

order

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WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

CARL BERNOFSKY and
SHIRLEY G. BERNOFSKY

VERSUS

THE ROAD HOME CORPORATION,
ICF EMERGENCY MANAGEMENT
SERVICES, LLC, LOUISIANA RECOVERY
AUTHORITY, and LOUISIANA DIVISION
OF ADMINISTRATION THROUGH THE
OFFICE OF COMMUNITY DEVELOPMENT

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CIVIL ACTION NO.

5:09-CV-01919-TS-MLH

**SUR-REPLY TO DEFENDANT ICF'S REPLY TO PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS**

NOW INTO COURT, *in propria persona*, come plaintiffs Carl Bernofsky and Shirley G. Bernofsky (collectively "Bernofsky"), who respectfully dispute defendant's assertions that 1) plaintiffs are not third-party beneficiaries, 2) ICF's actions were not conducted under color of law, and 3) plaintiffs are positioned similarly to plaintiffs in *Robinson v. Road Home*.¹

¹*Robinson v. Road Home Corp et al*, Civil Action No. 09-4782 (U.S. District Court for the Eastern District of Louisiana).

Bernofsky Is a Third-Party Beneficiary of ICF's Contract with the State

Every homeowner who registered with the Road Home program was an intended third-party beneficiary of ICF's contract, subject to verification of their qualifications. ICF was mandated by its contract with the State to contact homeowners who had registered for benefits and then examine their claims through the application process.²

A third party beneficiary is a person benefitting from a contract made between two parties, where the two contracting parties intended to benefit the third party beneficiary. The third party beneficiary is not a party to the contract but has rights under the contract since it was made with an intent to benefit him.³

The principal reason that the State entered into a contract with ICF was to enable the State to find and compensate all legitimate third-party beneficiaries who had suffered losses as a result of the hurricanes. Plaintiffs were subjected to disparate treatment and deprived of due process because they were never contacted or invited to present their claim through the application process, even though they were properly registered with the Road Home program.⁴

ICF's Actions Were Taken under Color of State law

Defendant ICF argues that, because it became a publically-traded company, it was neither a State actor nor were its actions taken under color of State law. Both of these assertions are flawed. ICF was employed to act on behalf of the State for the purpose of identifying

²See these proceedings, Doc. No. 24-2 (Exhibit A).

³Legal Encyclopedia, Cornell Legal Information Institute, Definition of "third party beneficiary," <http://www.law.cornell.edu/search/index.html>.

⁴Complaint, Exhibit A.

homeowners to be compensated for their losses. At all times relevant to its contract, ICF was a State actor acting under color of State law and subject to the State's regulations. Providing benefits to qualified third-party homeowners was not incidental to the actions taken by ICF, but was the fundamental purpose of ICF's contract with the State.⁵

Plaintiffs Are Not Similarly Situated as in *Robinson*

Defendant ICF's contention that *Robinson v. Road Home* is "similar" to the plaintiffs's suit is incorrect. The plaintiffs in *Robinson* made a claim pursuant to the Road Home program for damage to their house, and their application for damages secured a monetary award, but they asserted that the size of the award was inadequate to cover the cost of repairing damage to the foundation of their residence.

The Robinsons' Complaint was essentially a claim for the difference between the amount awarded and the amount needed to also repair the structural damage to their foundation, and it followed attempts to use the Road Home program's appeals process. Their claim was based on evidence that other homeowners with less documentation of foundation structural damage received awards that fully paid for those types of problems.

In contrast, plaintiffs in the instant suit were victims of a completely different type of disparate treatment inasmuch as their registration and claim for damage was totally ignored, and plaintiffs were never offered an application with which to file the additional information needed to become award recipients.

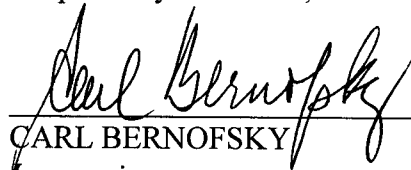
⁵See Footnote No. 2.

"This registration program is the first step on the road home for hundreds of thousands of our families, neighbors and friends. The Road Home housing registry will verify home addresses and ownership information. With this input, we can start the process of determining a homeowner's eligibility for funding," said Louisiana Governor Kathleen Babineaux Blanco.⁶

Along with other registrants, Bernofsky had properly registered with the Road Home program via The Road Home Registry on May 7, 2006,⁷ and by June 9, 2006, more than 26,000 homeowners had similarly registered with that program via the Internet.⁶ Defendant ICF suggests that plaintiffs' disparate treatment appears to be a "class-of-one" claim. Plaintiffs cannot know if other Road Home registrants also failed to be contacted by ICF and thereby were deprived of benefits. Nevertheless, that knowledge has no bearing on plaintiffs' failure to be contacted by ICF and the consequences of that failure that include, but are not limited to, the deprivation of due process.

Defendant ICF's dereliction of duty toward plaintiffs improperly deprived them of benefits and due process rights, and plaintiffs are entitled to an appropriate and just remedy.

Respectfully submitted,



CARL BERNOFSKY
In propria persona
SHIRLEY G. BERNOFSKY
In propria persona

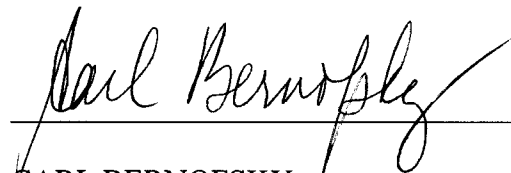
109 Southfield Road, Apt. 51H
Shreveport, Louisiana 71105
Tel: (318) 869-3871

⁶Louisiana Recovery Authority, News Release, June 9, 2006,
<http://www.lra.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=339>.

⁷Complaint, Exhibit A.

CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of March, 2010, a copy of the above and foregoing was delivered to the Clerk of Court for use in the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing upon all CM/ECF registrants.



CARL BERNOFSKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

CARL BERNOFSKY and
SHIRLEY G. BERNOFSKY

VERSUS

THE ROAD HOME CORPORATION,
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ORDER

After considering the *Motion in Opposition to Defendant's Motion to Dismiss* and *Sur-Reply to Defendant ICF's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss*, filed *in propria persona* by plaintiffs Carl Bernofsky and Shirley G. Bernofsky:

IT IS HEREBY ORDERED that defendant ICF Emergency Management Services, LLC's Motion to Dismiss is **DENIED**.

Shreveport, Louisiana, this _____ day of _____, 2010.

UNITED STATES MAGISTRATE JUDGE