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Class Counsel

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARK and RACHELLE BERGER, *et al.* on behalf of themselves and all persons similarly situated,

Plaintiffs,

v.

PROPERTY I.D. CORPORATION, *et al*.,

Defendants.

No. CV 05-5373-GHK (CWx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENTS

DATE: January 26, 2009
TIME: 9:30 a.m.
COURTROOM: 650
JUDGE: Hon. George H. King

Discovery Cutoff: May 9, 2008
Pretrial: Not Set
Trial: Not Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

TREATISES AND ARTICLES

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs[1] respectfully seek final approval of a proposed Settlement Agreement[2] resolving this class action lawsuit against four sets of defendants: (a) the Property I.D. Defendants;[3] (b) the Realogy Defendants;[4] (c) the Pickford Defendants;[5] and (d) the Re/Max Defendants[6] (collectively, "Defendants").[7] The proposed settlements are as advantageous to class members as they were difficult to obtain, and Plaintiffs are confident that they left no money "on the table."

Plaintiffs have been equally vigilant in ensuring that class members receive the "best notice practicable" of the proposed settlement, and have gone to unusual lengths to identify and locate class members, 73% of whom received direct mail notice of the settlement and a simple, straightforward claim form. This was supplemented by an extensive publication notice campaign, estimated to have

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[1] Joseph Chenier, Jr., Gil Lee, Jeanne Bakale Aldrich, Michael Attar, Ulysses J. Harvey, and Mark and Rachelle Berger.

[2] A fully-executed copy of the Settlement Agreement ("SA") is attached as Exhibit A to the accompanying Declaration of Barry Himmelstein in Support of Plaintiffs' Motion for Final Approval of Proposed Class Action Settlements ("Himmelstein Decl.").

[3] Property I.D. Corporation; Property I.D. of California, Inc.; Property I.D. California, LLC; Property I.D. Affiliates 1, LLC d/b/a Property I.D. USA; Property I.D. Associates, LLC; Disclosure Services, LLC; and Property I.D. Golden State, LLC.

[4] Cendant Corporation, Coldwell Banker Residential Brokerage Company, Century 21 Real Estate Corporation, Coldwell Banker Residential Brokerage Corporation, Coldwell Banker Real Estate Corporation, Realogy Corporation, Realogy Services Group LLC, ERA Franchise Systems, Inc., NRT Incorporated, Cendant Real Estate Services Group, LLC and Cendant Operations, Inc.

[5] HomeServices of California, Inc.; Pickford Realty, Ltd.; and Pickford Golden State Member, LLC.

[6] ROCH Enterprises, Inc., f/k/a Re/Max of California & Hawaii, Inc. and RAS Financial Services, Inc. The Realogy Defendants, Pickford Defendants, and Re/Max Defendants are collectively referred to herein as the "Broker Defendants." Plaintiffs and Defendants are collectively referred to as the "Parties."

[7] In its April 28, 2008 Order Re: Plaintiffs' Motion for Class Certification (Dkt. No. 829, "Class Cert. Order"), the Court previously dismissed claims against the Mason McDuffie Defendants and the Silver Oak Defendants (defined therein). Id. at 11. Accordingly, the proposed settlements would resolve the remainder of this litigation.

reached 77% of the target demographic, California homeowners, an average of 1.9 times each.

The reaction of class members to the proposed settlements has been overwhelmingly positive. There have been *no* objections received to date, and only 19 requests for exclusion. By contrast, less than halfway into the claims period, over 42,000 class members have "voted" in favor of the settlements by filing claims.

In granting preliminary approval of the settlements, the Court found that they were the product of arms-length negotiations by capable counsel, and therefore entitled to a presumption of reasonableness, but appropriately reserved a full determination of the fairness, reasonableness, and adequacy of the proposed settlements until the final fairness hearing. When measured against the relevant criteria, the settlements are not only fair, reasonable, and adequate, but highly advantageous to the classes.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Litigation

The background of this litigation, filed in July 1995, is well-known to the Court. The operative complaint alleges that Property I.D. and the Broker Defendants formed "sham" affiliated business arrangements, whereby the Broker Defendants referred their clients' natural hazard disclosure report ("NHD Report") business to Property I.D. in exchange for referral fees disguised as profit distributions from the sham affiliates, in violation of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq. ("RESPA") and California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq., and in breach of the Broker Defendants' fiduciary duties to their clients, the class members. See Sixth Amended Class Action Complaint (Dkt. No. 617, filed Sept. 21, 2007).

