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7 Attorneys for Plaintiffs and the Class

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 OMAR G. SCARBOROUGH and GAY)
12 E. SCARBOROUGH Trustees of The)
13 Scarborough Family Trust, dated)
14 1/5/07, on behalf of themselves and all)
others similarly situated,

15 Plaintiffs,

16 vs.

17 BERTHEL FISHER & COMPANY)
18 FINANCIAL SERVICES, INC, an)
19 Iowa corporation; GENEVA)
20 EXCHANGE, INC., a Minnesota)
corporation; GENEVA EXCHANGE,)
21 LLC, a Minnesota limited liability)
company; DUANE H. LUND, an)
individual; and DOES 1 – 10,

22 Defendants.

23 **CV10-5491 MRP(MANx)**
Case No.:

24 CLASS ACTION COMPLAINT FOR
25 DAMAGES

26 JURY TRIAL DEMANDED

27 Plaintiffs Omar G. Scarborough and Gay E. Scarborough, Trustees of the
28 Scarborough Family Trust, dated 1/5/2007 ("Plaintiffs") on behalf of themselves
and all others similarly situated, hereby bring this class action complaint and
allege, based upon their personal knowledge and the investigation of their
attorneys as follows:

I. INTRODUCTION

1
2 1. This case arises out of Defendants' offer and sale of securities in the
3 form of Tenant-In-Common interests to investors in an apartment complex known
4 as Beamer Place Apartments ("Beamer Place TICs"). The sale was part of an
5 investment scheme in which the promoter and issuer, Geneva Exchange, Inc. and
6 Geneva Exchange LLC (together as "Geneva"), their sole owner, Duane H. Lund
7 ("Lund"), and underwriter Berthel Fisher & Company Financial Services, Inc.
8 ("Berthel Fisher") sought to inflate the value of the Beamer Place TICs by
9 misrepresenting and/or concealing material facts as part of an exit strategy in
10 which Defendants reaped millions of dollars in investment proceeds, as well as
11 fees and commissions, from unsuspecting investors. Moreover, investors assumed
12 millions of dollars in loans Geneva and Lund would otherwise have had to pay.

13 2. Defendants offered and sold the Beamer Place TICs through a
14 network of broker-dealers to approximately 23 investors throughout the United
15 States including several in California, with total gross proceeds of approximately
16 \$7,463,063 in 2008. In addition to their capital investment, investors assumed
17 substantial mortgage debt totaling approximately \$9,104,057. Thus, the total
18 offering amounted to approximately \$16,567,120.

19 3. The Confidential Private Placement Memorandum ("PPM") which
20 was provided to potential investors, including Plaintiffs, misrepresented and
21 omitted highly material facts. For example, although the PPM vaguely referred to
22 the fact that the then-existing short-term mortgage loan was subject to "a cross-
23 default and cross-collateralization agreement" with two other mortgage loans on
24 two other properties ("CC Agreement"), it falsely represented that Geneva was
25 obtaining a release from the CC Agreement.

26 4. The PPM also failed to provide any information (*i.e.* appraisals, loan
27 to value, cash flow analysis) about the two other properties involved in the CC
28 Agreement. This was important because if one of the other two properties

1 defaulted, creditors could foreclose on the Beamer Place Apartments, causing the
2 investors to lose their entire investment. In addition, the PPM failed to warn
3 investors about the risks in the event that the CC Agreement was not released.
4 Furthermore, Beamer Place Apartment's appraisal value of \$18.5 million stated in
5 the PPM was overinflated. Had the appraisal been accurate, Plaintiffs' losses
6 would have been less than a total loss.

7 5. On September 18, 2009, the lender notified investors that the other
8 two loans were in default and the lender was exercising its rights under the CC
9 Agreement to foreclose on Beamer Place Apartments and in fact foreclosed.
10 Defendants' misrepresentations and omissions contained in the PPM caused
11 investors to lose their entire investment in the Beamer Place TICs and subjected
12 investors to the possibility of the lender seeking to collect from them personally for
13 any deficiency balance remaining following foreclosure.

14 **II. PARTIES**

15 6. Omar G. and Gay E. Scarborough are the Trustees of the Scarborough
16 Family Trust, dated January 5, 2007. At all relevant times, Plaintiffs have resided
17 in Azusa, CA. On or about May 29, 2008, Plaintiffs invested \$438,000 in the
18 Beamer Place TICs and assumed a loan amount of \$534,253. In making their
19 investment, Plaintiffs, directly and by and through their investment adviser,
20 received, reviewed, and relied upon the PPM. Plaintiffs have lost their entire
21 investment.

