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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRADLEY B. LARSEN, as Trustee of the BRAD AND CINDY LARSEN LOVING TRUST, et al., Plaintiff, vs. COLDWELL BANKER REAL ESTATE CORPORATION, a California corporation, doing business as COLDWELL BANKER COMMERCIAL AFFILIATES, INC., et al. Defendants.	Case No. SACV 10-00401 AG (MLGx) CLASS ACTION **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION** Date: December 5, 2011 Time: 10:00 a.m. Place: Courtroom 10 Date Action Filed: April 2, 2010 Trial Date: August 14, 2012

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TO THE COURT, TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 5, 2011 at 10:00 a.m, or as soon thereafter as may be heard, in Courtroom 10 of the above-entitled Court, located at 411 W. Fourth Street, Santa Ana, California, 92701, Plaintiffs Bradley B. Larsen, as Trustee of the Brad and Cindy Larsen Loving Trust; Jimmy R. Bunch, Jr.; Stephen J. Woodward; Sun Holdings, LLC; and Daniel Todd ("Plaintiffs") will and hereby do move this Court for an order:

1. To certify this action as maintainable as a class action;

2. To certify the following defined Class as the Plaintiff Class:

All persons and entities that paid money to invest in any of the REP Investment Funds (namely, the "INCOME FUND I"; "INCOME FUND II"; "INCOME FUND III"; "UNIT INVESTMENT BUSINESS TRUST I"' "UNIT INVESTMENT BUSINESS TRUST II"; "EQUITY FUND"; and/or the "GROWTH FUND".) Excluded from the Class are the named Defendants, as well as Real Estate Partners, Inc. (aka REP), Coldwell Banker Commercial Real Estate Partners (aka CB/REP), Coldwell Banker Commercial American Spectrum (aka CB/AS), Orange Coast Commercial Inc. ("OCC"), and all of their current and former officers, directors, management employees, successors, and wholly or partly owned subsidiaries or affiliated companies; class counsel and their employees and members; all persons within the third degree of relationship to any of them and any judge who hears or decides any matter in this litigation;

3. To certify the named Plaintiffs identified above as the representatives of the Plaintiff Class; and

4. Appointing J. Mark Moore, Ira Spiro and H. Scott Leviant of Spiro Moss LLP, and Michael R. Newhouse, Ruth L. Seroussi and Suzanne M. Henry of Newhouse|Seroussi, Attorneys, as Class Counsel.

This motion is brought pursuant to Rule 23 of the Federal Rules of Civil Procedure, and is based on this notice, the concurrently-filed memorandum of points and authorities, the Declarations of J. Mark Moore, H. Scott Leviant and Michael R. Newhouse filed herewith, the Declarations of the named Plaintiffs filed herewith, the Compendium of Evidence filed herewith, the complete files and records in this action, and upon such other and further argument and evidence that may be presented by Plaintiffs in reply or at the time of the hearing on this motion.

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1 This motion is made after conferences of counsel on numerous dates including, at least,
2 June 13, 2011, July 6-7, 2011, and August 19, 2011.
3
4 Dated: August 22, 2011 Respectfully submitted,
5 SPIRO MOSS LLP
6
7 By: /s/ J. Mark Moore
8 J. Mark Moore
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10 Michael R. Newhouse
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a consumer fraud class action, alleging that defendant Coldwell Banker Real Estate Corporation ("Coldwell") is liable for $55 million stolen from approximately 1,600 innocent investors via an unregistered real estate-related investment Ponzi scheme by Real Estate Partners, Inc. ("REP") and Coldwell's California-based franchisee, Coldwell Banker Commercial Real Estate Partners ("CB/REP"). However, for all of the complexity inherent in this scheme, the questions raised by this class certification motion are almost shockingly simple. Paraphrasing the famous questions by then-Senator Howard Baker, this lawsuit and this motion ask:

- What did Coldwell know and when did it know it?
- What did Coldwell do and when did it do it?

The answers to these questions are similarly simple, and they are deplorable. Coldwell affirmatively enabled and ratified the scheme by: (1) granting a franchise known as Orange Coast Commercial, Inc. ("CB/OCC") when it knew that its predecessor franchise, Coldwell Banker American Spectrum ("CB/AS"), violated its franchise agreement repeatedly and had recently been sued for claims similar to those at issue here; (2) granting CB/OCC's request to change its name to CB/REP to make it easier to market the REP offering, even though the franchise agreement forbid syndication; (3) insisting on reaping advertising and royalty fees from any income from sales of the REP funds; and (4) approving and/or ratifying brochures for each of the seven REP funds which prominently displayed the Coldwell logo and marks.

Coldwell then exacerbated matters by failing to properly supervise its franchisee, ignoring and failing to further investigate immediately obvious and ever-mounting evidence of the Ponzi scheme over an almost four year period, failing to notify those who had invested of the fraud, and failing to terminate CB/REP's franchise until it was too late. Put simply, Coldwell enabled the scheme, and made matters worse by failing to promptly stop the obvious misuse of its name.

With respect to this motion, this Court must decide whether it makes more sense for 1,600 people to prove, in 1,600 trials, Coldwell's approval, knowledge, assistance, inaction, negligence, ratification and resulting liability, or for one trial to determine the extent of Coldwell's misconduct

and liability. Because the core issues in this matter turn on common questions about Coldwell, the answer to that question is also simple: class certification is essential here to efficiently resolve, before one Court, the extent of Coldwell's involvement in, and liability for, the fraudulent scheme.

II. STATEMENT OF FACTS

A. The Fraudulent Investment Scheme

CB/REP marketed and sold units in seven distinct REP Investment Funds. The first five Offerings -- Income Fund I; Income Fund II; Income Fund III; Unit Investment Business Trust I; and Unit Investment Business Trust II -- sought to each raise $5 million from potential investors. (Compendium of Exhibits ["C.O.E."], Exh. 2: Income Fund I Brochure, Exh. 3: Income Fund II Brochure, Exh. 4: Unit Investment Business Trust I Brochure, Exh. 5: Income Fund III Brochure, Exh. 6: Unit Investment Business Trust II Brochure.)[1] The final two Offerings, the Equity Fund and the Growth Fund, each originally sought to raise $7.5 million, but were eventually doubled to $15 million each. (C.O.E., Exh. 7: Equity Fund Brochure; Exh. 8: Growth Fund Brochure.) All told, about $55 million was raised from approximately 1,600 Class Members.

The $55 million collected from Class Members through the Ponzi scheme was not used in the manner described in the brochures and accompanying Private Placement Memoranda. Instead, investors were paid "dividends" with subsequent investor funds to create the appearance of solvent, viable investment properties. (Second Amended Complaint, ¶96.)[2] CB/REP and REP insiders then stripped away the entire profit earned on the sales. In simple terms, CB/REP and REP obtained money by fraud to renovate and flip properties and to enrich their principals.

On September 6, 2007, the SEC filed suit in this Court against REP, the Investment Funds, and REP's principals for violations of federal securities laws, Case No. SACV 07-1022 AG (RNBx) (the "SEC Action"), resulting in an uncollected and likely uncollectable judgment.

B. Coldwell Turns a Blind Eye to Warning Signs with REP

In or around September 2000, REP purchased the CB/AS franchise. (¶15.) From the

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[1] Exhibits are fully identified in the Declaration of Michael R. Newhouse. The class definition is set forth in Plaintiffs' Notice of Motion and includes investors in all these funds.

