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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

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I. INTRODUCTION

The *Bagatelos* Plaintiffs' opposition fails to address the undisputed facts that compel summary judgment on their aiding and abetting claims as pled in their operative complaint. Those claims aver that Umpqua is derivatively liable for PFI's alleged Ponzi scheme because the *Bagatelos* Plaintiffs' tenancies-in-common ("TIC") investments were used as part of that alleged Ponzi scheme. Specifically, they assert that Umpqua has legal responsibility for what PFI allegedly did because Umpqua knowingly helped PFI divert their money through Umpqua accounts to "make monthly payments to previous investors, cover shortages in accounts opened for the benefit of other investors, and to line Casey's and Wallach's personal accounts." *Bagatelos* Compl., ¶¶ 96, 100.

But it is undisputed that Plaintiffs never deposited their investment funds in any PFI account, made those funds accessible to PFI or its executives, or otherwise sent money through *any* Umpqua account. Rather, the undisputed evidence shows that each of the *Bagatelos* Plaintiffs wired funds to an escrow company to purchase percentage ownership interests in specific apartment buildings or commercial office complexes. In exchange, the *Bagatelos* Plaintiffs were deeded recorded property interests that show up on title as promised.

To evade what should be a straightforward grant of summary judgment on claims that simply have no factual basis, the *Bagatelos* Plaintiffs attempt to concoct a new, unpled theory of fraud that is unrelated to the flow of funds or Umpqua's involvement in the same. In their new view, the case is no longer about whether their investments were part of a Ponzi scheme, but rather about PFI's non-disclosure of how other parts of its business were operating improperly. The problem for the *Bagatelos* Plaintiffs is that not only is that theory entirely unpled, but there is also no basis on which Umpqua could be held liable for such a non-disclosure. That is because, to the extent that is the *Bagatelos* Plaintiffs' new theory, that non-disclosure fraud has *nothing to do with Umpqua* or the banking transactions it helped facilitate.

In short, summary judgment is warranted because the undisputed evidence demonstrates that the *Bagatelos* Plaintiffs' tenancies-in-common were not part of any alleged Ponzi scheme and that the *Bagatelos* Plaintiffs received exactly what they were promised. Plaintiffs' arguments to the contrary ignore the nature of the TIC investments, rely on unpled theories of liability not before the Court, and fundamentally fail to account for the law governing their aiding and abetting claims.

II. ARGUMENT

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

The "aiding and abetting" claims that the *Bagatelos* Plaintiffs have asserted against Umpqua in their operative complaint fail because their TIC interests were not part of the scheme that Plaintiffs have charged Umpqua with aiding and abetting. The undisputed facts show that the *Bagatelos* Plaintiffs' money was *never* used in the fraudulent scheme, and was instead deposited directly in escrow accounts and used to purchase the buildings that the *Bagatelos* Plaintiffs owned as tenants-in-common. Put simply, because the *Bagatelos* Plaintiffs' TIC interests were not part of the broader fraudulent Ponzi scheme—and that is what they have accused Umpqua of "aiding and abetting"—they cannot prevail.

Further, the *Bagatelos* Plaintiffs cannot save their deficient lawsuit against Umpqua by attempting to recast this case as one about PFI's non-disclosure of its alleged bad acts in connection with other investors. Not only are those claims unpled (and thus not before the Court and claims on which Umpqua was never afforded an opportunity to take discovery), but there is no evidence that Umpqua had anything to do with that alleged non-disclosure. Recall that, in connection with Umpqua's summary judgment motion in *Camenisch*, the Court allowed the case to go forward because it found there was evidence of Umpqua's supposed knowledge of how funds were being misused and how Umpqua helped to facilitate that misuse of funds. The same cannot be said as to any alleged non-disclosure.

1. The *Bagatelos* Plaintiffs' Money Was Not Used in a Fraudulent Manner and Was Not Part of the Alleged Ponzi Scheme

The *Bagatelos* Plaintiffs first take issue with Umpqua's reliance on Ninth Circuit case law defining the term "Ponzi scheme," which they argue is too restrictive. *See* Opp. 10-11. According to the *Bagatelos* Plaintiffs, what matters is the fraudulent conduct at issue that impacted them, whether it is referred to as a Ponzi scheme or just a fraudulent scheme.