22 7. Defendant Berthel Fisher & Company Financial Services, Inc. is, and
23 was at all relevant times, an Iowa corporation with its principal place of business in
24 Marion, Iowa. It is a registered broker-dealer with branch offices nationwide. It
25 has been registered to sell securities in California, and has sold securities in
26 California since 1986. Berthel Fisher was, at all relevant times, the lead or primary
27 underwriter of the Beamer Place TICs and drafted, reviewed, and approved of the
28 content and representations in the PPM distributed to Plaintiffs and the Class.

1 8. Defendant Geneva Exchange, Inc. was, at all relevant times, a
2 Minnesota corporation. Geneva Exchange, Inc. was a promoter and offeror of the
3 Beamer Place TICs. It drafted, reviewed, and approved of the content and
4 representations in the PPM.

5 9. Defendant Geneva Exchange, LLC was, at all relevant times, a
6 Minnesota limited liability company. Geneva Exchange, LLC was a promoter and
7 offeror of the Beamer Place TICs. It drafted, reviewed, and approved of the
8 content and representations in the PPM.

9 10. Defendant Duane H. Lund (“Lund”) was, at all relevant times, an
10 individual whose residence is unknown. At the time of the alleged offering of
11 Beamer Place TICs, he was the sole owner and control person of Geneva and its
12 affiliated companies. He drafted, reviewed, and approved of the content and
13 representations in the PPM.

14 11. Doe Defendants 1 through 10, inclusive, are sued herein under
15 fictitious names. Their true names and capacities are unknown to Plaintiffs at this
16 time. When ascertained, Plaintiffs will amend this complaint by inserting the true
17 names and capacities herein. Plaintiffs are informed and believe, and on that basis
18 allege that each of the fictitiously named Defendants is responsible in some
19 manner for the occurrences alleged herein, and that Plaintiffs’ rights and interests
20 were prejudiced on account of the actions of Doe Defendants and/or that the Doe
21 Defendants have legal responsibility for the prejudice inflicted upon Plaintiffs.

22 **III. JURISDICTION AND VENUE**

23 12. Jurisdiction is conferred by virtue of § 22 of the Securities Act of
24 1933, (15 U.S.C.A. § 77v(a)) and § 27 of the Securities Exchange Act of 1934, (15
25 U.S.C. § 77aa), which confers exclusive federal jurisdiction over Plaintiffs’ federal
26 securities claims. Supplemental jurisdiction is conferred over the remainder of
27 Plaintiffs’ claims pursuant to 28 U.S.C. § 1367 by virtue of the fact that these
28

1 claims form part of the same case or controversy under Article III of the United
2 States Constitution as Plaintiffs' federal securities claims.

3 13. Venue is proper pursuant to 28 U.S.C. §1391(b) and (c) because a
4 substantial part of the events or omissions giving rise to Plaintiffs' claims occurred
5 in this judicial district.

6 **IV. GENERAL ALLEGATIONS**

7 14. Prior to January 15, 2007, N.B.M.J. Associates LLP ("N.B.M.J.")
8 owned the Beamer Place Apartment complex ("Beamer Place"). Beamer Place is a
9 22 building, multi-family apartment complex, located in Houston, Texas. It
10 consists of 267,424 rentable square feet, and has a pool, lounge areas, a fitness
11 center, washers and dryers, private patios and plenty of parking. As of March 25,
12 2008, the property was 96% leased.

13 15. On January 15, 2007, N.B.M.J. sold Beamer Place to RJR
14 Investments, LLC ("RJR"). On May 7, 2007, Geneva agreed to accept the
15 assignment of the purchase agreement between RJR and N.B.M.J. Geneva formed
16 an entity called "Geneva Multi-Family Exchange VI, LLC" ("Geneva VI") to
17 facilitate the sale (and as a vehicle to make the Beamer Place TIC offering.) In
18 other words, Geneva VI agreed to purchase Beamer Place in place of RJR.
19 Geneva VI closed escrow on Beamer Place on May 15, 2007.

20 16. On or around March 28, 2008, Geneva engaged Berthel Fischer to
21 underwrite an offering of Beamer Place TICs ("the Offering") to investors through
22 its network of investment brokers nationwide. Defendants worked together to draft
23 the PPM. They intended to provide copies of the PPMs to the individual
24 investment brokers who they expected to review and rely upon the PPM in making
25 recommendations to investors for the purchase of Beamer Place TICs. In fact, the
26 PPMs were distributed to, and relied upon by, individual brokers who then offered
27 the Beamer Place TICs to Plaintiffs and the Class.