[2] All "¶" references, unless otherwise stated, are to the Second Amended Complaint.

beginning of the CB/AS franchise relationship, REP violated terms of the franchise agreement. (¶16.) Coldwell advised REP and/or CB/AS of numerous violations of its franchise agreement, even sending REP and/or CB/AS a Notice of Intent to Terminate in October of 2002. (*Id.*)

In October 2002, an individual named Jeffrey Williams filed suit against REP, its officers (including Davenport and Thompson) and CB/AS for securities fraud, in this very Court, Case No. SACV 02-0997 DOC (MLGx) ("*Williams*"). (¶17.) The *Williams* complaint alleged, *inter alia*, that all defendants, including REP and CB/AS, issued, offered and sold interests in a limited liability company called "Real Estate Partners Venture Fund 1" (the "Venture Fund"). (*Id.*) Counsel for Mr. Williams sent Coldwell a litigation hold letter in the *Williams* matter. (¶18.) Thus, Coldwell had to have been explicitly aware of the litigation against REP and CB/AS. (¶ 18.) But, even if it claims it was not aware, had Coldwell done any due diligence, it would have discovered the *Williams* action. (*Id.*) Coldwell thus either conducted no adequate due diligence or was aware of *Williams*. Despite the warning signs, in April 2003 Coldwell chose to enter into two new Commercial Franchise Agreements (collectively the "Franchise Agreement") with OCC. (*Id.*) OCC was 40.5% owned by REP, with another 10.75% owned by REP's principal Dawson Davenport, and did business as CB/REP. OCC formally changed its name to Coldwell Banker Commercial REP, with Coldwell's approval, in July 2003. (*Id.*)

C. The Scheme Was Implemented with Substantially Uniform Misrepresentations and Omissions, Including False Information About Coldwell's Alleged Backing of the Program.

When CB/REP and REP undertook their fraudulent Ponzi scheme, uniformity in the misrepresentations was a critical component of its "success," assuming one defines success as a scheme that lasts for years, deceives countless victims so well that they participate on multiple occasions, and ultimately amasses $55 million in ill-gotten gains. (*See*, *generally*, C.O.E., Exh. 1: Class Member Declarations, various, beginning at ¶ 7 of the Declarations (instances of multiple investments).) The appearance of credibility, based heavily on Coldwell's involvement, was necessary for the scheme to succeed, and uniform misrepresentations created that false façade.

First, most of the sales made pursuant to the scheme commenced with cold calls to potential investors, based upon substantially similar sales pitch scripts. Those scripts used the

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Coldwell Banker name to build credibility:

> Hi _______, this is _______ with ***Coldwell Banker Commercial Real Estate Partners***. How is your day going so far? Great. [I] wanted to take a second and let you know in the last 7 years we've become the 3rd largest ***Coldwell Banker*** franchise in the country with ½ Billion under management.

(C.O.E., Exh. 13 [Script, emph. added]; *see also*, C.O.E., Exhs. 12, 14-18 [Scripts].) The scripts were all crafted to include representations suggesting a long and strong affiliation with Coldwell. Salespeople at CB/REP and/or REP confirmed the Coldwell affiliation representations:

> **Q** Did you ever tell them about REP's affiliation with Coldwell Banker?
> **A** Yeah. At this time, I did.
> **Q** What did you tell them about that?
> **A** I told them that we were -- at one time, we were one of the third largest franchises owned by a Coldwell Banker franchise, which was true, from my knowledge.

(C.O.E., Exh. 40, at 134:17-23.) Other salespersons agreed. (*See*, C.O.E., Exh. 41 at 63:14–64:5; Exh. 32 at 39:11–19; Exh. 43 at 41:20–42:8; Exh. 49 at 101:4–19; Exh. 50 at 31:14-20.)

Second, Class Members received the *Brochures that prominently featured the Coldwell logo and touted the Coldwell network.* (C.O.E., Exh. 9: Property "Before/After" Brochure; Exhs. 2-8: Fund Brochures.) For example, the Income Fund I Brochure said:

> Real Estate Partners has acquired a Coldwell Banker Commercial franchise and created a Special Assets Group that utilizes Coldwell Banker Commercial's extensive network to implement Master Services Agreements with financial institutions. The Master Service Agreement is a contract between financial institutions and Real Estate Partners that specifies services 10 be provided to the institution, including Portfolio Analysis, Single Asset Analysis, Property Inspection, Property Appraisals, Project Management, Property Management, Receivership Services, leasing and Sales. By taking advantage of the Coldwell Banker Commercial network Real Estate Partners is able to fully service Real Estate assets nationwide. This allows Real Estate Partners and Real Estate Partners Income Fund I to have early access to a wider portfolio of assets meeting acquisition criteria.

(Exh. 2, at REP 00004.)

As the final lynchpins in the campaign to create a widely-available perception of a link between the REP-issued funds, CB/REP and Coldwell, REP and/or CB/REP issued reports to investors, saturated the media with press releases, and used websites to proclaim Coldwell's backing. Reports used the Coldwell name to lull investors with claims of growth and success. (C.O.E., Exhs. 10 – 11: Quarterly REP Reports.) Website and media pronouncements were carefully crafted to include liberal references to Coldwell. (C.O.E., Exhs. 20-34: Various press

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releases, articles, and web pages; Exh. 44: McGill Depo. at 109:11 – 110:14 (directing investors to website and press releases); Exh. 45: Pai Depo., at 85:4-19 (same); Exh. 46: Powers Depo., at 132:24 – 133:13 (directing investors to media); Exh. 47: Rayburn Depo., at 76:24 – 77:22 (same); Exh. 48: Sanders Depo., at 94:8 – 95:9 (directing to website and internet).)[3] Even basic communications with Class Members, like Plaintiffs, included the "Coldwell" name and/or directed Class Members to "cbcrep.com." (C.O.E., Exhs. 35-38: Fax covers to various Plaintiffs.)

D. The Class Members Invested Based On Coldwell's Alleged Involvement

REP's use of Coldwell's name to bolster its fraud was crucial to its success, a conclusion that is both obvious on its face and demonstrably provable. In fact, more than 130 members of the class, including Plaintiffs, have already declared the significant materiality of Coldwell's involvement to their investment decision. (Exh. 1: Class Member Declarations, ¶¶ 3-6.) Like the Class, Plaintiffs invested as a result of receiving and relying on information about Coldwell's involvement. (Larsen Decl., ¶¶ 3-6; Bunch Decl., ¶¶ 3-6; Woodward Decl., ¶¶ 3-6; Todd Decl., ¶¶ 3-6; Freeman Decl., ¶¶ 3-6.)

Salespeople from REP and/or CB/REP knew that the Coldwell name was *the* driving force behind the scheme's sales:

> **Q** The first time you worked there, when you used the name Coldwell Banker, was that something that you found advantageous in talking to investors?
> **A** Yes.
> **Q** Could you explain that to me?
> **A** Well, Coldwell Banker's got a big name and a good reputation, and when you talk to the secretary and ask for Mr. Jones, you'd say, "This is Susan with Coldwell Banker Real Estate Partners," and they'd most likely come to the phone, because of Coldwell Banker.
> **Q** Were there any *people that you talked to on the phone the first time around who specifically told you* they were interested in this project because of the Coldwell Banker association?
> **A** Yes.
> **Q** About how many, what percentage?
> **A** Thirty percent.
> **Q** And that was 30 percent of the people you were able to send packages to?
> **A** Yes.

(Exh. 50, at 53:6-25; *see also*, Exh. 47, at 117:6-25.) (Italics added.) The people that invested did

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[3] Exhibits 25-34 were produced by Coldwell in the SEC Action. Coldwell also noted the existence of media communication in its internal and external communications. (*See*, Exhs. 53, 55, 56, 58.) Coldwell clearly knew how its name was being used but did nothing.

so because they reasonably believed Coldwell was backing the investments. Plaintiffs' declarations and the Class Member declarations submitted herewith confirm as much.[4]

E. Coldwell Opened the Door for the Fraud, and Ratified Thereafter

With information about the scheme flowing to Coldwell from many sources, it did nothing to stop the fraud or warn investors. Rather, Coldwell tried to cover for itself by occasionally issuing sham protests over use of its name and similar violations suggesting REP's and CB/REP's dishonesty. For example, in a September 19, 2003 letter, Coldwell complained to CB/REP that the www.cbcrepca.com website was "misleading to the public" because it described CB/REP as "a network of over 400 Coldwell Banker Commercial offices…" (C.O.E., Exh. 56: 9-19-03 Letter to Davenport.) That same letter criticized use of the "Coldwell Banker Commercial" name without consent in email sent by CB/REP to brokers and agents. (*Id.*) But, Coldwell did nothing.