But even under their definition of the fraudulent conduct at issue, the problem for the *Bagatelos* Plaintiffs, which they do not address, remains that PFI did *not* use the TIC investor money in the manner alleged. As such, the *Bagatelos* Plaintiffs were simply not part of the scheme which Umpqua allegedly

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aided and abetted and summary judgment is warranted.[1]

Additionally, although it has no bearing on the fact that the *Bagatelos* Plaintiffs' funds were not used in the fraudulent scheme, the alleged "Ponzi" nature of the scheme is, in fact, a cornerstone of the *Bagatelos* Plaintiffs' case. It was the allegedly uniform and Ponzi-like nature of PFI's fraudulent scheme that permitted the *Camenisch* Plaintiffs to proceed as a class, and it is that ruling that the *Bagatelos* Plaintiffs rely on here. In particular, the *Bagatelos* Plaintiffs point to this Court's statement at oral argument on their motion for class certification in the *Camenisch* case, that "if, in fact, the plaintiffs could establish the Ponzi scheme nature of this, it impacted all of the investment vehicles." Opp. 10 (citing *Camenisch*, Dkt. 146 (9/29/22 Hr'g Tr.) at 37).

The *Bagatelos* Plaintiffs argue that the same reasoning applies here, because they were impacted in the same manner as non-TIC investors when PFI's "house of cards" collapsed. Opp. 10. But the *Bagatelos* Plaintiffs misconstrue the Court's reasoning on that point. The Court permitted the class to go forward on a class-wide basis, based on the *Camenisch* Plaintiffs' theory that the class members "were defrauded in the course of the same overall scheme" and that differences in investment types were immaterial "given the alleged commingling of funds."[2] *See* Order Denying Summary Judgment and Granting Class Certification ("*Camenisch* Order on MSJ"), Dkt. 144 at 14. In other words, it was PFI's alleged commingling of funds (i.e., treatment of the investments of an undifferentiated mass), that, if proven, could potentially allow a jury to disregard the differences between investments and establish a uniform fraud. The *Bagatelos* Plaintiffs' "house of cards" theory, on the other hand, implies that the alleged cross-investment *loss* could establish a global fraud. That is wrong and the *Bagatelos* Plaintiffs

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[1] The *Bagatelos* Plaintiffs point to two "reserve" accounts from which they assert funds were misappropriated. Whether these reserve accounts had funds taken from them (of which there is insufficient proof at any rate) is irrelevant. That was not the *Bagatelos* Plaintiffs' money. The *Bagatelos* Plaintiffs did not direct any money toward the reserve accounts or any account held, managed, or accessible to PFI. Rather, the *Bagatelos* Plaintiffs simply agreed to pay a certain sum of money for an ownership interest, which they subsequently received. Moreover, these allegations do not appear in their operative complaint.

[2] As will be shown in Umpqua's forthcoming decertification motion and, if necessary at trial, the supposed "commingling" was actually on-ledger (i.e., documented) intercompany borrowing between affiliated LLCs—a legitimate business practice. That is simply not a basis to declare the entirety of PFI a fraud, when it had real investments, the overwhelming majority of which operated profitably before investor distributions are taken into consideration.

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cite no law supporting it. A correct application of the Court's statement here illustrates that the nature of the TIC investments is dispositive, because, unlike the LLC, DOT, or Straight Note investors, *none* of the TIC investors' money was deposited into a PFI account or otherwise accessible by PFI or its executives. Stated simply, the *Bagatelos* Plaintiffs cannot rely on the alleged "commingling" of their funds, because their funds were never commingled with anything.

2. Plaintiffs' Aiding and Abetting Claims Rest on Umpqua's Alleged Actual Knowledge of, and Offering of Substantial Assistance to, a "Ponzi Scheme"

Furthermore, California law is eminently clear that to prevail on an aiding and abetting claim, a plaintiff must prove *both*: (i) the underlying tort committed by the primary tortfeasor; and (ii) the defendant's secondary liability for the same (including the defendant's actual knowledge of the tort and providing substantial assistance to its commission). *See Casey v. U.S. Bank Nat. Ass'n*, 127 Cal. App. 4th 1138, 1146 (2005); CACI No. 3610 (elements of aiding and abetting under California law). In a case like this one brought against a depository bank, for aiding and abetting liability to attach, the bank must have "actual knowledge" *of the specific intentional tort being committed*. *See Casey*, 127 Cal. App. 4th at 1146.

