category of damages (like post-petition interest), Umpqua cannot be held liable for the same either.

C. Considering Plaintiffs' Concession, the Court Must Enter Summary Judgment on Both Pre-2007 Investors and Pre-2007 Investments; The Issue is Not "Moot" Because the Certified Class Includes Pre-2007 Investors and Investments

In response to Umpqua's showing that there is no way Plaintiffs can possibly prevail as to pre-2007 investments, Plaintiffs disclaim any intent to pursue claims related to those investments—

explaining that they "do not intend to request damages resulting from pre-2007 investments." Opp. 16-17. Plaintiffs also attempt to portray this concession as a non-issue, pointing out that they "do not include any money invested by class members with PFI prior to 2007" in their damages calculation and suggesting that had "Umpqua conferred with Plaintiffs . . . Plaintiffs could have informed them that it was not necessary." *Id.* Based upon this portrayal of the issue of pre-2007 investments as inconsequential and something that they do not intend to pursue, Plaintiffs ask the Court to deny Umpqua's request for summary judgment on this issue "as moot." *Id.*

The issue of pre-2007 investments is, however, decidedly *not* moot. This is a *certified* class action in which class notice has been sent and class members have had already had the opportunity to opt-out of the case. The 1,219 class members included in the certified class are now as much part of this case as the named plaintiffs. That includes the handful of class members with only pre-2007 investments,[6] as well as the broader group of class members who made both pre-2007 and post-2007 investments. As a result, when Umpqua demonstrated that the class cannot prevail as to pre-2007 investors, and Plaintiffs did not dispute that is correct, the class members with pre-2007 investments *lost* as to those pre-2007 investments. Umpqua is thus entitled to judgment, in full, as to any class members with only pre-2007 investments because, by virtue of Plaintiffs' concession, those class members have no claims. Umpqua is also entitled to partial summary judgment as to the claims of class members with both pre-2007 and post-2007 investments as to their pre-2007 investments because those class members too have lost—although not entirely, as they have post-2007 investments remaining. It is simply a misapprehension of the class action.

But perhaps more troublingly, Plaintiffs' and class counsel's treatment of this issue (including their misapprehension of the legal significance of class certification and whether certain class members can just be jettisoned as convenient) raises serious concerns about their adequacy to serve as representatives of such a broad class. Their approach to this issue also presents serious concerns with how zealously these class representatives (who have only post-2018 investments), and class

[6] At his deposition, Plaintiffs' damages expert confirmed that even using Umpqua's liability date as January 1, 2007, he determined that two class members had zero damages. Supp. Decl. of Kasey J. Curtis, Ex. 17 at 166:12-24, 167:10-22. Those two class members are Maria Aida Sandoval and Katherine Revoir. *Id.* at 169:7-9, 170:8-8.

counsel, will represent the interests of earlier investors. At the forthcoming class-wide trial, when difficult issues arise about the scope of any liability period and whether there is evidence that Umpqua "knew" of the fraud by any particular date, will these class representatives and class counsel again jettison the claims of earlier investors to salvage their own? Umpqua respectfully urges the Court to take up this issue in the context of its forthcoming motion to decertify the class.

III. CONCLUSION

For the reasons discussed above and in Umpqua's moving papers, Umpqua respectfully request that the Court: (i) determine that the law of class members' state or country of residence governs their aiding and abetting claims and the claims of non-California class members be decertified; (ii) grant partial summary judgment on class members' request for an award of pre-judgment interest; and (iii) grant partial summary judgment on class members' claim for damages on pre-2007 investments.

DATED: June 11, 2024

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