A year later, in a September 9, 2004 letter, Coldwell's Vice President, Legal, threatened to terminate CB/REP for, *inter alia*, using "the Coldwell Bank Commercial Marks in a recent REP business prospectus. . . ." (C.O.E., Exh. 53: 9-9-04 Letter to CB/REP.) That same letter also said: "In certain instances, your agents have been found to simply refer to your franchise as 'Coldwell Banker Commercial,' failing to use your DBA at all. (*Id.*) In response, CB/REP, through counsel, evasively claimed that "if OCC is in violation of any such identity standards, any such violations are inadvertent, unintentional and will be corrected." (C.O.E., Exh. 54: 10-6-04 Letter

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[4] Once REP was no longer touting the Coldwell name, sales became slower and tougher:

> **Q** About how many phone calls that you made per day, how many of those resulted in a package being sent out?
> **A** Gosh, maybe two, one it was really hard.
> **Q** Why is that?
> **A** Because it was -- Real Estate Partners, when we didn't have the Coldwell Banker name, it became very hard to sell.
> **Q** So when you had the Coldwell Banker name, it was a little bit easier to sell?
> **A** Yes, definitely.
> **Q** Why is that?
> **A** Because it's a more well-known name in the community.
> **Q** So when you were allowed to use the Coldwell Banker name, was that something that helped open the door –
> **A** Sure.

(Exh. 43, at 95:9-24.)

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to Coldwell from CB/REP counsel.) Even this evasive response was insufficient to elicit any real action from Coldwell.

Incredibly, on November 23, 2004, Coldwell continued to merely brandish the termination sword, without actually using it, when it wrote to CB/REP's counsel and specifically mentioned the investment offering scheme at issue in this matter:

> Even more damning evidence of the commingling of these separate businesses are the numerous phone calls that Coldwell Banker Commercial's Business Consultant Mike McLean has received for Real Estate Partners, Inc. These calls are typically potential investors of Real Estate Partners who inquire about REP's relationship with the Coldwell Banker Commercial franchise. In most instances ***these individuals indicate that they would not otherwise do business with REP but for the Coldwell Banker name***. Mr. McLean's name and number is provided to these individuals by Mr. Davenport and others as a reference for REP. The most recent incident involved it "mike" from conneticut [sic]. He advised in a voicemail message to Mr. McLean that he had "some questions regarding a Real Estate Partners who is a franchisee in California and they are doing an offering and ***if Coldwell Banker's name wasn't associated with it I wouldn't be considering it because I don't know them*** ... " We have transcribed the call and recorded the audio as well. Even more recently we have spoken with Mike Vigneault and Ron Forbes. Mr. Forbes advised in particular that Daryl Lawrence of REP Investment Funds told him that the deal Mr. Forbes was considering investing in was the 'first time that Coldwell Banker has ever ventured into a pre-REIT fund." Both gentlemen told us that, without question, ***your client is using the Coldwell Banker name to sell investments***.

(C.O.E., Exh. 55: 11-23-04 Letter from Coldwell to CB/REP counsel, emphasis added.) Disturbingly, the majority of the letter is more concerned with the failure to make royalty payments and REP's use of the "Coldwell Banker" name in advertising, and not with the fact that a "pre-REIT fund" was being sold using the "Coldwell Banker" name. (*Id.*) In fact, Coldwell's focus on getting paid, rather than halting fraudulent schemes, is well illustrated by an internal, Coldwell e-mail from Andrew Napurano to Debbie Iuliano, dated February 3, 2004. The e-mail, referencing a CBS MarketWatch story about CB/REP's brokering of a $6.8 million sale of a Xerox facility, said, "make sure we get paid on this one." (C.O.E., Exh. 58: 2-3-04 e-mail from Napurano to Iuliano.) **And paid Coldwell was**. (C.O.E., Exh. 39: Checks from REP dba CB/REP to Coldwell; Exh. 60: Ledger of Payments from REP to Coldwell.)

The following year, Coldwell deceitfully attempted to downplay its knowledge of REP's activities. In a letter dated February 4, 2005, Ms. Carhart-Gladdis, Vice President – Legal for Coldwell, wrote to the Texas State Securities Board, saying: "I understand from you that Real Estate Partners is selling an interest in a REIT or a mutual fund, although I have not seen the

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offering circular and you have indicated that you are prohibited by law from providing us with a copy." (C.O.E., Exh. 57: 2-4-05 Letter.) Coldwell's counsel went on to claim that Coldwell was "investigating this matter further…" Of course, the misleading letter neglected to note that Coldwell already knew that a "pre-REIT fund" was being sold using the "Coldwell Banker" name *and had known of the intention to do so since at least 2003*, if not earlier:

> Dawson has submitted a request for a name change to Coldwell Banker Commercial REP (Real Estate Partners). This is because he and his senior brokers have created investment vehicles for investors, which CBC REP will manage. Legal has approved and documents will be sent from corporate in next few days.

(C.O.E., Exh. 59: 8-27-03 Affiliate Site Report by McLean.) And in 2004, McLean was directly asked whether Coldwell "endorsed" one of the funds. (C.O.E., Exh. 61: Email from Grimes.)

Yet another example of the substantial common evidence showing Coldwell's knowledge of REP's misconduct can be found in 2003, when Greg Brady, at CB/REP faxed Mike McLean pages from the Income Fund II Brochure. (C.O.E., Exh. 52: 10-17-03 Fax from Brady to McLean; see also, Exh. 3.) Mr. McLean explained at deposition what he did with the document:

> **Q** Did you do anything with these documents that Mr. Brady faxed to you?
> **A** I probably passed them up to corporate.
> **Q** Do you know if anything was done with them?
> **A** Ultimately, I think they were used to help us terminate Coldwell Banker Commercial REP.

(C.O.E., Exh. 51: 11-30-06 McLean Depo., at 135:12-17.) Taken at face value, it took about *three years* for Coldwell to use that document to terminate CB/REP. Furthermore, Dawson Davenport has testified that all of the brochures were approved by Coldwell prior to use. (C.O.E., Exh. 62: 1/30/07 Davenport Depo., at 159:6-164:10.) A trier-of-fact should have the opportunity to consider the plausibility of that claim for the entire class of defrauded Class Member investors.

This and other common evidence detailed above and below will demonstrate Coldwell's liability for the claims alleged by Plaintiffs. Such voluminous evidence of Coldwell's approval and awareness of the scheme perpetrated by CB/REP and REP supports a classwide determination of whether Coldwell knew sufficient information to have either (1) affirmatively approved and/or enabled the scheme, (2) ratified the scheme, or, (3) failed to investigate and warn in the face of unmistakable red flags.

1 **III. THE REQUIREMENTS FOR CLASS CERTIFICATION ARE SATISFIED**

2 In this context, "the question is not whether the plaintiff or plaintiffs have stated a cause of
3 action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*
4 *v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). The court "is bound to take the substantive
5 allegations of the complaint as true," *Blackie v. Barrack*, 524 F.2d 891, 907 n. 17 (9th Cir. 1975).