Under this legal framework, the *Camenisch* Plaintiffs' claims have focused on trying to establish Umpqua's knowledge of a Ponzi scheme—as opposed to specific instances of fraud unique to individual investors—a task which would be impossible on this record and certainly cannot be performed on a class-wide basis. Indeed, in the *Bagatelos* Plaintiffs' own words, at summary judgment 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" and "(ii) Umpqua knew PFI was using investor money for these illicit purposes." Opp. 3.

As in *Camenisch*, the entirety of the *Bagatelos* Plaintiffs' allegations and evidence regarding Umpqua's "actual knowledge" is directed toward Umpqua's alleged knowledge of a *Ponzi scheme*—in particular, how funds allegedly flowed through Umpqua accounts in furtherance of that alleged scheme. *Bagatelos* Compl. at ¶¶ 29-54 (alleging Umpqua's knowledge of and assistance to the scheme); Opp. 3, 9 (relying on summary judgment evidence and rulings in *Camenisch*); Opp. to Umpqua Bank's

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Mot. for Summary Judgment ("*Camenisch* MSJ Opp."), Dkt. 162 at 15-18 (arguing that Umpqua had actual knowledge of the scheme). Plaintiffs have not alleged, nor established, that Umpqua even knew about the *Bagatelos* Plaintiffs, let alone the terms of their investments or the specific investment-related transactions that occurred. And the TIC investors' money was indisputably used for the purchase of the properties in which they acquired interests—not to fund payments to old investors or for any other Ponzi transactions. Stated plainly, if the TIC investments were not otherwise implicated in the scheme by virtue of its Ponzi nature (and they were not), Umpqua's alleged knowledge of the Ponzi scheme *cannot* support an aiding and abetting claim as to the *Bagatelos* Plaintiffs.

The same can be said with respect to Umpqua's purported substantial assistance to PFI's commission of the alleged fraudulent conduct at issue. Returning once more to the *Bagatelos* Plaintiffs' own framing of the issues, their operative complaint alleges that "Umpqua learned of the fraudulent scheme in the course of providing banking services to PFI" and "gave substantial assistance *to the scheme*." *Bagatelos* Compl. ¶ 97 (emphasis added); *see also id.* ¶ 102 (Umpqua know PFI was breaching its fiduciary duty and "instead of exposing the Ponzi scheme, Umpqua substantially assisted PFI in operating the scheme and breaching its fiduciary duty to Plaintiffs"). And, as stated in opposition here, the *Camenisch* Plaintiffs argued at summary judgment that the evidence showed Umpqua "chose to substantially assist PFI's operation of the Ponzi scheme in various ways." Opp. 3. Again, the *Bagatelos* Plaintiffs' aiding and abetting claims rest on Umpqua's alleged substantial assistance to a Ponzi scheme of which the *Bagatelos* Plaintiffs' TIC investments were not a part. Umpqua simply cannot have substantially assisted in the use of the *Bagatelos* Plaintiffs' funds to pay old investors, cover shortages in accounts, or personally enrich PFI executives, because their funds were not used in that manner.

Because the aiding and abetting claims rest on allegations and evidence regarding Umpqua's actual knowledge of and substantial assistance to the purported Ponzi scheme, the *Bagatelos* Plaintiffs' inability to demonstrate that they were part of said scheme means those claims must fail.

3. The *Bagatelos* Plaintiffs' Unpled Fraudulent Concealment Claim and Other Novel Theories Not Before the Court are Not a Basis for Denying Summary Judgment

In another attempt to dodge the above problems with their claims, the *Bagatelos* Plaintiffs next assert that it was fraudulent concealment that Umpqua aided and abetted, as opposed to the fraudulent

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use of investor funds. This and other novel theories of liability are absent from the *Bagatelos* Plaintiffs' operative complaint and not before the court.