The action has survived numerous pleading challenges,[8] as well as a

[8] See, e.g., Order on Motion to Dismiss (Dkt. No. 82, Mar. 14, 2006) (finding

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prolonged, multi-faceted, and misguided effort to disqualify Plaintiffs' counsel and/or intimidate the Plaintiffs into dropping this meritorious case.[9] The Court has certified classes for litigation purposes,[10] and both fact and expert discovery have been completed. The case has spawned satellite litigation between Defendants and their insurers, in which Plaintiffs have also been named as defendants[11] between Defendants and the federal government,[12] between Defendants *inter se*,[13] and between Property I.D. and competitors,[14] including its general counsel at the outset of the case.[15]

B. The Proposed Settlements

The proposed settlements provide a total of $39.3 million in consideration to the three classes, including attorneys' fees and the cost of class notice and settlement administration, as follows: Realogy Class — $33 million; Pickford Class — $5,438,000; and Re/Max Class — $903,474. SA ¶ 16. Of these amounts, the Property I.D. Defendants have contributed a total of $7.5 million, to be

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equitable tolling allegations sufficient); Memorandum and Order Re: Various Defendants' Consolidated Motions to Dismiss (Dkt. No. 574, Aug.17, 2007) (determining appropriate measure of damages under RESPA, and finding allegations of breach of fiduciary duty sufficient).

[9] See Memorandum and Order Re: Defendants' Motion to Disqualify Plaintiffs' Counsel (Dkt. No. 329, filed Nov. 7, 2006).

[10] See Class Cert. Order.

[11] See Complaint for Declaratory Judgment and Demand for Jury Trial, Nutmeg Ins. Co., et al. v. Property I.D. Corp., et al., C.D. Cal. No. CV 07-00288-GHK (CWx) (filed Jan. 10, 2007) (naming the Bergers and Plaintiff Attar as defendants). Following dismissal for lack of jurisdiction, Property I.D.'s insurers re-filed the case in California state court, naming all Plaintiffs as defendants. See Complaint for Declaratory Relief, Nutmeg Ins. Co. v. Property I.D. Corp., et al., Los Angeles Super. Ct. Case No. BC387895 (filed Mar. 25, 2008).

[12] Jackson v. Property I.D. Corp., et al., C.D. Cal. Case No. CV 07-03372-GHK (CWx) (filed May 23, 2007).

[13] Valley of California, Inc. et. al v. Property I.D. Corp., Sacramento Super. Ct. Case No. 06AS03737.

[14] Property I.D. Corp., et al. v. Mauricio Braun, et al., Sacramento Super. Ct. Case No. BC 364 705.

[15] Sergio Siderman v. Carlos Siderman, et al., Los Angeles Super. Ct. Case No. BC 369836 (filed Apr. 30, 2007); National Disclosure Authority v. Property I.D. Corp., Los Angeles Super. Ct. Case No. BC376531 (filed Aug. 24, 2007).

allocated among the three Classes in proportion to the sales of their respective joint ventures (see Part III(C)(2), infra), as follows: Realogy Class — $6 million; Pickford Class — $1,095,0000; and Re/Max Class — $405,000. SA ¶ 17. The Realogy Defendants have deposited an additional $4 million, the Pickford Defendants an additional $1,050,000, and the Re/Max Defendants an additional $498,474. See id. After the claims process is complete, the Realogy Defendants will contribute up to an additional $23 million, and the Pickford Defendants will contribute up to an additional $3,293,000 as necessary to pay claims. SA ¶ 19.

Subject to these overall limits, Class members submitting valid claims will receive a full refund of the amount they paid for a Property I.D. NHD Report, generally $99 or $114. See SA ¶ 50. Plaintiffs do not allege any defect in any Property I.D. report, and the settlement does not release any claims that class members may have arising out of any such errors or omissions. SA ¶ 56.

C. Preliminary Approval and Class Certification

On August 29, 2008, the Court granted Plaintiffs' motion for preliminary approval of the proposed settlements. See Order re: Plaintiffs' Motion for Preliminary Approval of Proposed Class Action Settlements (Dkt. No. 873, "Prelim. Approval Order"). The Court found that the settlements were the product of arm's length negotiations conducted by capable counsel, and were therefore entitled to a presumption of fairness. Id. at 1. The Court further found that the proposed settlements fall within the range of possible approval, reserving a full determination of the fairness, reasonableness, and adequacy of the proposed settlements until the hearing on the instant motion. Id. at 2.