6 **A. The Requirements of Rule 23(a) Are Satisfied Here**

7 "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class
8 whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541,
9 2551 (June 20, 2011). "Under Rule 23(a), the party seeking certification must demonstrate, first,
10 that" (1) the class is so numerous that joinder of all members is impracticable; (2) there are
11 questions of law or fact common to the class; (3) the claims or defenses of the representative
12 parties are typical of the claims or defenses of the class; and (4) the representative parties will
13 fairly and adequately protect the interests of the class. *Id*. at 2548. "Second, the proposed class
14 must satisfy at least one of the three requirements listed in Rule 23(b)." *Id*, at 2548-49. Plaintiffs
15 discuss the Rule 23(a) requirements in Part III.A, and the Rule 23(b)(3) requirements in Part III.B.

16 **1. Numerosity**

17 "As a general rule, classes of forty or more are considered sufficiently numerous." *Mazza v.*
18 *Am. Honda Motor Co*., 254 F.R.D. 610, 617 (C.D. Cal. 2008). After conferences of counsel, it is
19 agreed that numerosity is not disputed by Defendant.

20 **2. Typicality**

21 Rule 23(a)(3) requires "the claims or defenses of the representative parties [to be] typical of
22 the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). "Under the rule's permissive standards,
23 representative claims are 'typical' if they are reasonably coextensive with those of absent class
24 members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1101,
25 1020 (9th Cir. 1998); *see also Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985). The
26 commonality, typicality, and adequacy-of-representation requirements "tend to merge" with each
27 other. *Dukes*, at 2551 n. 5 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982)).
28 Plaintiffs are members of the proposed class and suffered the same injury as fellow class

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members - namely, the loss of invested funds. Plaintiffs' and absent class members' claims arise from the same conduct and are based on the same legal theories. Like all class members, Plaintiffs were led to believe that they were investing in Coldwell Banker investments, and did invest (and lose) their funds at least in substantial part for that reason. Typicality is satisfied.

3. Adequacy of Representation

The adequacy requirement under Rule 23(a)(4) "requires: (1) that the proposed representative plaintiffs do not have conflicts of interest with the proposed class, and (2) that plaintiffs are represented by qualified and competent counsel." *Dukes*, 603 F.3d at 614; *see also Hanlon*, 150 F.3d at 1020 (adequacy turns on absence of conflicts with other class members and whether named plaintiffs and their counsel prosecute the action vigorously).

The declarations of Plaintiffs submitted herewith demonstrate that Plaintiffs invested funds like other class members,[5] that they understand their roles as class representatives, and that, to their knowledge, they have no known conflicts of interest with any other class members.[6] Because they are adequate, this Court should appoint them to represent the class.

Similarly, counsel's declarations filed herewith establish that Plaintiffs' counsel are experienced litigating consumer class actions and other complex cases. Counsel have investigated the claims, demonstrated their knowledge of the applicable law, possess the resources needed to represent the class, and demonstrated that they can and will vigorously prosecute this class action.

4. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same

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[5] Each class representative need not have invested in each fund. *See, e.g., In re Dreyfus Aggressive Growth Mutual Fund Litig*., No. 98 Civ. 4318 (HB), 2000 WL 14357509, at *3 (S.D.N.Y. Sept. 20, 2000); *In re Dynex Capital, Inc. Securities Litig*., Slip Copy, 2011 WL 781215, *3 (S.D.N.Y. March 7, 2011).

[6] The test is "whether or not plaintiffs have demonstrated a willingness and vigor to prosecute the action, whether they have any disabling conflicts going to the heart of the controversy, and whether they have qualified counsel." *In re Adobe Systems, Inc. Securities Litig*., 139 F.R.D. 150, 156 (N.D.Cal. 1991) (plaintiffs understood gravamen of their claims, and need not be intimately familiar with every issue). *See also, Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (Adequacy depends on counsel's qualifications, an absence of antagonism, a sharing of interests between representatives and absentees, and unlikelihood of collusion.)

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injury.'" *Dukes*, at 2551 (quoting *Falcon*, 457 U.S. at 157). "This does not mean merely that they have all suffered a violation of the same provision of law," but instead that their claim(s) "depend upon a common contention ... of such a nature that is capable of classwide resolution-which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*.

Here, the class members have suffered the same injury – loss of their invested funds in a fraudulent investment scheme. In addition, there are numerous common questions that are capable of class-wide resolution (*Dukes*, at 2551) and depend on common answers: whether material misrepresentations were made in investment brochures and sales calls, leading Plaintiffs and class members to invest; whether CB/REP participated with REP in the fraud scheme by marketing REP's securities and communicating with investors; whether Coldwell affirmatively approved, enabled and ratified the conduct of the primary defrauders, REP and CB/REP; whether Coldwell substantially assisted in the fraudulent scheme and the conduct which violated the UCL, with knowledge of it; and whether Coldwell's conduct, in doing nothing despite knowledge of its franchisee's wrongdoing, was negligent and/or in violation of the UCL. *See*, *e.g.*, *Negrete v. Allianz Life Ins. Co*., 238 F.R.D. 482, 488 (C.D.Cal. 2006) (finding commonality satisfied where class members' claims "derive from a common core of salient facts, and share many common issues" and granting class certification). Commonality is satisfied.

B. Plaintiffs Also Satisfy the Requirements of Rule 23(b)(3)

Under Rule 23(b)(3), certification is proper if (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual class members; and (2) class treatment is superior to other available methods for the fair and efficient adjudication of the controversy. *Local Joint Exec. Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162-63 (9th Cir. 2001); *Negrete*, 238 F.R.D. at 487, 489. Here, Plaintiffs satisfy both predominance and superiority, warranting class certification.

1. Uniform Material Misrepresentations to the Class Establish Predominance with Respect to the Misrepresentation Claims

Predominance is met because the misrepresentation claims are based on a common scheme

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and course of conduct to deceive investors about Coldwell's involvement in order to obtain their funds.[7] "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234 (9th Cir. 1996). "Predominance is a test readily met in certain cases alleging consumer or securities fraud. . ." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

a) *Cases Involving Investment Fraud Schemes Deserve Class Treatment*

According to the California Supreme Court, "it is not necessary to show reliance upon false representations by direct evidence." *Vasquez v. Superior Court*, 4 Cal. 3d 800, 814 (1971). Rather, the court can presume that the representation was relied upon "[w]here representations have been made in regard to a material matter and action has been taken." *Id.* In this case, Plaintiffs and class members were presented with standardized investment brochures that prominently featured the Coldwell Banker name and logo, suggesting (falsely) that the investments were Coldwell Banker products and/or backed by Coldwell Banker. In addition, many class members were told in marketing calls, generally using scripts, that Coldwell Banker Real Estate Partners was Coldwell Banker's third largest franchise (a false claim) and that it was selling Coldwell Banker investment products (a false claim). Such facts would be material to a reasonable person in determining whether to invest tens of thousands of dollars with REP, which, unlike Coldwell, had no proven track record of success. Plaintiffs and class members did invest, based on Coldwell's asserted involvement, and the "fact" of its involvement was material to their investment decisions. *See, supra*, Part II.

In re First Alliance Mortg. Co., 471 F.3d 977 (9th Cir. 2006) ("*First Alliance*") is instructive. In that case, loan officers for bankrupt subprime lender First Alliance Mortgage Company had made standardized sales presentations in face-to-face meetings with borrowers,

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[7] The elements of a fraud claim are (1) a misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal.App.4th 798, 806-807 (2007). A negligent misrepresentation's elements are similar but do not include knowledge of falsity or intent to defraud. *Id.*; *see also Platt Electrical Supply, Inc. v. EOFF Electrical, Inc.*, 522 F.3d 1049, 1055 (9th Cir. 2008). Plainly, knowledge of falsity and intent to defraud are matters focusing on the defrauding parties' conduct. And damages are undisputed.