At summary judgment—and at trial—the claims and issues are defined by the allegations in the complaint. "It is well-settled that the 'issues on summary judgment are framed by the complaint.'" *Cole v. CRST, Inc.*, 150 F. Supp. 3d 1163, 1169 (C.D. Cal. 2015) (quoting *Rodriguez v. Countrywide Homes*, 668 F. Supp. 2d 1239, 1246 (E.D. Cal. 2009)). As such, claims and theories raised for the first time at summary judgment are not properly presented to the court. *Earth Island Institute v. U.S. Forest Service*, 87 F.4th 1054, 1072 (9th Cir. 2023) ("Summary judgment is not a procedural second chance to flesh out inadequate pleadings"). Because "'the issues in the complaint guide the parties during discovery and put the defendant on notice of what evidence is necessary to defend against the allegations,' courts routinely hold that 'a plaintiff cannot oppose summary judgment based on a new theory of liability because it would essentially blindside the defendant with a new legal issue after the bulk of discovery has likely been completed.'" *Cole*, 150 F. Supp. 3d at 1169 (quoting *Rodriguez*, 668 F. Supp 2d at 1246). The Court should reach the same conclusion here.

In California, fraud and fraudulent concealment are different claims, with different legal elements.[3] *Graham v. Bank of Am., N.A.*, 226 Cal. App. 4th 594, 605-06 (2014) (describing the required elements for fraud and fraudulent concealment separately); *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.*, 157 Cal. App. 4th 835, 845 (2007) ("Claims for negligent misrepresentation and intentional concealment deviate from [the elements of fraud]."); *Bank of Am. Corp. v. Superior Court*,

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[3] In *Graham*, the California Court of Appeals set forth the following elements for fraudulent misrepresentation and fraudulent concealment as follows: "To establish a claim for fraudulent misrepresentation, the plaintiff must prove: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. [Citation.] The required elements for fraudulent concealment are: (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact. [Citation.]" 226 Cal. App. 4th at 605-06 (internal quotations omitted).

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1 198 Cal. App. 4th 862, 872 (2011) (explaining that the existence of a duty to disclose facts is a "threshold
2 question" in establishing a claim for fraudulent concealment).
3 The *Bagatelos* Plaintiffs now contend that the "evidence before the Court shows that all the
4 elements of fraudulent concealment are met." Opp. 13. But, per their operative complaint, the *Bagatelos*
5 Plaintiffs have not brought a claim for aiding and abetting fraudulent concealment. They have brought
6 claims for aiding and abetting fraud and breach of fiduciary duty. *Bagatelos* Compl., ¶¶ 95-103.
7 Moreover, in support of their aiding and abetting claims, the *Bagatelos* Plaintiffs specifically alleged that
8 the tortious conduct at issue was PFI's *use* of their investment funds as part of a Ponzi scheme. *Id*. at ¶
9 96 (alleging the *Bagatelos* Plaintiffs funds "*were being used* … to make monthly payments to previous
10 investors, cover shortages in accounts opened for the benefit of other investors, and to line Casey's and
11 Wallach's personal accounts" (emphasis added)); *id.* at ¶ 100 ("PFI breached its fiduciary duties by using
12 Plaintiffs' investment money to pay previous investors, cover shortages in accounts opened for the benefit
13 of other investors, and to fund payments to Casey's and Wallach's personal bank accounts.").
14 This is not mere semantics. Because aiding and abetting claims impose derivative liability for the
15 specific tort of another, the *Bagatelos* Plaintiffs' pleading put Umpqua on notice of both the underlying
16 tortious conduct allegedly committed by PFI, and the *Bagatelos* Plaintiffs' theory of secondary liability
17 for that specific tort. *See Casey*, 127 Cal. App. 4th at 1146; CACI No. 3610 (elements of aiding and
18 abetting under California law); *Cole*, 150 F. Supp. 3d at 1169 (issues in complaint guide parties during
19 discovery and put the defendant on notice of the evidence needed to defend against the claim). Again,
20 this matters a great deal because the *Bagatelos* Plaintiffs must prove that Umpqua knew of the *specific*
21 tortious conduct at issue and rendered substantial assistance to the same. *Casey*, 127 Cal. App. 4th at
22 1146 ("a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is"). The
23 *Bagatelos* Plaintiffs' allegations and evidence in this case go entirely to Umpqua's purported knowledge
24 of and assistance to PFI's alleged commission of a "Ponzi" scheme—not PFI's alleged concealment of
25 said scheme from investors like the *Bagatelos* Plaintiffs, who had real investments.
26 The same problems plague the other unpled theories that the *Bagatelos* Plaintiffs raise at various
27 points throughout their opposition, including theories concerning the capital raised by PFI to fund the
28 purchases of the buildings, PFI's management of the buildings, or the funds used in the operation of the