Pursuant to the Parties' request, the Court amended the class definitions to include the relevant class periods, as follows: Realogy Class — July 31, 1996 through June 30, 2006;[16] Pickford Class — July 14, 2000 through August 16,

[16] As amended, the Court defined the Realogy Class as follows:

Footnote continued on next page

2005;[17] and Re/Max Class — August 23, 2000 through February 28, 2003.[18] Id. at

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> All persons who purchased Property I.D. Natural Hazard Disclosure Reports, in a transaction involving a federally related mortgage loan, and not primarily for business, commercial, or agricultural purposes, ordered by an agent or broker of any Realogy Defendant(s), [defined as Cendant Corporation, Coldwell Banker Residential Brokerage Co., Century 21 Real Estate Corporation, Coldwell Banker Residential Brokerage Corp., Coldwell Banker Real Estate Corp., Realogy Corp., Realogy Services Group, LLC, ERA Franchise Systems, Inc., NRT, Inc., Cendant Real Estate Services Group, LLC, and Cendant Operations, Inc., Property I.D. Affiliates I, LLC, and Property I.D. Associates, LLC] or their subsidiaries or affiliates, including their owned and operated brokerages, affiliates, or franchisees, during the period from July 31, 1996 through June 30, 2006. Excluded from the class are: a) all Defendants, any entity in which they have a controlling interest, and their legal representatives, officers, directors, assigns and successors; and b) the judge to whom this case is assigned and members of the judge's immediate family.

Id. at 2.

[17] As amended, the Court defined the Pickford Class as follows:

> All persons who purchased Property I.D. Natural Hazard Disclosure Reports, in a transaction involving a federally related mortgage loan, and not primarily for business, commercial, or agricultural purposes, ordered by an agent or broker of any Pickford Defendant(s), [defined as HomeServices of California, Inc., Pickford Realty, Ltd., and Property I.D. Golden State, LLC] or their subsidiaries or affiliates, including their owned and operated brokerages, affiliates, or franchisees, during the period from July 14, 2000 through August 16, 2005. Excluded from the class are: a) all Defendants, any entity in which they have a controlling interest, and their legal representatives, officers, directors, assigns and successors; and b) the judge to whom this case is assigned and members of the judge's immediate family.

Id. at 3.

[18] As amended, the Court defined the Re/Max Class as follows:

> All persons who purchased Property I.D. Natural Hazard Disclosure Reports, in a transaction involving a federally related mortgage loan, and not primarily for business, commercial, or agricultural purposes, ordered by an agent or broker of any Re/Max Defendant(s), [defined as Re/Max of California and Hawaii, Inc., RAS Financial Services, Inc., and Disclosure Services, LLC] or their subsidiaries or affiliates, including their owned and operated brokerages, affiliates, or franchisees, during the period from August 23, 2000 through February 28, 2003. Excluded from the class are: a) all Defendants, any entity in which they have a controlling interest, and their legal representatives, officers, directors, assigns and successors; and b) the judge to whom this case is assigned and members of the judge's immediate family.

Id. at 3.

2-3. Because the revised Re/Max Class definition places Plaintiff Michael Attar's transaction outside the class period, the Court approved the Parties' request to appoint Ulysses Harvey as the substitute class representative for the Re/Max Class, finding that Mr. Harvey is an adequate and typical class member qualified to represent the Re/Max Class. Id. at 3.

The Court further found that the proposed mailed notice and publication notice would provide the best notice practicable under the circumstances, including individual notice to all potential class members who could be identified through reasonable effort, and satisfied the other requirements of Fed. R. Civ. P. 23(c)(2)(B) and 23(e). Prelim. Approval Order, at 4. The Court directed that the mailed notice be altered to accurately reflect that Plaintiffs Mark and Rachelle Berger have been appointed as class representatives for the Realogy Class, Plaintiff Jeanne Bakale Aldrich has been appointed as class representative for the Pickford Class, and Plaintiff Harvey has been appointed as class representative for the Re/Max Class. Id.

The Court directed that the notice administrator, Garden City Group, Inc. ("GCG") send an initial mailed notice and claim form to all potential class members who can be identified by no later than September 29, 2008, and endeavor to obtain current addresses for and re-mail any notices returned as undeliverable by no later than October 29, 2008. Id. at 4-5. The Court directed that GCG publish the publication notice as set forth in the Declaration of Jeanne C. Finegan, Senior Vice President of GCG (Dkt. No. 866), to be completed no later than October 29, 2008. Id.