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failing to disclose, among other things, hidden fees "result[ing] in a large class of borrowers entering into loan agreements they would not have entered had they known the true terms." *First Alliance*, 471 F.3d at 991-92; *see also Plascencia v. Lending 1st Mortg.*, 259 F.R.D 437, 447-448 (N.D.Cal. 2009) (citing *First Alliance* in certifying fraud and UCL claims predicated on nondisclosure of material facts in Option ARM loan documents). Lehman Brothers ("Lehman") was sued in a class action for aiding and abetting in the fraud, in its capacity as a lender to First Alliance and the underwriter of its securitized debt. After a jury found Lehman liable to the class for aiding and abetting the fraud, Lehman contended on appeal that class treatment had been improper because the oral misrepresentations made to borrowers were not uniform. *Id.* at 990.[8] Lehman also argued insufficiency of evidence of class-wide fraud. The Ninth Circuit disagreed:

> While some other courts have adopted somewhat different standards in identifying the degree of factual commonality required in the misrepresentations to class members in order to hold a defendant liable for class-wide fraud, ***this court has followed an approach that favors class treatment of fraud claims stemming from a common course of conduct***." .... "Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions" ....
>
> Class treatment has been permitted in fraud cases where, as in this case, a standardized sales pitch is employed.

Id. at 990-91.

Finding that the focus should be on the underlying, centrally-orchestrated scheme itself, the Ninth Circuit rejected the notion that "individualized" presentations to class members precludes certification. *Id.* at 991. The court explained that oral misrepresentations made by agents in furtherance of the scheme need not be "identical." *Id.* It expressly rejected a "talismanic rule that a class action may not be maintained where a fraud is consummated principally through oral misrepresentations, unless those representations are all but identical." *Id.* Where a "centrally

[8] Lehman argued class treatment was improper because every class member would have to show the alleged misrepresentations "were conveyed to borrowers in a uniform manner and that the uniform misrepresentations came directly from the written, standardized sales pitch. *Id.* at 990. The Ninth Circuit disagreed, holding that it "is the underlying scheme which demands attention. Each plaintiff is similarly situated with respect to it, and it would be folly to force each bond purchaser to prove the nucleus of the alleged fraud again and again." *Id.* at 991.

orchestrated strategy" is shown, the "center of gravity of the fraud transcends the specific details of oral communications." *Id. See also Menagerie Productions v. Citysearch*, No. CV 08-4263 CAS (FMO), 2009 WL 3770668, *5 (C.D. Cal. Nov. 9, 2009) (noting that *First Alliance* held that "where a 'centrally-orchestrated scheme to mislead' is alleged, *it is the scheme and not the precise details of any individual's experience* that forms the nucleus of the class claims.") (Emph. added.)

Focusing on the gravamen of the scheme, *First Alliance* relied on *In Re Am. Cont'l Corp./Lincoln Savings & Loan Sec. Litig.*, 140 F.R.D. 425, 431 (D. Ariz. 1992), which held:

> The gravamen of the alleged fraud is not limited to the specific misrepresentations made to bond purchasers.... The exact wording of the oral misrepresentations, therefore, is not the predominant issue. It is the underlying scheme which demands attention.

Like *First Alliance*, the marketing brochures and materials here are "unquestionably designed to obfuscate" the truth about the underlying investments - i.e., the truth that, in fact, the investments were not Coldwell investment products, and that Coldwell was not standing behind them. *First Alliance*, 471 F.3d at 985. The oral sales pitches made to class members, uniformly touting Coldwell's involvement, were designed for the same purpose. Class certification cannot be avoided simply because the scheme was implemented through salespersons employed by REP or CB/REP. *Id.* at 990-91. *See also In re Heritage Bond Litigation*, No. MDL 02-ML-1475 DT, 2004 WL 1638201, *7 (C.D. Cal. July 12, 2004) (granting class certification in case alleging securities claims and negligence arising out of investments in 11 municipal bond offerings, the court noting that "this Court will not deny class certification because some class members received the misleading information from brokers while others read it in the Official Statements.") The class action mechanism would be impotent if a defendant could avoid potential liability for defrauding a large group of persons by simply tinkering with the wording of misrepresentations across the class of victims, thereby diverting attention from the wrongful scheme itself. *Id.* at 992.

Class certification also was granted in a case involving a common scheme to defraud investors using uniform sales information in *McPhail v. First Command Fin. Planning, Inc*, 247 F.R.D. 598 (S.D.Cal. 2007). In *McPhail*, the defendant trained its sales force to convey a uniform message that failed to inform investors about the earnings they lost due to high front-end sales loads. *Id.* at 602-03. The defendant argued the class should not be certified because the "actual

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sales pitches did not exactly follow the script and, therefore, the oral representations were never uniform." *Id.* at 609. Citing *First Alliance* and *Lincoln Savings*, the *McPhail* court concluded the plaintiff demonstrated class-wide reliance because the material misrepresentations made to the class of investors were "sufficiently similar." *Id.* at 614. In so holding, the court found that "the reliance requirement must encompass the rise of sophisticated marketing strategies which rely on communicating similar misrepresentations to a large class of investors." *Id.* at 614-15.

In this case, there was a centrally-orchestrated scheme to defraud Plaintiffs and class members, through the use of standardized written materials and sales pitches that misrepresented material facts concerning Coldwell's involvement. Plaintiffs and class members were induced to participate by means of intentional and/or negligent misrepresentations.

b) *California Law Provides for a Class-Wide Inference of Reliance*

Reliance "is proved by showing that the defendant's misrepresentation or nondisclosure was 'an immediate cause' of the plaintiff's injury producing conduct. . . A plaintiff may establish that the defendant's misrepresentation is an 'immediate cause of the plaintiff's conduct by showing that in its absence the plaintiff 'in all reasonable probability' would not have engaged in the injury producing conduct."' *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009) (citations omitted). A "presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. . . A misrepresentation is judged to be 'material' if a 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' . . ." *Id.*, at 327 (citations omitted).

The availability of a *class-wide presumption of reliance* in this case is a second reason that common issues predominate over issues relating only to individual class members with respect to the claims for fraud and negligent misrepresentations. Here, as explained above, substantially uniform brochures touting Coldwell's association with the investments were provided to Plaintiffs and Class Members alike, and substantially similar sales pitches touting Coldwell's involvement were made to all investors. Such facts make this a paradigmatic case for class certification, since, under California law, where a class of consumers is exposed to substantially the same material misrepresentation or omission, class-wide reliance can be inferred and/or presumed. As the

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California Supreme Court held four decades ago, "'[w]here representations have been made in regard to a material matter and action has been taken, it will be presumed that the representations were relied on.'" *Vasquez*, 4 Cal. 3d at 814-15. Stated another way, "if the trial court finds material misrepresentations were made to the class members, *at least an inference of reliance* would arise as to the entire class." *Vasquez*, at 815.[9] Allowing plaintiffs to presume reliance, the Court in *Vasquez* relied on federal class cases involving investors who relied on material misrepresentations in publicly disseminated materials. *Id*. at 815 (citations omitted).

The California Supreme Court later reaffirmed the availability of a class inference of reliance in *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1095 (1993) (citing *Vasquez*, 4 Cal.3d at 814 & fn 9). The Ninth Circuit also reaffirmed as much on August 22, 2011:

> "If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class.'" *Vioxx*, 180 Cal. App. 4th at 129, 103 Cal. Rptr. 3d at 95; *see also Vasquez v. Superior Court*, 4 Cal. 3d 800, 814, 484 P.2d 964, 973, 94 Cal. Rptr. 796, 805 (1971); Steroid, 181 Cal. App. 4th at 156-57, 104 Cal. Rptr. 3d at 338. This rule applies to cases regarding omissions or "failures to disclose" as well.