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buildings. As an example, the *Bagatelos* Plaintiffs raise a haphazard theory regarding the capitalization schemes that were set forth in the TIC Agreements, asserting that the funds PFI contributed to the purchase of the TIC properties "consisted of funds misappropriated from other PFI investors." Opp. 7.

Not only does this theory appear nowhere in their pleading, but the *Bagatelos* Plaintiffs have not offered legitimate evidence that can support this assertion. The *Bagatelos* Plaintiffs cite to a statement in the declaration of Amy Zeman, counsel for the *Bagatelos* Plaintiffs, in which she states that she "reviewed" the Final Settlement Statements as well as the bank account records produced by Umpqua, and determined that "each property was purchased using at least some money transferred from one of PFI's clearing accounts." Zeman Decl., ¶ 10. Ms. Zeman has no personal knowledge of any of this statement; nor is she a witness (fact or expert) in this case. Further, she does not submit or cite to specific bank account records. All of this is plainly improper under Federal Rule of Civil Procedure 56(c). *See Lanovaz v. Twinings N. Am., Inc*, No. 12-cv-02646-RMW, 2016 WL 4585819, at *3 n. 1 (N.D. Cal. Sept. 2, 2016), *aff'd*, 726 F. App'x 590 (9th Cir. 2018) ("A declaration submitted in opposition to a motion for summary judgment must 'be made on personal knowledge.' An attorney declaration based on review of documents constitutes 'second-hand knowledge.' (quoting Fed. R. Civ. P. 56(c)(4) and *Estremera v. United States*, 442 F.3d 580, 584 (7th Cir. 2006))); *Aguilera v. Unocal Corp.*, No. 2:22-CV-01394-FWS-PD, 2023 WL 6369701, at *5 (C.D. Cal. Aug. 14, 2023) (finding that counsel's declaration "attest[ing] to factual matters outside the course of litigation" that "does not adequately establish Mr. Kelley's, in his role as Plaintiffs' counsel, personal knowledge of those matters" insufficient for purposes for Fed. R. Civ. P 56(c)(4)); *Clark v. Cnty. of Tulare*, 755 F. Supp. 2d 1075, 1084 (E.D. Cal. 2010) ("Declarations by attorneys are sufficient only if the facts stated are matters of which the attorney has knowledge, such as matters occurring during the course of the lawsuit, such as authenticity of a deposition transcript."); *Beattie v. Provident Life & Accident Ins. Co*., 2005 WL 8166043 at *6 n. 5 (S.D. Cal. Dec. 6, 2005) (plaintiff's counsel's declaration, which purportedly summarized deposition testimony and documents produced during discovery, was inadmissible where plaintiff did not submit the deposition transcript and documents on which the declaration was based).

In sum, the *Bagatelos* Plaintiffs' aiding and abetting claims are based on allegations that PFI used their funds for illicit purposes and Umpqua knowingly and substantially assisted the same. That obviously

did not happen. The *Bagatelos* Plaintiffs cannot assert a new theory of liability based on PFI's use of *non*-TIC investor money to purchase or operate the buildings at issue.

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

To recover on their claim for aiding and abetting fraud, the *Bagatelos* Plaintiffs must offer evidence of their "out-of-pocket" loss. *Service by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1818 (1996) ("In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the 'detriment proximately caused' by the defendant's tortious conduct."). Where, as here, the alleged fraudulent transactions involve the sale of property, out-of-pocket loss is assessed by the difference in value between the purchase price of the property and the actual value of the property at the time of the transaction. *Saunders v. Taylor*, 42 Cal. App. 4th 1538, 1543 (1996); *Goodwin v. Wolpe*, 240 Cal. App. 2d 874 (1966). Because the *Bagatelos* Plaintiffs have offered no evidence to that effect, and received the ownership interests they were promised, they cannot establish that they have any viable fraud damages.