Finally, the Court set December 15, 2008 as the deadline for Class members to request exclusion from the Class or file any objections to the proposed settlement; set the briefing schedule and hearing on the instant motion and the accompanying motion for attorneys' fees; and set a claims filing deadline of March 27, 2009. Id. at 5.

D. Notice to the Class

As set forth in the accompanying Declaration of Jeanne C. Finegan in Support of Plaintiffs' Motion for Final Approval of Proposed Class Action Settlements ("Second Finegan Decl."), the notice program was completed in accordance with the Court's directives. Id. ¶ 3. As to the mailed notice, Ms. Finegan states:

> Property I.D. Defendants' electronic records contained only the addresses of the properties (not the names of the owners) on which Property I.D. natural hazard disclosure reports ("NHD Reports") were issued. Pursuant to the Agreement, the Property I.D. Defendants provided Class Counsel with information for each of the Settlement Classes. Class Counsel then provided this information to First American CoreLogic, Inc. so that the names of the sellers could be appended to the property addresses. On September 17, 2008, Class Counsel provided a data file to GCG and advised that it contained a total of 320,767 records of persons or entities identified as potential Class Members (the "Mailing List"). At direction of counsel, GCG identified records containing multiple names for the same property address and created separate records for each name listed. After implementing this change, the data file contained a total of 330,808 records. However, because Class Members no longer live at those addresses because the Class is composed almost entirely of home sellers, GCG provided the data file to Lexis Nexis to perform a property search and provide the most up-to-date

> property address for the Class Members. Lexis Nexis provided GCG with 268,859 updated property addresses. Once GCG removed duplicate records, the Mailing List contained a total of 249,450 records. No later than September 29, 2008, GCG mailed Notice Packets with first class postage and with U.S. Postal Service return service requested to each of the to all 249,450 records on the Mailing List.

Id. ¶ 6.[19]

7,846 mailed notice packets were returned as undeliverable with forwarding address information provided by the postal service. Id. ¶ 7. These were promptly remailed to the new addresses. Id. 12,940 notice packets were returned as undeliverable with no forwarding address. Id. GCG succeeded in obtaining new addresses for 5,554 of these packets, and promptly remailed them. Id.[20]

The publication notice was published in approximately 130 California newspapers, and four of California's Spanish-language newspapers having the largest circulation. Id. ¶ 11. Publication was completed by the October 29, 2008 deadline set by the Court. See id. ¶ 11 & Exh. C (proof of publication).

Working with Class Counsel, GCG also established the settlement website, www.nhdreportsettlement.com, at which class members can view, download and/or print the long-form notice — in either English or Spanish, a claim form (including

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[19] As directed by the Court, prior to mailing, the mailed notice was altered to state that "Plaintiffs Mark and Rachelle Berger have been appointed as Class Representatives for the Realogy Class, Plaintiff Jeanne Bakale Aldrich has been appointed as Class Representative for the Pickford/Prudential Class, and Plaintiff Ulysses Harvey has been appointed as Class Representative for the Re/Max Class." Id., Exh. A § 3.

[20] The Preliminary Approval Order requires that the secondary mailing be completed by October 29, 2008. Prelim. Approval Order at 5. As Ms. Finegan explains, GCG continued to receive notice packets returned as undeliverable after that date, and continued to remail them promptly on a rolling basis. Id. ¶ 7.

exemplars of supporting documents), the Settlement Agreement, and Preliminary Approval Order, and obtain answers to frequently asked questions. Id. ¶ 15. As of December 8, 2008, the website received a total of 6,313 unique visitors. Id.

Finally, a toll-free telephone helpline was established, allowing callers to request a mailed notice or a callback. Id. ¶ 16. As of December 8, 2008, the helpline received 5,434 calls and 1,704 callback requests, all of which were promptly returned by GCG. Id.[21]

E. Claims, Exclusion Requests, and Objections

As of December 8, 2008, GCG has received a total of 42,302 completed claim forms in response to the mailed notice, and an additional 254 completed claim forms in response to the publication notice, for a total of 42,556 claims. Second Finegan Decl. ¶ 8. By contrast, GCG has received only 19 exclusion requests. Id. ¶ 9 & Exh. B (opt-out list).

As of December 15, 2008, Class Counsel and/or counsel for Defendants have not received a single objection to the proposed settlements. Himmelstein Decl. ¶ 4. GCG has likewise received no objections. Second Finegan Decl. ¶ 10. Class Counsel have received a "Notice of Intention to Appear" from one potential class member (see Himmelstein Decl., Exh. B), but the Notice does not state any objection to the settlements, and apparently was not filed with the Court, as required by the class notice. See Second Finegan Decl., Exh. A § 22.