Stearns v. Ticketmaster Corp., 9th Cir. Appeal No. 10-55341 (Aug. 22, 2011), at 11357. S*ee also In re Steroid Hormone Product Cases*, 181 Cal.App.4th 145, 157 (2010) (reversing denial of class certification in case involving claims under the UCL and CLRA, noting that if plaintiff could show that material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class).[10]

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[9] "The requirement that reliance must be justified in order to support recovery may also be shown on a class basis. ***If the court finds that a reasonable man would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise***. It should be noted in this connection that ***a misrepresentation may be the basis of fraud if it was a substantial factor in inducing the plaintiff to act and that it need not be the sole cause of damage***." *Vasquez*, at 814 n. 9.

[10] And *see Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282 (2002) (quoting *Vasquez* in stating: "Causation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class. The fact that a defendant may be able to defeat causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all."); *McAdams v. Monier, Inc*., 182 Cal. App. 4th 174, 184 (2010) (inference of common reliance available based on uniform failure to disclose material fact); *Wilner v. Sunset Life Ins. Co*., 78 Cal. App. 4th 952, 963 (2000) (citing *Vasquez*); *Chavez v. Blue Sky Natural Beverage Co*., 268 F.R.D. 365, 376 (N.D. Cal. 2010) (certifying fraud and CLRA claims, noting that class-wide

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Jenson v. Fiserv Trust Co., 256 Fed. Appx. 924, 924-26 (9th Cir. 2007) involved facts much like those here - a Ponzi scheme, 1,700 investors, and a defendant that was not the primary bad actor. The defendant, Fiserv Trust Co., was a trust company through whom a sub-class of the class members had invested their money with D.W. Heath & Associates (apparently not a defendant). After the district court granted certification, Fiserv appealed. The Ninth Circuit, relying on *First Alliance*, *Vasquez* and *Mirkin*, affirmed, noting that "[t]he Ponzi scheme itself would have to be proved or controverted over and over were the case not to proceed as a class action." *Id*., at 926. The court held that, in California, of a presumption of class-wide reliance where uniform representations and omissions are involved, noting that "common issues do not necessarily fail to predominate because reliance must be shown." *Id*. (citing *Mirkin* and *Vasquez*).

In the present Ponzi scheme, substantially uniform material misrepresentations were made to each class member in investment brochures and in sales pitches, before each class member invested their funds. Moreover, this Court has before it sworn testimony not only from Plaintiffs but from 127 putative class members establishing that, in fact, Coldwell's alleged involvement in their investments was an important factor in their decisions to invest. Materiality cannot reasonably be disputed.[11] Under California law, as made clear above, a presumption of class-wide

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reliance may be inferred if plaintiff can show that material misrepresentations were made to class members); *Zeisel v. Diamond Foods, Inc*., Case No. 10-01192 JSW, 2011 WL 2221113, *10 (N.D. Cal. June 7, 2011) (Plaintiff "contends that each class member was exposed to the same allegedly misleading and misbranded labels. Thus … assuming [plaintiff] can prove the representations were material, [plaintiff] could establish an inference of reliance on behalf of the class"); *Brazil v. Dell, Inc*., No. C-07-1700 RMW, 2010 WL 5387831, *5 (N.D.Cal. Dec. 21, 2010) (certifying fraud claims *Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355, 363 (1976) (following *Vasquez*, holding that inference of reliance was proper because monthly maintenance fees are "manifestly a material factor in ... condominium purchases" and because purchases "were acts consistent with their reliance."); *Plascencia*, 259 F.R.D. at 446 (certifying class in case involving material omissions in form loan documents); *Lymburner v. U.S. Financial Funds, Inc*, 263 F.R.D. 534, 541 (N.D.Cal. 2010) (same); *Fitzpatrick v. General Mills*, No. 10-11064, 2011 U.S. App. LEXIS 6047 (11th Cir. Mar. 25, 2011) (adopting presumption of reliance as to purported health benefits of yogurt); *Cole v. Asurion Corp*., 267 F.R.D. 322 (C.D. Cal. 2010) (granting certification on omission-based liability theory); *Wolin v. Jaguar Land Rover North America*, 617 F.3d 1168 (9th Cir. 2010) (reversing denial of certification because common questions predominated as to duty to disclose information a reasonable consumer would deem material).

[11] *See In re Tobacco II Cases*, 46 Cal. 4th at 327 ("A misrepresentation is judged to be 'material' if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.") Certainly, a reasonable man

reliance on the representations regarding Coldwell's role and involvement is warranted. Nevertheless, Coldwell will doubtless argue that some class members might have relied on purported facts in addition to its represented role in their investments, such as CB/REP's claims of high returns and future dividends from REP issued investments. However, any such argument fails as a basis to defeat class-wide reliance, because, while a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause: "'It is not necessary that the plaintiff's reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor influencing his conduct. It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision.'"[12] *Tobacco II*, 46 Cal. 4th at 326-327 (quoting *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 976-77 (1997)); see also *Chavez*, 268 F.R.D. at 377 (citing *Tobacco II* in discussing California standard for inferred reliance in common law fraud context); *Vasquez*,at 814, n. 9.

Based on both the *First Alliance* line of cases, discussed in Part III.B.I.a *supra*, and the *Vasquez* line of cases, predominance is satisfied insofar as the underlying misrepresentations are concerned. The scheme itself is largely undisputed. As with the 127 sworn declarations from class members describing the materiality of Coldwell's role, there is no reason to force each class member to prove the scheme, and Coldwell's contributions, over and over again.

2. Coldwell's Liability Can be Proven with Common Evidence

a) *Common Issues Predominate as to the Negligence Claim*

The elements of a negligence claim are duty, breach, causation and damages. *Rosencrans v. Dover Images, Ltd.*, 192 Cal. App. 4th 1072, 1082 (2011) (citing *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527, 1541 (2003).) See also CACI 400. "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide."

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would find the representations of Coldwell's involvement important in considering whether to invest. At minimum, whether one would do so is a *common question*.

[12] All Plaintiffs have stated under oath that they would not have invested had they known the true facts. This suffices for reliance. *Jordan v. Paul Financial, LLC*, 745 F.Supp.2d 1084, 2010 WL 3892261, *8 (N.D. Cal., Sept. 30 2010) (citing *Mirkin*).

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Vasquez v. Residential Invs., Inc., 118 Cal. App. 4th 269, 278 (2004); *Rosencrans*, 192 Cal. App. 4th at 1082 (same); *Bomersheim v. Los Angeles Gay & Lesbian Center*, 184 Cal. App. 4th 1471, 1482 (2010), *review denied* Sept. 1, 2010 (reversing denial of class certification). Causation is shown if the defendant's negligence is a "substantial factor" in causing damages. *Id*., at 1087.

In the present case, Plaintiffs allege that Coldwell is liable for negligence because CB/REP and REP were its agents (¶152), and Coldwell had a duty to Plaintiffs and class members to: 1) ensure that its agents were properly licensed to sell and offer to sell securities; and 2) to ensure that the investments at issue were registered securities when it approved, enabled and shared in the profits of CB/REP's sale of the REP investments using Coldwell's name and marks. (¶153-56). Coldwell breached its duty to Plaintiffs and class members by failing to ensure that REP and CB/REP possessed required licenses prior to its approval and authorization, as well as by failing to take steps to remedy CB/REP's and REP's illegal conduct, consistent with reasonable care, control, supervision and oversight over its franchisee, ¶159. As a result, Coldwell's action and inaction caused Plaintiffs and the class to be defrauded while its franchisee used its name as a cloak of legitimacy for the scheme, resulting in damages in excess of $55 million. (¶¶ 160-61.)

