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ALL CITIES REALTY, INC.

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ALL CITIES REALTY, INC.,

Plaintiff,

vs.

HOLLYMAX REALTY, INC., a California  
corporation, COMMBROKER, INC. a  
California corporation; KENNETH G.  
DAVIS, FARZAD ANDY DORRANI,  
ALLEN JACKSON, ARIANNE KAYS,  
JEANETTE GURZA-JUNCO, (JULIA)  
JIAO HONG KULECK, ROB  
O'SULLIVAN, SHANNAN O'SULLIVAN,  
COLETTE STEVENS, SUSAN  
WILLIAMS, OMID BENJAMIN  
ARASTEH, GLEN BEER, MAURICE  
BENITAH, NINA DHILLON, MATTHEW  
FREEDMAN, JACK KHALILI, JIHAN  
KIM, ROBERT MELAMED, GINA  
SAEIDIAN, SIMON SHAHERI, BYRON  
RIFE, JR., DALE A. ELENIAK, and DOES  
1 through 10, inclusive.

Defendants.

) Case No: SA CV08-195 AHS  
) (MLGX)

) **OPPOSITION TO MOTION BY  
) HOLLYMAX, ETC. TO DISMISS;  
) MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT  
) THEREOF**

) DATE: December 14, 2009  
) TIME: 1:30 p.m.  
) CTRM: 9B

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**TABLE OF CONTENTS**

I INTRODUCTION .....1

II THE COMPLAINT SATISFIES THE RULE 8 PLEADING STANDARDS .....1

III SUMMARY OF THE RELEVANT FACTS ALLEGED IN THE COMPLAINT .....3

    A. Overview .....3

    B. Summary of Defendants’ Arguments .....3

    C. Statement of Facts .....3

        (i) The Parties .....4

        (ii) Allegations Concerning Defendants’ Infringement of Plaintiff’s Registered Mark.....4

IV THE COMPLAINT CONTAINS SUFFICIENT ALLEGATIONS TO HOLD KELLI TODD PERSONALLY LIABLE AS AN ALTER EGO OF HOLLYMAX AND COMMBROKER.....8

V THE COMPLAINT STATES VALID CLAIMS AGAINST HOLLYMAX.....13

VI THE COMPLAINT SETS FORTH SUFFICIENT FACTS TO ESTABLISH LIABILITY AGAINST DEFENDANT BYRON RIFE, JR. ....14

VII THE COMPLAINT PROPERLY ALLEGES TRADEMARK INFRINGEMENT AGAINST THE AGENT DEFENDANTS .....18

VIII THE REQUEST FOR A STAY SHOULD BE DENIED .....20

IX CONCLUSION .....21

**TABLE OF AUTHORITIES**

Cases

Amvest Mortgage Corp. v. Antt,  
58 Cal. App. 4<sup>th</sup> 1239, 1243 (1997) .....14, 15

Associated Vendors Inc. v. Oakland Meat Co.,  
210 Cal.App.2d 825, 838-840 (1962) .....12

Ashcroft v. Iqbal,  
\_\_\_ U.S. \_\_\_, 129 S.Ct. 1937 (2009) .....1, 2

Bell Atlantic Corp v. Twombly,  
550 U.S. 544 (2007) ..... 1

Goldsmith v. Tub-O-Wash,  
199 Cal. App. 2d (1962) .....9

Gray v. Don Miller & Associates,  
35 Cal. 3d 498, 507 (1984) .....14

Holley v. Crank,  
386 F.3d 1248 (9<sup>th</sup> Cir. 2004) ..... 14

Holley v. Crank,  
400 F.3d 667 (9<sup>th</sup> Cir. 2004) .....18

Las Palmas Associates v. La Palmas Center Associates,  
235 Cal. App. 3d 1220 (1991) .....9, 13

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,  
507 U.S. 163, 168-169 (1993) ..... 1