III. THE PROPOSED SETTLEMENTS ARE DESERVING OF FINAL APPROVAL

A. The "Best Notice Practicable" Has Been Provided to the Class

As the Court has already determined, the notices and notice plan approved by the Court "will provide the best notice practicable under the circumstances, including individual notice to all potential class members who can be identified

[21] Plaintiffs are also informed that Defendants provided the appropriate federal and California state officials with the notifications regarding the proposed settlement required by 28 U.S.C. § 1715. Himmelstein Decl. ¶ 3.

through reasonable effort," as required by Fed. R. Civ. P. 23(c)(2)(B). The notice plan was fully implemented. See Part II-D, supra.

From the records of 320,767 transactions, First American CoreLogic, Inc., Lexis Nexis, and GCG were able to identify 330,808 potential class members, and obtain current addresses for 249,450 of them (75%) after removal of duplicate records. Second Finegan Decl. ¶ 6. Of these, 7,386 were undeliverable (12,940 – 5,554), and the mailed notices presumably reached 242,064 class members (249,450 – 7,386), or 73% of the classes. Id. Given the 10-year class period, the fact that Property I.D.'s records contained *no* class member names or addresses (see id. ¶ 6), and these substantial efforts, there can be little doubt that individual notice has been provided to all class "members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In addition to the mailed notice, the extensive publication notice campaign is estimated to have reached approximately 77% of California homeowners an average of 1.9 times each. Id. ¶ 12. Accordingly, the class has received the "best notice practicable under the circumstances" (Fed. R. Civ. P. 23(c)(2)(B)), as the parties' notice expert attests. Second Finegan Decl. ¶ 17.

B. The Settlements Are Presumed Fair

In evaluating the proposed settlements, the Court explained that its review is a limited one, in light of the presumption of fairness that attaches:

> Where a proposed settlement has been reached after arm's-length negotiation conducted by capable counsel, it is presumptively fair. We find that the settlement here has been negotiated at arm's-length by capable counsel, and so conclude that the presumption of fairness applies here. Thus the Court's intrusion into the agreement between the parties should be limited to an effort to

> ascertain whether the settlement is "the product of fraud or overreaching by, or collusion between, the negotiating parties" and to assure "that the settlement, taken as a whole is fair, reasonable and adequate to all concerned."

Prelim. Approval Order, at 1 (quoting Officers for Justice v. Civil Serv. Comm'n of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982), cert denied, 459 U.S. 1217 (1983)).

C. The Settlements Are Fair, Reasonable, And Adequate By Any Reasonable Measure

Whether viewed through the prism of the presumption of fairness, or placed under a magnifying glass, the proposed settlement easily passes muster. In its Preliminary Approval Order, the Court explained that:

> Approval of a class action settlement is guided by the factors enumerated in Fed. R. Civ. P. 23(e), and include a finding by the court that the proposed settlement is "fair, reasonable, and adequate." Courts have held that assessing whether a proposed settlement is fair, reasonable, and adequate requires "a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." Different factors may predominate in different factual

contexts.

Prelim. App. Order at 1 (quoting Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1375-1376 (9th Cir. 1993)) (other citations omitted). Each of these factors is discussed separately below.

1. Plaintiffs' Case Is Strong

Plaintiffs believe that their case is strong, and that they have a high likelihood of obtaining a favorable verdict if the proposed settlements are rejected and the case goes to trial. See Memorandum of Points and Authorities In Support of Plaintiffs' Motion for Class Certification (Dkt. No. 700), Parts II & III (summarizing applicable law and common evidence of Defendants' violations).[22] Indeed, it is the strength of Plaintiffs' case, and Plaintiffs' perseverance, that enabled Plaintiffs to obtain the proposed settlements on the highly favorable terms offered to the classes. Given the substantial amounts offered in settlement, and the uncertainties and delays inherent in any complex litigation, the proposed settlements are not merely fair, but highly favorable.