Because the *Bagatelos* Plaintiffs cannot establish damages under the applicable out-of-pocket loss rule, the *Bagatelos* Plaintiffs ask the Court to adopt a different method of calculating damages—one that looks not at their out-of-pocket loss from the alleged sale, but on the broader question of what they recovered from PFI's bankruptcy case. In support of that argument, the *Bagatelos* Plaintiffs rely on *Garrett v. Perry*, 53 Cal. 2d 178 (1959). In *Garrett*, the buyer purchased a cattle ranch, after the sellers misrepresented the operating revenue of the ranch. The buyer purchased the property in part with notes payable to the sellers in installments, which were secured by deeds of trust on the property. *Garrett*, 53 Cal. 2d at 180. When the buyer was unable to operate the ranch profitably, he became delinquent on his payments to the sellers, who subsequently foreclosed on the deeds of trust. Title was thereafter returned to the sellers. *Id*. at 181. The trial court awarded the buyer the difference between the purchase price and the actual value of the property. On review, the California Supreme Court concluded that the trial court erred in failing to consider events that took place after the transaction, including the buyer's payments on the promissory notes, the foreclosure, and the re-vesting of title in the seller. *Id*. at 183-84.

Garrett is inapposite, for several reasons. First, the circumstances in the present case differ in important respects from those that drove the Court's decision in *Garrett*. In *Garrett*, the subsequent event

that the Court considered was a foreclosure, which was part and parcel of the original transaction. *Id*. at 185. That is, the fraudulent representations led directly to the buyer's default and the return of title to the sellers. In contrast, here, the *Bagatelos* Plaintiffs' ownership interests were not lost as a direct result of the allegedly fraudulent conduct. As title holders, the *Bagatelos* Plaintiffs retained their ownership interests well into the bankruptcy until Plaintiffs voluntarily relinquished them. In addition, the Court in *Garrett* was concerned with a windfall to the plaintiffs and relied on subsequent events to reduce the award. *Id*.

Perhaps the most glaring omission in Plaintiffs' reading of *Garrett* is that the buyers in that case *did* present evidence of the actual value of the purchased property. Although the *Garrett* Court ultimately concluded that other values were more appropriate measures of the buyers' loss, it made that decision only after comparing said loss with the difference in value between the purchase price and the actual value of the property. *Id*. Unlike in *Garrett*, the Court here has no way of determining whether the actual values of the property interests received are appropriate or significant values in measuring the alleged loss. That is particularly important here because we have no way of knowing how the *Bagatelos* Plaintiffs would have been compensated had they simply sold their interests as opposed to voluntarily relinquished them in exchange for joining the unsecured creditors pool. *See* Umpqua's Motion for Summary Judgment as to the *Bagatelos* Plaintiffs ("Mot.") at 5-7 (addressing the *Bagatelos* Plaintiffs' decision to relinquish their ownership interests and join the unsecured creditors pool).

This distinction also lends to a reading of *Garrett* that is in harmony with *Goodwin* and *Saunders*, because the lack of evidence on the actual value of the thing received explains the different results in those cases. For example, the *Goodwin* buyers received a condemned building, lost the businesses acquired in the transaction and arguably ended up with nothing of value. *Goodwin*, 240 Cal. App. 2d at 875-76. Nevertheless, the California Court of Appeal held that the buyers' lack of evidence concerning the value of the business precluded them from recovering on their claim for fraud. *Id*. at 879. Unlike the *Garrett* Court, the *Goodwin* court simply did not have sufficient evidence to determine that alternative values were more appropriate measures of the loss in that case. The same is true here. The *Bagatelos* Plaintiffs have not provided sufficient evidence of the actual value of the property interests that they received, and the Court should conclude that the *Bagatelos* Plaintiffs' claims fail as a result.