Whether Coldwell had a legal duty to Plaintiffs and class members, and whether it breached that duty, are common questions, the resolution of which depends on Coldwell's conduct rather than on facts relating to the class members and their individual investments. And, whether Plaintiffs were damaged is not even in dispute; plainly, each of them invested and lost. The only real question for Rule 23 purposes regarding the negligence claim is whether causation of damages can be proven on a class-wide basis. Where the alleged injuries are physical injuries, proving causation classwide can be a difficult. *See, e.g., Gratin v. S&M Nu Tec LLC*, 245 F.R.D. 429, 439 (C.D. Cal. 2007) (no predominance where plaintiffs were consumers who purchased doggie treats that were harmful to their dogs). *But see In re Heritage Bond Litigation, supra* (certifying negligence claim in case involving losses in investment scheme). But, this is not a case involving physical injuries. In this case, as in *Heritage Bond Litigation*, Plaintiffs are dealing with quantifiable economic losses arising out of investment in a Ponzi scheme, the successful marketing of which, and losses therefrom, depended on Coldwell's involvement and negligence.

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1 Coldwell will likely argue that it cannot be found negligent, that others are to blame, and
2 that it did not cause Plaintiffs and class members' damages (or breach any duty). But this is not
3 the merits phase. Whether Coldwell (1) owed a duty of care to Plaintiffs and class members, and
4 (2) breached such a duty by affirmatively enabling the investments and failing to take steps to
5 protect investors to whom its franchisee was selling unregistered securities while falsely touting its
6 involvement, are common questions resolvable with common evidence. Here, the question of
7 causation is determinable on a class basis because an inference of causation is available.

8 *Bomersheim*, 184 Cal.App.4th 1471, is instructive. *Bomersheim* involved allegations that
9 the defendant treated syphilis patients with a Bicillin C-R, not approved for such use, rather than
10 the proper drug. Many patients had to be retested and re-treated. A negligence class action was
11 filed, alleging the defendant had a duty to provide medical care consistent with the applicable
12 standard of care and breached it by negligently administering the wrong drug. The trial court
13 denied certification on several grounds, including because individual issues predominated as to
14 causation and damages – despite common issues regarding duty and breach - and because
15 superiority was lacking since damages could be up to $18,000. *Id.*, at 1479-80.

16 The court of appeal reversed. The court confirmed that duty was a legal issue, whereas
17 breach was a factual one. However, both issues were common to the class. *Id.*, at 1482. With
18 respect to causation, the court concluded that, on the facts, causation could be determined with
19 common proof. *Id.*, at 1484-85. Specifically, the court stated:

20–26
> ***It is not necessary to show an individual's motivation by direct evidence***. Whether one party's conduct induced another's response can often be inferred from the circumstances attending the transaction . . . . [citations to *Vasquez* and other cases omitted] [¶] ***An inference of causation arises when a material event impacts an individual whose subsequent actions constitute a reasonable response. In the class context, where individuals are uniformly subjected to a material stimulus and thereafter uniformly act in a manner consistent with a reasonable response, a classwide inference is raised that the stimulus caused the response***. [¶] Here, putative class members all came to the Center seeking treatment for syphilis, a potentially life-threatening disease. They were given the wrong medication. After being informed that the treatment may have been ineffective, they sought retreatment. ***A reasonable inference as to the entire class is that the initial mistreatment caused members to seek retreatment. Causation can therefore be presumed on common proof***.

27 *Bomersheim*, at 1484-85. The same is true here. Defendant's allegedly negligent behavior was
28 common as to all class members and was, as alleged, a substantial factor in causing injury to all of

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them. As such, a class-wide inference of causation is available under California law. Since duty and breach are questions unrelated to unique circumstances of class members, and damages, though different in amount, indisputably exist, the Court should resolve this claim on a class basis.

b) *Common Issues Predominate as to Agency-Based Liability*

Whether REP and CB/REP were in fact acting as Coldwell's agents in the scheme has nothing to do with individual class members. Similarly, whether, legally, Coldwell can be held liable on an agency basis for REP and CB/REP's fraudulent conduct in marketing and selling unregistered securities by touting Coldwell's involvement, does not raise individual issues.[13]

"An ostensible agency is established when a principal intentionally, or by want of ordinary care, causes a third person to believe another is an agent." *Jacoves v. United Merchandising Corp*., 9 Cal. App. 4th 88, 103 (1992), review denied Nov. 25, 1992 (citing Civ. Code §§ 2300, 2317 and reversing summary judgment in favor of hospital). A principal is liable when it knows the agent holds itself as clothed with certain authority and the principal remains silent, to the detriment of third parties transacting business with the agent. *Id*. (citing *Preis v. American Indem. Co*., 229 Cal. App. 3d 752, 761 (1990)).[14]

Here, as alleged, Coldwell granted the CB/OCC franchise (notwithstanding the *Williams* case), granted a name change to CB/REP to assist in syndication, insisted on receiving advertising and royalty fees from any syndication (though syndication violates the Franchise Agreement), and expressly approved brochures for all seven funds which prominently displayed the Coldwell logo and marks. Coldwell knew that CB/REP was holding itself out as acting on Coldwell's behalf and as offering investors Coldwell investment products; *at a minimum, whether Coldwell knew as much is a common question determinable with common evidence.* As alleged, despite its

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[13] Whether CB/REP and REP were alter egos, as alleged (SAC, ¶¶ 19, 27, 31), also implicates no individual issues regarding class members.

[14] *See also C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc*., 213 F.3d 474, 480 (9th Cir. 2009) (citations omitted) (noting that ostensible authority may be proven through evidence of "the principal knowing that the agent holds himself out as clothed with certain authority but remaining silent...."); *Gulf Ins. Co. v. TIG Ins. Co*., 86 Cal. App. 4th 422, 439 (2001) (same, citing *Preis*); *Chicago Title Ins. Co v. AMZ Ins. Services, Inc*., 188 Cal. App. 4th 401, 426 (2010), *review denied* Dec. 15, 2010 (citations omitted).

1 authorizations, approvals and ongoing knowledge, Coldwell remained silent vis-à-vis the public,
2 and took no steps to protect the public. While Coldwell may proclaim that it did take steps –
3 however feeble and belated – to restrain CB/REP, this, again, is not the merits stage. The present
4 question is whether Plaintiffs' allegations can be proven or disproven with common evidence.
5 Ostensible agency is not the only common basis for establishing vicarious liability. "An
6 agency may be created, and an authority may be conferred, by a precedent authorization or a
7 subsequent ratification." Civ. Code § 2307. Ratification can take many forms, including express
8 ratification. However, the knowing acceptance and retention of benefits arising from another's
9 actions also serves to ratify those actions. Civ. Code § 2310. Here, the SAC details how Coldwell
10 learned of CB/REP's acts, did nothing, but continued to receive benefits. (*See* ¶¶ 122-147.)
11 Moreover, when a principal is aware that the rights of third persons are in *jeopardy*, mere
12 *silence* will be deemed ratification:
13
14
15

> There is no question but that ***where the rights of third persons*** depend on his election, the rule is a principal must disaffirm an unauthorized act of his agent within a reasonable time after acquiring knowledge thereof, else his silence may be deemed ratification or acquiescence in order to protect an unsuspecting third party.

16 *Gates v. Bank of America Nat. Trust & Savings Ass'n*, 120 Cal. App. 2d 571, 576-577 (1953).
17 Here, the SAC not only describes Coldwell's affirmative, enabling acts, but also describes the
18 information flowing to Coldwell sufficient to enable Coldwell to conclude that the rights of
19 investors were violated or jeopardized. This issue is ideally suited to class-wide adjudication.
20 Normally, a principal must possess all facts surrounding a transaction before the principal
21 can be held to have ratified. But, when the principal remains intentionally ignorant after receiving
22 information sufficient to invoke inquiry notice, ratification may be imputed:
23
24
25

> Ordinarily, the law requires that a principal be apprised of all the facts surrounding a transaction before he will be held to have ratified the unauthorized acts of an agent. However, where ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable man on inquiry …, he may be held to have ratified despite lack of full knowledge.