Minton v. Cavaney,  
56 Cal. 2d 576 (1961) .....9

NEC Electronics, Inc. v. Hurt,  
208 Cal. App. 3d 772 (1989) .....8, 9, 10

TABLE OF AUTHORITIES  
(Continued)

1  
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Cases (continued)

Pareto v. F.D.I.C.  
(9<sup>th</sup> Cir. 1998) 139 F. 3d 696, 699 .....4

Platt v. Billingsley,  
234 Cal.App.2d 577, 582 (1965) .....10

Riddle v. Leuschner,  
51 Cal.2d 574, 581 (1959) .....10

Sonora Diamond Corp. v. Superior Court,  
83 Cal.App.4th 523, 538-539 (2000) .....9

Talbot v. Fresno-Pacific Corp.,  
181 Cal.App.2d 425, 427 (1960) .....10

Valdez v. Downey S&L Ass'n,  
2007 U.S. Dist. LEXIS 31290 (N.D. Cal) .....15, 16

Walters v. Marler,  
83 Cal. App. 3d 1 (1978) ..... 14

Statutes

California Business & Professions Code §10130 .....14

California Business & Professions Code §§10131 .....16

California Business & Professions Code §10158 .....14

California Business & Professions Code §10159.2(a) .....15, 16

California Business & Professions Code §10211 .....14

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TABLE OF AUTHORITIES  
(Continued)

1  
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Other Authority

California Code of Regulations §2725 [10 CCR 2725 (2008)] .....16

California Code of Regulations §2731(a) [10 CCR 2731 (2008)] .....16

Cal. Code Regs. Title X, §2740 .....14

FRCP Rule 8(a)(2) .....1

FRCP Rule 12(b)(6) .....4

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **I INTRODUCTION**

4 The moving defendants base their motion primarily upon an argument that the  
5 Court should disregard the factual allegations in the Second Amended Complaint  
6 (hereinafter simply “the Complaint”), contending that they are conclusions.  
7 Defendants are incorrect. The Complaint contains detailed factual allegations that  
8 go miles beyond the Rule 8 standards of pleading. It appears that Defendants are  
9 asking the Court to insist that Plaintiff put in every detail of proof in an initial  
10 pleading to sustain its claims without the benefit of discovery. Defendants want this  
11 Court to believe that Plaintiff should know every detail of the inner workings of  
12 Defendants’ entire business and operations at the outset of the case and therefore  
13 must allege it in the pleading. This is not the appropriate standard of review and the  
14 Court should reject such a draconian result.

15 **II THE COMPLAINT SATISFIES THE RULE 8 PLEADING**  
16 **STANDARDS**

17 A complaint only requires a short and plain statement of the claim showing  
18 that the pleader is entitled to some relief. [FRCP Rule 8(a)(2).] The complaint is  
19 sufficient if it gives the defendant fair notice of what the claim is and the grounds  
20 upon which it rests. [Bell Atlantic Corp v. Twombly, 550 U.S. 544 (2007).] The  
21 complaint need not contain detailed factual allegations supporting the claim; litigants  
22 must rely upon summary judgment and discovery to weed out unmeritorious claims.  
23 [Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507  
24 U.S. 163, 168-169 (1993).] The Complaint here is more than sufficient to meet these  
25 standards.

26 Defendants rely heavily upon the recent Supreme Court decision entitled  
27 Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937 (2009) to make a contrary argument.  
28 However, this decision did not establish new law; it merely summarized the existing

1 standards. The following is taken from the Slip Opinion synopsis:

