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6 *Class Counsel*

7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10  
11 MARK and RACHELLE BERGER,  
*et al.* on behalf of themselves and  
12 all persons similarly situated,

13 Plaintiffs,

14 v.

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

16 Defendants.  
17

No. CV 05-5373-GHK (CWx)

**JOINT *EX PARTE* APPLICATION  
FOR ORDER APPROVING  
DISTRIBUTION OF SETTLEMENT  
FUNDS**

Judge: Hon. George H. King  
Courtroom: 650



1 Proceedings, Jan. 26, 2009, at 36:9-20 (requesting that “some attempt be made to  
2 come up with a cy pres remedy”). The Court carefully considered and overruled  
3 Mr. Alfi’s objections (see id. at 43:25-48:22), and on January 28, 2009, entered a  
4 Final Order and Judgment Granting Final Approval of Proposed Class Action  
5 Settlements (Dkt. No. 900) and an Order Granting Class Counsel’s Motion for  
6 Award of Attorneys’ Fees and Reimbursement of Expenses (Dkt. No. 899),  
7 directing that “[t]he Settlement Administrator shall retain 25% of the attorneys’ fees  
8 awarded herein and keep such amount in an interest bearing account pending  
9 further order of the Court” (id. at 3), out of concern that the Realogy and/or  
10 Pickford Defendants might be unable to make the final contributions due from them  
11 under the Settlement Agreement. See Reporter’s Transcript, at 12:20-20:5.

12 On February 24, 2009, Mr. Alfi filed a notice of appeal from the final  
13 judgment (Dkt. No. 902). No other appeals have been filed, and the time in which  
14 to appeal has long since expired.

15 GCG has completed the processing of all claims in accordance with the  
16 Settlement Agreement. See Declaration of Jennifer Keough in Support of Joint *Ex*  
17 *Parte* Application for Order Approving Distribution of Settlement Funds (“Keough  
18 Decl.”) ¶ 2. Of the 57,751 claims submitted, the Settlement Administrator has  
19 approved 50,377, or over 87%, for payment. Id. ¶ 2 & Exh. 2.

20 On June 3, 2009, GCG received the final payment due from the Realogy  
21 Defendants pursuant to the Settlement Agreement. Id. ¶ 3 & Exh. 1. No additional  
22 payments are due from Defendants. Id. Accordingly, Mr. Alfi’s appeal is the only  
23 remaining obstacle to distribution of settlement funds to class members—who  
24 began filing claims over eight months ago—and implementation of the related  
25 HUD settlement. See Jackson v. Property I.D. Corp., et al., C.D. Cal. Case No. CV  
26 07-03372-GHK (CWx) (Apr. 16, 2009 Order staying case pending resolution of  
27 Berger appeal).

28 On May 29, 2009, Mr. Alfi, his counsel, and the Parties participated in a

1 mediation under the supervision of Ninth Circuit Mediator Roxane G. Ashe, at the  
2 courthouse in Pasadena. Consistent with Mr. Alfi’s focus on *cy pres* relief, an  
3 agreement was reached that, subject to the approval of this Court, pursuant to the  
4 last sentence of paragraph 20 of the underlying Settlement Agreement: (1) \$37,500  
5 in *cy pres* funds will be paid to the Consumer Federation of California Education  
6 Foundation, \$37,500 will be paid to the CALPIRG Education Fund, and \$37,500  
7 will be paid to Consumer Watchdog (f/k/a The Foundation for Taxpayer and  
8 Consumer Rights); and (2) Mr. Alfi will dismiss his appeal. See Declaration of  
9 Barry Himmelstein in Support of *Ex Parte* Application for Order Approving  
10 Distribution of Settlement Funds (“Himmelstein Decl.”), Exh. A, Exh. B (order  
11 noting tentative settlement).<sup>7</sup> The 501(c)(3) organizations to whom the *cy pres*  
12 funds are proposed to be directed are established and well-respected consumer  
13 advocacy and education organizations. See Himmelstein Decl., Exhs. C, D, E  
14 (information from each organization’s website).<sup>8</sup> The Parties respectfully request  
15 that any additional *cy pres* funds remaining after payment of these sums be likewise  
16 divided among the aforementioned consumer organizations in equal measure.<sup>9</sup>

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18 <sup>7</sup> As set forth in underlying Settlement Agreement, “[a]ny Remaining Funds as to  
19 the RE/MAX Settlement Class shall . . . be disposed of in such manner as the Court  
20 shall direct.” Settlement Agreement ¶ 20 (last sentence). While Rule 23(e) of the  
21 Federal Rules of Civil Procedure specifies the procedures to be followed where “the  
22 claims . . . of a certified class may be settled, voluntarily dismissed, or  
23 compromised” (*id.*), the Rule does *not* apply to settlement of an objector’s appeal  
24 from the approval of class action settlement. See *Duhaime v. John Hancock Mut.*  
*Life Ins. Co.*, 183 F.3d 1, 4 (1st Cir. 1999). The agreement also provides that the  
25 Realogy Defendants will pay Mr. Alfi’s late-filed claim. Class Counsel will pay  
26 Mr. Alfi’s attorney’s fees in the agreed-upon amount of \$37,500 out of the  
27 attorneys’ fees previously awarded (see Dkt. No. 899). Accordingly, while Court  
28 approval is required by the Settlement Agreement as to the disbursement of *cy pres*  
funds, no such approval is required for these other aspects of the settlement with  
Mr. Alfi.