26 *Reusche v. California Pacific Title Ins. Co.*, 231 Cal.App.2d 731, 737 (1965) (internal citations
27 omitted). This is fully consistent with fundamental maxims of California law: "Where one of two
28 innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be

the sufferer." Civ. Code § 3543. If Coldwell didn't know exactly what was happening, it knew enough that it should have investigated and learned the rest, a fact amenable to class-wide proof.

c) *Predominance is Met as to Aiding and Abetting and UCL Liability*

"[L]iability may be imposed on one who aids and abets the commission of an intentional tort if the person knows the other's conduct constitutes a breach of a duty and gives substantial assistance or encouragement to the other so to act." *Peel v. BrooksAmerica Mortg. Corp*., --- F.Supp.2d ----, 2011 WL 2174373, *7 (C.D.Cal. June 1, 2011) (quoting *First Alliance* in finding aiding and abetting alleged). Courts regularly find claims for aiding and abetting to be appropriate for class treatment, as the questions of substantial assistance and knowledge are questions that focus on the alleged aider, rather than the victims. *Jenson*, again, is illustrative. Regardless whether Fiserv ultimately would be found liable for substantially assisting in the fraud, the Ninth Circuit held, "Fiserv either knew of Heath's scheme to defraud and took steps substantially to advance the scheme or it didn't. Either way, its knowledge and assistance (if any) predominates as a common issue." *Id. See also First Alliance*, at 990-995 (rejecting class certification challenge and affirming class-wide liability for aiding and abetting fraud).

Here, Plaintiffs seek to hold Coldwell liable for aiding and abetting the fraud, negligent misrepresentations and UCL violations of the primary defrauders. (To date, the Court has not dismissed the UCL claim and, as previously argued by Plaintiffs, should not do so.)[15] As in *Jenson*, either Coldwell knew of the wrongful conduct or it didn't. Either it substantially assisted or it didn't. Neither element implicates individual questions. Class treatment is proper.

3. Superiority Is Satisfied

All four Rule 23(b)(3) "superiority" factors militate in favor of certification here.[16] First, as

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[15] Whether UCL violations occurred cannot be disputed. "Unlawful" prong violations occurred because (1) REP issued unregistered securities and CB/REP marketed and sold those unregistered securities; and (2) those entities engaged in fraud, in violation of the statutory fraud provisions in Civil Code §§ 1709-1711. The UCL's "fraudulent" prong was also plainly violated, as the brochures and statements touting Coldwell's involvement were likely to (and calculated to) mislead a reasonable person. Finally, UCL "unfairness" cannot be questioned.

[16] The superiority analysis requires "a comparable evaluation of other procedures" for resolving all the claims at issue. *Local Joint Executive Bd. of Culinary/Bartenders v. Las Vegas*

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evidenced by the declarations submitted herewith, class members have no interest in prosecuting separate actions. Cases involving securities fraud frequently involve large individual damages, yet courts find superiority easily satisfied in that context. *See*, *e.g.*, *In re Merrill Lynch & Col, Inc. Research Reports Securities Litig*., 246 F.R.D. 156, 165 (S.D.N.Y. 2007) (quoting *In re Blech Sec. Litig*., 187 F.R.D. 97, 107 (S.D.N.Y. 1999) in noting that "[i]n general, securities suits ... easily satisfy the superiority requirement of Rule 23."); *In re Heritage Bond Litigation*, 2004 WL 1638201, *11 (noting that 2/3 of class members had damages of less than $50,000).[17]

Second, there is no other litigation commenced by class members against Coldwell. (C.O.E., Exh. 63: RFA 5.) Third, there is no reason not to concentrate the litigation here. The fraudulent scheme was conceived and carried out here, the named defendants (as well as REP and CB/REP) are California entities, the investment contracts specified California law as the governing law (C.O.E., Exh. 64: PPM Subscription Agreement), and this Court has already overseen the SEC's action and is familiar with the facts insofar as they relate to some of the players in the scheme. (*See*, *generally*, SEC Action.)

Finally, because of the predominance of common issues, there are few if any significant manageability problems in a case such as this one, involving a relatively small class of identifiable investors with identifiable alleged damages. Moreover, "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored, and should be the exception rather than the rule." *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 140 (2d Cir.2001) (Sotomayor, J.), *cert. denied*, 536 U.S. 917 (2002). "Manageability concerns must be weighed against the alternatives and 'will rarely, if ever, be in itself sufficient to prevent

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Sands, Inc., 244 F.3d 1152, 1163 (9th Cir. 2001). The crux of the question is whether a class action is preferable to multiple lawsuits, from a litigation efficiency standpoint. *Valentino*, 97 F.3d at 1234-35. Superiority is shown where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Id*., 97 F.3d at 1234. "In determining superiority, courts must consider the four factors of Rule 23(b)(3)." *Zinser v. Accufix Research Institute, Inc*. 253 F.3d 1180, 1191 (9th Cir. 2001).

[17] *See also In re Cooper Companies Inc. Sec. Litig*., 254 F.R.D. 628, 636 (C.D. Cal. 2009) (Judge Carney certifying class where class representatives allegedly lost $1.4 million); *In re Cornerstone Propane Partners, L.P., Sec. Litig*., 2006 WL 1180267, *5 (N.D.Cal. May 3, 2006) (certifying class where class representative had alleged damages exceeding $578,000).

1 certification of a class.'" *Campbell v. PricewaterhouseCoopers*, 253 F.R.D. 586, 605 (E.D. Cal.
2 2008) (quoting *Klay v. Humana, Inc*., 382 F.3d 1241, 1272 (11th Cir. 2004). A class action is
3 plainly a superior alternative to filing hundreds of cases.

4 **4. A Nationwide Class Is Proper And Comports With Due Process**

5 Here, certifying a nationwide class is appropriate since application of California law to the
6 out-of-state class members comports with due process. *See Parkinson v. Hyundai Motor*
7 *America*, 258 F.R.D. 580, 597-99 (C.D. Cal. 2008) (certifying national class as to UCL and
8 CLRA claims); *Menagerie Productions, Inc. v. Citysearch*, 2009 WL 3770668, *14 (C.D. Cal.
9 Nov. 9, 2009) (certifying nationwide class as to contract-based claims and UCL claim). "To
10 satisfy their burden, plaintiffs must show that California has a significant contract or aggregation
11 of contacts to the claims of the class members to ensure that California law is not being applied
12 arbitrarily." *Parkinson*, at 597 (citing *Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-22 (1985),
13 and discussing California's three-part governmental interest test); *see also Menagerie*
14 *Productions*, at *14; *In re Heritage Bond*, at *9-10 (certifying nationwide class).

15 Defendants are California corporations. Likewise, REP and CB/REP were California
16 corporations, headquartered in California and carrying out the scheme from offices within this
17 District. The investment contracts with Plaintiffs and class members included a California choice
18 of law clause. (C.O.E., Exh. 64.) *See Menagerie Productions*, at *16 (finding this fact relevant to
19 propriety of nationwide certification). There are sufficient contacts to permit application of
20 California law. Just as plainly, Defendant can make no showing that other states have a stronger
21 interest in applying their own laws - assuming they were materially different from California's
22 laws, and they are not - to the claims of the residents of those states. *Menagerie Productions*, at
23 *15; *see also Parkinson*, 598. As in *Parkinson*, California has a "strong interest in policing
24 wrongful conduct allegedly occurring within its borders, including when the victims of such
25 conduct are out-of-state residents." *Id.* Nationwide class certification is proper.

26 **IV. CONCLUSION**

27 For the foregoing reasons, Plaintiffs respectfully submit that their motion be granted in full.
28

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Dated: August 22, 2011

Respectfully submitted,

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