2. The Amount of the Settlements Strongly Favors Final Approval

As set forth above, the proposed settlements make available to the three Classes a total of $39.3 million in consideration, as follows: Realogy Class — $33 million; Pickford Class — $5,438,000; and Re/Max Class — $903,474. SA ¶ 16. Based on the documents produced in discovery, and information provided by Property I.D., as to each Class, the total sales of the corresponding joint ventures were approximately as follows: Realogy Class — $32,509,287; Pickford Class — $5,328,814; and Re/Max Class — $1,974,097. Himmelstein Decl. ¶ 5. Accordingly, the total consideration made available to the Realogy Class and Pickford Class slightly *exceeds* the total revenues of the corresponding joint

[22] As the Court has considered this evidence in the context of ruling on Plaintiffs' motion for class certification, Plaintiffs will not burden the Court unnecessarily by presenting it again here. See Cl. Cert Order, at 1 ("As the parties are familiar with the facts, we will not repeat them except as needed.")

ventures.

While treble damages are recoverable under RESPA (see 12 U.S.C. § 2607(d)(2)), in evaluating the sufficiency of a proposed settlement, a court should generally "compare the settlement recovery to the estimated single damages." In re Remeron End-Payor Antitrust Litig., No. Civ. 02-2007 FSH, 2005 WL 2230314, *24 (D.N.J. Sept. 13, 2005) (citing In re Ampicillin Antitrust Litig., 82 F.R.D. 652, 654 (D.D.C. 1979) and Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)). The parties continue to disagree over the appropriate measure of damages, with Plaintiffs basing the calculation on the purchase price of the real estate settlement service (as the Court has held),[23] and Defendants contending for only the portion of the sales price funneled back to the Broker Defendants as distributions from the joint ventures. The proposed settlements with the Realogy and Pickford Classes easily pass muster under either measure.

As to the Re/Max Class, the amount contributed by the Re/Max Defendants, $498,474, equals the total distributions received by the Re/Max Defendants from the corresponding joint venture, Disclosure Services, LLC. Himmelstein Decl. ¶ 6. The total consideration made available to Re/Max Class members equals just under half (45.7)% of the revenues of the joint venture. Plaintiffs respectfully submit that "fifty cents on the dollar" is a satisfactory settlement of almost any contested litigation. Accordingly, the amount of the settlement strongly favors final approval.

3. HUD Fully Supports the Settlements

The "presence of a governmental participant" is an important factor weighing in favor of approval of a class action settlement. Torrisi, 8 F.3d at 1375. In this case, the federal Department of Housing and Urban Development ("HUD"), the agency charged with enforcement of RESPA (see 12 U.S.C. §§ 2602(6), 2607(d)(4), 2617), has expressly endorsed the proposed settlements.

[23] See Memorandum and Order Re: Various Defendants' Consolidated Motions to Dismiss (Dkt. No. 574, Aug.17, 2007).

As the Court is well aware, in May 2007, nearly two years after Plaintiffs initiated this litigation, HUD filed a related case against Property I.D. and the principal Realogy and Pickford Defendants for violations of RESPA, alleging essentially the same misconduct as Plaintiffs. See Complaint, Jackson v. Property I.D. Corp., et al., C.D. Cal. Case No. CV 07-03372-GHK (CWx) (filed May 23, 2007). The Parties in Berger executed the Settlement Agreement and filed their motion for preliminary approval on August 4, 2008. Within days thereafter, HUD executed its own settlement agreements with Property I.D. and the principal Realogy Defendants, and issued a press release stating that:

> A settlement in a related federal class action lawsuit requires the companies to pay up to a combined $35 million dollars, much of it to California consumers who purchased hazard disclosure reports as far back as 1996. HUD determined that its request for an accounting and disgorgement of illegal profits in its lawsuit will be satisfied through the defendants' payments to consumers in the settlement of this private action filed under RESPA.

News Release, HUD Settles Lawsuit With California Hazard Reporting Company and Real Estate Brokerage, HUD No. 08-120 (Aug. 8, 2008) (Himmelstein Decl., Exh. C).

HUD's settlement agreements with Property I.D. and the Realogy Defendants recite the terms of the class action settlement, and expressly state that "[t]he Secretary also represents that the Class Settlement and this Settlement Agreement serve the consumer protection purposes of RESPA and are beneficial to NHDS report consumers." Himmelstein Decl., Exh. D (HUD/Property I.D. Settlement Agreement) at 5, 7; Exh. E (HUD Realogy Settlement Agreement) at 5-6. The settlements with HUD are expressly conditioned on the Court's approval of