1 17. Defendants further intended that investors such as Plaintiffs and the
2 Class would receive, review, and rely upon the PPM. In fact, on the first page of
3 the PPM it reads: "Each investor should read this Confidential Private Placement
4 Memorandum dated March 25, 2008 and all Exhibits attached hereto [] in their
5 entirety before making an investment decision." The PPM further warns that, "No
6 one has been authorized to make any representations or give any information not
7 contained or referred to herein. Only those representations set forth in this
8 Memorandum may be relied upon in connection with this offering." Plaintiffs and
9 the Class in fact received, reviewed, and relied upon the PPM in making their
10 decisions to invest.

11 18. In the Offering Defendants offered and sold a 69.88% interest in
12 Beamer Place for a purchase price of \$7,463,063. However, each \$350,000 equity
13 investment (the minimum purchase) required the purchaser to also assume
14 \$426,961 in existing loans, which were then guaranteed personally by Lund.
15 Following a full subscription of the offering, Geneva VI retained 10%, while
16 investors from a prior offering in 2007 retained 20.11%.

17 19. Berthel Fisher received a commission of 7% of the equity portion of
18 the offering price for interests sold, plus an expense allowance of .5% and a due
19 diligence expense allowance of .5% of the equity portion of the offering price.
20 Berthel Fisher was entitled to appoint sub-agents as part of a "selling group" who
21 were required to be registered representatives of members of FINRA. Thus, the
22 underwriter and selling brokers earned as much as \$653,018 from this offering
23 based on the maximum equity offering amount.

24 20. According to the PPM, Geneva and Lund received at least \$2,836,446
25 from the sale of Beamer Place TICs. Moreover, Lund was relieved of millions of
26 dollars in personal loan guarantee obligations following the successful close of the
27 offering.

1 21. According to the PPM, Geneva acquired Beamer Place as part of a
2 portfolio of three different apartment complexes in the Houston area. Although not
3 set forth in the PPM, investors later learned that the portfolio consisted of Beamer
4 Place, Star Crossing, and Greentree Apartments. Geneva purchased the three
5 properties for \$25,650,000 and purportedly made improvements to the property
6 totaling \$780,000. According to the PPM, N.B.M.J. allocated \$14,255,000 in
7 value to Beamer Place.

8 22. Geneva financed a portion of the purchase price with a \$13,027,000
9 short-term loan provided by Prudential Mortgage Capital Company, LLC
10 (“Prudential”). According to the PPM, Geneva VI expected to refinance the short-
11 term loan with a long-term loan in the near future. The short-term loan was
12 personally guaranteed by Lund. Buried in the summary portion of the PPM it
13 noted that “[t]he Short-Term Loan is also currently subject to a cross-default and
14 cross-collateralization agreement with two other loans taken in connection with the
15 portfolio purchase described above, *but the Company is in the process of obtaining*
16 *a release from such agreement.*”

17 23. The PPM explained that the Geneva was in the process of procuring
18 long-term financing from Citibank in the amount of \$12,500,000, which was less
19 than the amount of the short-term loan, at an anticipated loan interest rate of
20 6.15%. The long-term loan would be for a term of 10 years with a balloon
21 payment due upon maturity. To make up the shortfall, Geneva planned to make a
22 loan in the amount of \$527,000. The PPM made no mention of the cross-default
23 loan issue when discussing future financing plans.

24 24. On pages 12 through 21, the PPM lists and describes various risk
25 factors that investors were to take into account when deciding whether or not to
26 invest. It referenced the “Risks Relating to Real Estate,” in which it discussed
27 general risks of real estate ownership, including the possibility of lower rental
28 rates, a fall in the value of the property, local population trends, and other general

1 risks that would apply to any real estate investment. It warned that the property
2 was being sold “as is” with only limited warranty as to the condition of the
3 property. It also discussed warnings about toxic or hazardous materials,
4 compliance with the Americans With Disabilities Act, warnings about toxic mold,
5 potential for lower occupancy rates, risks of competition, and that investors would
6 hold undivided interests in the property as a whole. It discussed the potential
7 requirement for additional working capital and the risks relating to a default or
8 bankruptcy of a co-owner, such as foreclosure and personal liability for the
9 investor’s share of the loan.

10 25. The PPM warned investors about the “Risks Relating to Taxes” –
11 recommending that investors consult their tax adviser regarding the risks and
12 potential problems associated with a 1031 exchange. It discussed Geneva’s efforts
13 to qualify the offering for purposes of a 1031 exchange. It warned investors of the
14 risks of a failure to qualify for a 1031 exchange. It further warned about the
15 potential for disallowance of certain deductions, or if taxable income is in excess
16 of cash receipts, the potential for changes to the federal tax code, etc.