<sup>8</sup> While the agreement specifies that *cy pres* funds will be distributed to the  
Consumer Federation of California and CALPIRG, without specific reference to  
their education funds, it was subsequently determined and agreed that only  
contributions to these organizations’ separate education funds are tax deductible,  
and therefore an appropriate use of *cy pres* funds. See Himmelstein Decl. ¶ 3 &  
Exhs. C, D, E.

<sup>9</sup> The Settlement Administrator’s estimate of Projected Additional Costs

*Footnote continued on next page*

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2 Obviously, it is *overwhelmingly* in Class members' interests to have Mr.  
3 Alfi's appeal dismissed so that the over 50,000 valid claims can be paid forthwith.  
4 The \$150,000 in *cy pres* funds to be directed pursuant to the agreement with Mr.  
5 Alfi will not dilute any Class member's recovery (*i.e.*, all valid claims will be paid  
6 in full). See Keough Decl., Exh. 1. It is likewise in Class members' interests that  
7 the distribution be completed as soon as possible, especially given the Realogy  
8 Defendants' financial condition.<sup>10</sup>

9 Accordingly, the Parties respectfully request that the Court: (1) approve the  
10 payment of \$37,500 in *cy pres* funds each to the Consumer Federation of California  
11 Education Foundation, the CALPIRG Education Fund, and Consumer Watchdog;  
12 (2) direct the Settlement Administrator to pay all claims determined valid, in  
13 accordance with the terms of the Settlement Agreement; and (3) release the  
14 previously awarded attorneys' fees being held pending receipt of Defendants' final  
15 settlement payments. A proposed order is filed herewith.<sup>11</sup>

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18 *Footnote continued from previous page*

19 (\$239,855.37) is a conservative one. See Keough Decl., Exh. 1. Accordingly, it is  
20 likely there will be some amount of RE/MAX Remaining Funds beyond the amount  
21 projected. Id. Allocating those funds now would relieve the Court of the necessity  
22 of ruling on a subsequent *ex parte* application or motion.

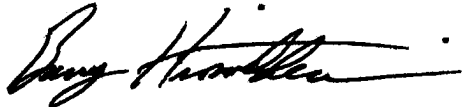
23 <sup>10</sup> Realogy understandably wishes to refrain from making unnecessary statements  
24 about its financial condition, and so expressly declines to join in this footnote.  
25 Realogy's public SEC filings show that it lost \$1.9 billion in 2008, and \$259  
26 million for the first quarter of 2009. See  
27 <http://www.sec.gov/Archives/edgar/data/1355001/000119312509037295/d10k.htm>;  
28 <http://www.sec.gov/Archives/edgar/data/1355001/000119312509108447/d10q.htm>.  
In March, Moody's Investors Service put Realogy on "a new list . . . called the  
Bottom Rung, which details companies that the ratings agency says are most likely  
to default on their debts. Moody's estimates that 45 percent of the companies on the  
list will default on debt in the next year." See  
<http://www.istockanalyst.com/article/viewarticle/articleid/3108005>.

<sup>11</sup> The Parties appreciate that the Court encourages sparing use of the *ex parte*  
procedure. Should the Court find the instant matter insufficiently pressing to  
warrant such attention, the Parties respectfully request that the Court set an  
expedited briefing schedule, as no opposition or reply is anticipated, insofar as all  
of the remaining litigants are parties to the agreement with Mr. Alfi.

1 Dated: June 8, 2009

Respectfully submitted,

LIEFF, CABRASER, HEIMANN &  
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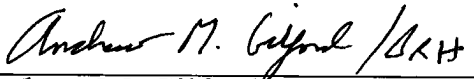
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14 Dated: June 8, 2009

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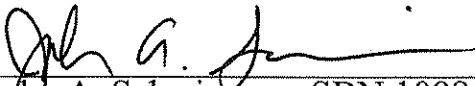
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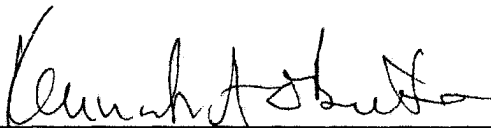
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