the class action settlements; required Property I.D. and the Realogy Defendants to seek a stay of the HUD litigation pending approval of the class action settlements; and attach the Berger Settlement Agreement as an Exhibit. Himmelstein Decl., Exh. D at 7-8 & Exh. A thereto; Exh. E at 6-8 & Exh. A thereto. HUD subsequently settled with the Pickford Defendants, likewise conditioning the settlement on approval of the class action settlements. See Pickford's Notice of Motion and Unopposed Motion for a Stay Pending Final Approval of Settlement Agreement (Dkt. No. 79) at 1-2. Property I.D., the Realogy Defendants, and the Pickford Defendants sought and obtained a stay of the HUD litigation, pending approval of the instant settlements. See Order on Unopposed Motion for Stay (Dkt. No. 75, Sept. 12, 2008); Order Re Pickford's Unopposed Motion for a Stay Pending Final Approval of Settlement Agreement (Dkt. No. 81, Dec. 10, 2008).

Plaintiffs respectfully submit that such express governmental endorsement of a class action settlement is uncommon, and attests to the fairness and adequacy of the proposed settlements.

4. The Risk, Expense, Complexity, and Likely Duration of Further Litigation Favor Settlement

While litigation classes have been certified, discovery is complete, and Plaintiffs are confident they would survive summary judgment and prevail at trial, continued litigation is not without risk. In particular, the Court reserved for ruling at a later date (presumably on motions for summary judgment) the question of whether NHD Reports are "settlement services" subject to RESPA. See Order Re: Plaintiffs' Motion to Strike (Dkt. No. 748, Jan. 8, 2008), at 2 ("We find that there are disputed questions of fact regarding the nature of NHD reports, and that the questions of law are neither clear nor free of dispute. . . .We defer decision on whether NHD reports are "settlement services" within the meaning of RESPA until we are presented with a more appropriate vehicle by which to resolve this issue."). While Plaintiffs are confident they would prevail on this issue, prudence demands

caution in light of the uncertainty expressed by the Court, as a loss on this issue would be the death knell of this litigation.

A trial of this action, and the inevitable appeals, would consume considerable resources of the Court and the Parties, and further deplete Property I.D.'s available insurance coverage, depriving class members of this important source of compensation.[24] Indeed, a judgment against Property I.D. could force the company into bankruptcy proceedings,[25] jeopardizing or at least complicating the collection of a favorable judgment. See Torrisi, 8 F.3d at 1376 (defendant's precarious financial condition "predominates to make clear that the district court acted within its discretion" in approving settlement). Continued litigation may also delay any eventual payments to class members for years, pending trial and exhaustion of appeals. Put simply, the instant settlement, which promises class members a full refund of the amount they paid for their Property I.D. report(s), is too favorable to gamble on continued litigation.

Plaintiffs also face additional hurdles in collecting a judgment against the Re/Max Defendants. In April 2007, the owners of Re/Max of California and Hawaii, Inc. sold the assets of the business (its franchise contracts with Re/Max franchisees) back to Re/Max International, Inc., and ceased all business operations. Himmelstein Decl. ¶ 8.[26] Under the contract of sale, this litigation is deemed an

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[24] Property I.D.'s errors and omissions policies, which provide a total of $10 million in coverage, are what is commonly known as "wasting" policies, in that the cost of defending this action is charged against the policy limits. At the time the Settlement Agreement was executed, there was approximately $7.5 million in coverage remaining on the policies. Himmelstein Decl. ¶ 7.

[25] As set forth above, revenue from the sale of Property I.D. reports allocated to the joint ventures affiliated with the Broker Defendants total $39.8 million, which could conceivably produce a judgment of almost $120 million. See 12 U.S.C. § 2607(d)(2) (providing for damages of "three times the amount of any charge paid for such settlement service"); Memorandum and Order Re: Various Defendants' Consolidated Motions to Dismiss (Dkt. No. 574, Aug.17, 2007) (determining measure of damages under RESPA). There is no question that a judgment of $39.8 million or more would render the company insolvent. Himmelstein Decl. ¶ 7.

[26] Plaintiffs did not learn of this until after the May 2, 2007 deadline for adding parties to the action had long since passed.

"excluded liability," which remains with Re/Max of California and Hawaii, Inc. Id. That company, and the other Re/Max Defendant, RAS Financial Services, Inc. (which held the company's interest in the joint venture), have no remaining assets, except for $550,000 contributed by their shareholders to fund the proposed settlement and its associated legal expenses, and receivables, aged over a year, due from franchisees in various levels of financial distress. See Declaration of Stephen A. Haselton in Support of Plaintiffs' Motion for Preliminary Approval of Proposed Class Action Settlement (Dkt. No. 863) ¶ 5.