17 26. The PPM further warned about “Risks Relating to Financing.” It
18 warned about the need to refinance the short-term loan and that a failure to do so
19 could jeopardize the continued ownership of the property. It further warned that
20 the interest rate on the refinancing may be higher than the short-term loan. It also
21 warned that the ability to refinance would depend upon the property manager’s
22 ability to achieve certain occupancy rates from quality renters. It warned that
23 Geneva was in the process of procuring refinancing but that the terms of the new
24 loan cannot be known with certainty. It further warned that, although the new loan
25 will be a non-recourse loan, the lender will likely require certain “carve-outs” or
26 conditions which would cause the loan to become a recourse loan resulting in
27 personal liability to the investors. It further warned that the new lender may not
28 allow the investors to assume the loan. It further discussed the risks relating to

1 certain transfer restrictions, the availability of financing and market conditions, the
2 need to refinance the loan, limited prepayment rights, and risks associated with the
3 sale of the property. Specifically, the PPM reads –

4 The proceeds realized from the sale of the Property will
5 be distributed among the Co-Owners, but only after the
6 payment of any loans, the satisfaction of the claims of
7 other third-party creditors and certain fees owed to the
8 Management Team as described [in the PPM]. The
9 ability of an Investor to recover all or any portion of the
10 Investor's Investment will, accordingly, depend on the
11 amount of net proceeds realized from the sale and the
12 amount of claims to be satisfied therefrom. There can be
13 no assurance that the Investors will realize gains on the
14 sale of the Property.

15 27. Despite repeated discussions of the default risks, the risks relating to
16 repayment of loans before any payment to investors in the case of a sale of the
17 property, *none of the risk disclosures identified or explained the significant risks*
18 *related to the ongoing cross-default and cross-collateralization loans.* Throughout
19 the lengthy risk disclosures, the PPM failed to explain the risk of default relating to
20 the Star Crossing and Greentree Apartments. It failed to provide any details about
21 the other properties, such as their appraisal values, revenues, or debt service,
22 despite the fact that unbeknownst to investors, Beamer Place depended upon the
23 other two properties to service their debt on a timely basis.

24 28. Additionally, the PPM further reported that the appraised value of the
25 Beamer Place property was \$18,500,000 at the time of purchase in 2007. The
26 inclusion of this appraisal value was designed to mislead investors into believing
27 that the appraisal value at the time of the offering was the same, when in fact
28 Defendants knew that the appraisal value had dramatically declined. Upon the

1 property's foreclosure in 2009 an appraiser valued the property at approximately
2 \$10 million.

3 29. Defendants' material misrepresentations and omissions were made
4 with the intent to defraud investors into buying Beamer Place TICs at inflated
5 prices. Berthel Fisher participated in this scheme in order to earn hundreds of
6 thousands of dollars in commissions and fees.

7 30. The materiality of the misleading and omitted facts was not fully
8 realized until September 18, 2009 when Prudential sent a notice of default to
9 investors. According to Prudential's notice, Beamer Place had not defaulted on
10 any loan payment. The lender wrote: "Lender has not received the September debt
11 service payments on the loans secured by the real property commonly known as
12 Star Crossing and Greentree Apartments. The payments were due on September 5,
13 2009."

14 31. The Lender claimed that Star Crossing and Greentree Apartments
15 missed payments totaling \$133,524.29. The Lender referenced the CC Agreement
16 covering all three properties in the portfolio. Unbeknownst to investors and
17 contrary to the one sentence reference to the CC Agreement in the PPM, Geneva
18 had not obtained a release from the CC Agreement.

19 32. The Lender ultimately foreclosed upon Beamer Place. Unfortunately,
20 the sale price came in millions of dollars below the purchase price paid by Beamer
21 Place TIC investors. Plaintiffs and the Class, after investing up to \$7,463,063,
22 receive nothing and face the potential threat of the Lender seeking a deficiency
23 judgment against them.

24 **V. CLASS ALLEGATIONS**

25 33. Plaintiffs seek to certify a Plaintiff Class pursuant to Fed. R. Civ.
26 Proc. 23(b)(3).

27 34. The Plaintiff Class is defined as follows:
28

1 All persons who purchased a Tenant In Common Interest
2 in Beamer Place Apartments pursuant to a March 25,
3 2008 Private Placement Memorandum. Excluded from
4 this definition are Defendants, members of the Lund's
5 immediate family, past or present officers and directors
6 of the entity defendants, any affiliate or subsidiary of the
7 entity defendants and the senior officers and directors of
8 the affiliate or subsidiary, or any entity in which any
9 excluded person has a controlling interest, and the legal
10 representatives, heirs, successors, and assigns of any
11 excluded person.