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1 *OCM Principal Opportunities Fund* is also inapposite because it addresses the "special
2 principles" that are applicable to damages for fraud relating to the sale of publicly traded securities, which
3 are not applicable here. 157 Cal. App. 4th at 872. As the *OCM* court explains in detail, ordinarily, out-of-
4 pocket damages for fraud arising from a sale are measured by the difference in value between the price
5 of the purchased item and the actual value of that item at the time of the sale. *Id*. However, because a
6 misrepresentation "may render the market price of a security 'fictitious'" at the time of purchase, "special
7 principles" applicable to securities fraud permit the purchaser to establish the value of the security based
8 on the market price after the fraud is broadly discovered. *Id*. at 872-73. In other words, the special
9 principles discussed by the *OCM* court permit the purchaser of a publicly traded security to deviate from
10 the stated rule that the value of the "thing received" is measured by the price at which it could be resold
11 at the time of the original transaction.

12 The *OCM* court's explanation of the principles applicable in that case runs contrary to the
13 *Bagatelos* Plaintiffs' assertions about the appropriate measure of damages in this case. The *Bagatelos*
14 Plaintiffs did not purchase publicly traded securities or acquire any other type of "fictitious" investment.
15 Instead, the *Bagatelos* Plaintiffs purchased ownership interests in properties. *See* Mot. 4-5, 13-14
16 (describing Plaintiffs' purchase of the buildings in this matter). Those properties were real and held
17 significant value until the *Bagatelos* Plaintiffs voluntarily relinquished their interests. *Id*. at 4-7 (stating
18 values of the buildings and describing the *Bagatelos* Plaintiffs voluntary releases of their interests).

19 The *Bagatelos* Plaintiffs' decision to relinquish their legitimate and valuable interests is not a
20 reason to deviate from the law on damages arising from fraudulent property transactions. The *Bagatelos*
21 Plaintiffs received what they were promised and have no evidence that the properties at issue were
22 overvalued at the time of purchase as would be required by the out-of-pocket loss rule. As a result, the
23 *Bagatelos* Plaintiffs have failed to prove an essential element of the underlying fraud claim and summary
24 judgment is required.

25 **C. The PFI Trustee's Disclaimer Was Limited to the *Camenisch* Class Action**

26 The *Bagatelos* Plaintiffs do not deny that the PFI Trustee's disclaimer, on its face, only disclaims
27 the claims asserted in *Camenisch*. Given that, the Court need not look beyond the express language of
28 the disclaimer. "If contractual language is clear and explicit, it governs." *Bank of the W. v. Superior Court*,

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1 2 Cal. 4th 1254, 1264 (1992). Mr. Goldberg's email clearly and explicitly disclaims the claims being
2 *pursued* in *Camenisch*, with specific reference to the court in which it is pending and the case number.
3 *See* Curtis Decl., Ex. 51 (disclaiming "any and all Contributed Claims that are pursued in the lawsuit …
4 styled as *Camenisch v. Umpqua Bank*, Case No. 20-cv-05905-RS"). Given the specificity in the Trustee's
5 disclaimer, there is no room to interpret it as applying to anything other than the *Camenisch* case.

6 The construction urged by the *Bagatelos* Plaintiffs would require the court to insert language that
7 does not exist. In the construction of a contract "the 'court is simply to ascertain and declare what is in
8 terms or in substance contained therein, not to insert what has been omitted, or to omit what has been
9 inserted…'" *PV Little Italy, LLC v. MetroWork Condominium Assn.*, 210 Cal. App. 4th 132, 152 (2012).
10 If Mr. Goldberg had intended to disclaim additional claims beyond those pursued as part of the class
11 action, he was free to use language effectuating that intent. He did not. The Trustee's email provides for
12 the disclaimer of the *Camenisch* class members' claims, not for the disclaimer of claims pursued in the
13 *Camenisch* action and any subsequent claims by members of the putative class or any claims against
14 Umpqua.

15 The PFI Trustee and the *Bagatelos* Plaintiffs are bound by the clear and explicit language of
16 disclaimer and the *Bagatelos* claims were not disclaimed as a matter of law.

17 **III. CONCLUSION**

18 For the reasons stated above and in the preceding motion, Umpqua respectfully urges the Court
19 to grant summary judgment in its favor on the claims brought by the plaintiffs in the *Bagatelos* case.

20

21 Dated: June 11, 2024

/s/ Kasey J. Curtis

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