Absent this settlement, in order to recover *anything* of substance from the Re/Max Defendants, Plaintiffs would have to prevail in two additional layers of litigation: (1) at the front end, a motion to amend the complaint to name the shareholders as defendants; and (2) at the back end, an "alter ego" or fraudulent transfer claim. Given the Court's reluctance to permit the addition of parties at this stage of the litigation (see Class Cert. Order at 11), and the difficulties inherent in prevailing on an alter ego or fraudulent transfer claim, the proposed settlement with the Re/Max Defendants easily merits final approval.

5. The Risk of Maintaining Class Action Status Favors Settlement

Plaintiffs are confident that the Court's class certification order is well-reasoned and fully-supported by the record. However, should the settlement be rejected, Defendants would proceed with their pending motions for reconsideration, and would undoubtedly seek interlocutory review pursuant to Fed. R. Civ. P. 23(f). Should the Ninth Circuit decline to hear the appeal, and should Plaintiffs prevail at trial, Defendants would obtain review by appeal from the final judgment. While Plaintiffs are confident that this is a relatively simple and straightforward case appropriate for class certification, the possibility of reversal on appeal cannot be discounted entirely.

6. The Extent of Discovery Completed, and the Stage of the Proceedings, Favor Settlement

After over three years of hard-fought litigation, Class Counsel had a solid appreciation of the strengths and weaknesses of their clients' case before entering into the proposed settlements. Both fact and expert discovery had been completed. Himmelstein Decl. ¶ 9. The Parties had each completed their document productions, and depositions had been taken of the Plaintiffs, the Property I.D. Defendants, the Realogy Defendants, the Pickford Defendants, a number of former Property I.D, employees, and numerous experts designated by the Parties. Id. The legal issues had also been sharpened through numerous pleading challenges and rulings of the Court. See, e.g., Order on Motion to Dismiss (Dkt. No. 82, Mar. 14, 2006) (finding equitable tolling allegations sufficient); Memorandum and Order Re: Various Defendants' Consolidated Motions to Dismiss (Dkt. No. 574, Aug.17, 2007) (inter alia, determining appropriate measure of damages under RESPA, and finding allegations of breach of fiduciary duty sufficient). Classes had been certified for litigation purposes. See Class Cert. Order. Indeed, the only remaining phases of the litigation are summary judgment and trial, which the Court declined to set until all efforts at settlement had been exhausted unsuccessfully. See Revised Scheduling Order (Dkt. No. 679, Nov. 8, 2007). The proposed settlements were negotiated by Class Counsel with a full appreciation of the strengths and weaknesses of their clients' case.

7. The Experience and Views of Counsel Strongly Favor the Proposed Settlements

As the Court noted in granting preliminary approval, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" Prelim. Approval Order at 2 (quoting Boyd v. Bechtel Corp., 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Class Counsel consider these settlements a "home run," as class members will receive a full refund of the purchase price of their Property I.D. reports. Class Counsel fought long and hard to achieve this

exceptional result, and endorse the settlements wholeheartedly.

8. The Reaction of Class Members Overwhelmingly Favors the Proposed Settlements

In any large class action, an absence of objections is "extremely unusual." In re Anthracite Coal Antitrust Litig., 79 F.R.D. 707, 712-13 (M.D. Pa. 1978), aff'd in part, 612 F.2d 571 and 612 F.2d 576 (3d Cir. 1979). When relatively few class members object to or exclude themselves from a class action settlement, courts interpret that response as evidence that the settlement warrants final approval.[27]

Although approximately 250,000 class members received notice of the settlement by direct mail, *none* have objected to the settlement, and only 19 have requested exclusion. Second Finegan Decl. ¶¶ 9-10; Himmelstein Decl. ¶ 4. By contrast, 42,556 class members have "voted" in favor of the settlement by submitting claim forms requesting their share of the settlement consideration. Second Finegan Decl. ¶ 8. Plainly, the reaction of class members overwhelmingly favors the proposed settlements.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant final approval of the proposed settlements, and enter judgment accordingly. A proposed form of order is lodged herewith.

[27] For example, in Stoetzner v. U.S. Steel Corp., 897 F.2d 115 (3d Cir. 1990), the Court found that objections by 29 members out of a settlement class of 281 — over 10% — "strongly favors settlement." Id. at 118-19. In Boyd, 485 F. Supp. at 624, the Court found that objections from 16% of a class constituted a "persuasive" showing that a settlement was adequate.

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Respectfully submitted,

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