12 35. The members of the Plaintiff Class are so numerous that joinder of all
13 members is impracticable.

14 36. Questions of law and fact common to the members of the Plaintiff
15 Class predominate over questions that may affect individual Class members.

16 37. Plaintiffs' claims are typical of the claims of the members of the
17 Plaintiff Class as all members of the Plaintiff Class are similarly affected by
18 Defendants' wrongful conduct.

19 38. Plaintiffs will fairly and adequately protect the interests of the
20 members of the Plaintiff Class and has retained competent counsel experienced in
21 securities class action litigation.

22 39. A class action is superior to all other available methods for the fair
23 and efficient adjudication of this controversy since joinder of all members is
24 impracticable. Furthermore, as the injuries suffered by individual Plaintiff Class
25 members may be relatively small, the expense and burden of individual litigation
26 make it impossible for members of the Class to individually redress the wrongs
27 done to them. There will be no difficulty in the management of this action as a
28 class action.

1 **VI. CLAIMS FOR RELIEF**
2 **FIRST CLAIM FOR RELIEF**

3 **Violations of § 10(b) and Rule 10(b)(5) of the Securities Exchange Act of 1934**
4 **(Against All Defendants and DOES 1-10)**

5 40. Plaintiffs hereby incorporate by reference each of the preceding
6 allegations as though fully set forth herein.

7 41. The Beamer Place TIC interests are securities.

8 42. In connection with the offer and sale of the Beamer Place TIC
9 interests, Defendants disseminated or approved the false statements specified
10 above which they knew or recklessly disregarded were misleading in that they
11 contained misrepresentations and failed to disclose material facts necessary in
12 order to make the statements made, in light of the circumstances under which they
13 were made, not misleading.

14 43. Defendants violated § 10(b) of the 1934 Act and Rule 10b-5 in that
15 they:

16 (a) Employed devices, schemes, or artifices to defraud;

17 (b) Made untrue statements of a material fact or omitted to state a
18 material

19 fact necessary in order to make the statements made, in light of the
20 circumstances under which they were made, not misleading; or

21 (c) Engaged in acts, practices, or courses of business which operated or
22 would

23 operate as a fraud or deceit upon Plaintiff and others similarly
24 situation in connection with their purchase of the TIC investment.

25 44. Plaintiffs and the Class relied on Defendants' misrepresentations
26 and/or omissions of material fact at all relevant times. If it were not for
27 Defendants' misrepresentations and omissions of material fact, Plaintiffs and the
28 Class would not have purchased the Beamer Place TIC interests.

1 45. As a direct and proximate cause of Defendants' fraudulent acts in
2 connection with the Beamer Place TIC interests, Plaintiffs and the Class have
3 suffered damages in an amount to be determined at trial.

4 **SECOND CLAIM FOR RELIEF**

5 **Violations of § 20 of the Securities and Exchange Act of 1934**

6 **(Against Defendant Lund and DOES 1-10)**

7 46. Plaintiffs hereby incorporate by reference each of the preceding
8 allegations as though fully set forth herein.

9 47. At all relevant times, Lund was the sole owner and control person of
10 Geneva and acted as a controlling person of Geneva within the meaning of Section
11 20(a) of the Exchange Act, as alleged herein. By virtue of his sole ownership,
12 participation in and/or awareness of Geneva's operations and/or intimate
13 knowledge of the statements contained in the PPM and disseminated to Plaintiffs
14 and the Class, Lund had the power to influence and control and did influence and
15 control, directly or indirectly, the decision-making of Geneva, including the
16 content and dissemination of the various statements that Plaintiffs contend are
17 materially false and misleading.

18 48. As set forth above, Lund committed acts in violation of §10(b) and
19 Rule 10b-5. Thus, to the extent Lund is found not to have engaged in such conduct
20 directly, as a controlling person, Lund nevertheless is jointly and severally liable
21 with and to the same extent as Geneva.

22 49. At all relevant times, Lund directly or indirectly induced Geneva to
23 act in violation of § 10(b) and Rule 10b-5 and did not act in good faith.

24 50. As a direct and proximate result of Lund's wrongful conduct,
25 Plaintiffs and the Class have suffered damages in connection with the purchase of
26 the Beamer Place TICs in an amount to be determined at trial.

27 ///

28 ///