2 “Under Federal Rule of Civil Procedure 8(a)(2), a complaint must  
3 contain a “short and plain statement of the claim showing that the  
4 pleader is entitled to relief.” “[D]etailed factual allegations” are not  
5 required, *Twombly*, 550 U. S., at 555, but the Rule does call for  
6 sufficient factual matter, accepted as true, to “state a claim to relief  
7 that is plausible on its face,” *id.*, at 570. A claim has facial plausibility  
8 when the pleaded factual content allows the court to draw the  
9 reasonable inference that the defendant is liable for the misconduct  
10 alleged. *Id.*, at 556. Two working principles underlie *Twombly*. First,  
11 the tenet that a court must accept a complaint’s allegations as true is  
12 inapplicable to threadbare recitals of a cause of action’s elements,  
13 supported by mere conclusory statements. *Id.*, at 555. Second,  
14 determining whether a complaint states a plausible claim is context-  
15 specific, requiring the reviewing court to draw on its experience and  
16 common sense. *Id.*, at 556. A court considering a motion to dismiss  
17 may begin by identifying allegations that, because they are mere  
18 conclusions, are not entitled to the assumption of truth. While legal  
19 conclusions can provide the complaint’s framework, they must be  
20 supported by factual allegations. When there are well-pleaded factual  
21 allegations, a court should assume their veracity and then determine  
22 whether they plausibly give rise to an entitlement to relief.”

23 Defendants ask that this Court reject Plaintiff’s detailed facts by characterizing them  
24 as “conclusions.” Are Defendants seriously suggesting that 25 pages of multiple  
25 factual allegations, with exhibits and examples; are all just simple conclusions and  
26 can be disregarded? This is something that the Court should not do.

27 ///

28 ///

1 **III SUMMARY OF THE RELEVANT FACTS ALLEGED IN THE**  
2 **COMPLAINT**

3 A. Overview

4 This case arises from Defendants' wrongful use of Plaintiff's federally  
5 trademarked name, All Cities Realty®. These moving Defendants fall into four  
6 distinct categories as argued in the motion to dismiss: (1) Hollymax; (2) Kelli Todd  
7 as its alter ego; (3) various agents of Hollymax and Commbroker who are not their  
8 employees but conducted business under Plaintiff's trademarked name; and (4)  
9 Byron Rife, Jr., the current broker of record for Hollymax and Commbroker.

10 B. Summary of Defendants' Arguments

11 Hollymax argues that the Court should reject the allegations in the Complaint  
12 and hold that: (i) no factual detail is alleged, and (ii) Hollymax did not infringe upon  
13 Plaintiff's mark. Kelli Todd also asks that the Court reject the alter ego allegations  
14 against her, and piggybacks her arguments contending that because the claims  
15 against Hollymax fail, the claims against her must also fail.

16 Defendant Rife seeks dismiss the complaint on grounds that as the broker of  
17 record, he has no vicarious liability to third parties for actions taken by Hollymax,  
18 Commbroker and their respective agents.

19 The "individual" agent Defendants, who acted as real estate agents selling real  
20 estate under Plaintiff's trademarked name, seek to dismiss the complaint on the  
21 argument that Plaintiff has not pled sufficient facts to establish infringement. They  
22 argue that marketing their business under Plaintiff's name is not sufficient to  
23 establish liability.

24 As discussed below, the complaint properly pleads claims against all of the  
25 Defendants.

26 The motion to dismiss should be denied.

27 C. Statement of Facts

28 The relevant allegations in the Second Amended Complaint are summarized

1 here, referenced by their paragraph number (“¶”). They must be accepted as true for  
2 purposes of this motion (notwithstanding Defendants’ contention to the contrary).  
3 [FRCP Rule 12(b)(6); Pareto v. F.D.I.C. (9<sup>th</sup> Cir. 1998) 139 F. 3d 696. 699.]

4 (i) The Parties

5 Plaintiff All Cities Realty, Inc. (“Plaintiff” or “All Cities Realty®” as context  
6 requires) is the owner of a federally registered service mark for the name “All Cities  
7 Realty” for real estate brokerage and real estate appraisal services. Plaintiff also  
8 holds a registered California trademark for the name “All Cities Realty.” [¶2]

9 Hollymax and Commbroker are California corporations. [¶¶3-4] Byron Rife  
10 is a real estate broker licensed in California, and during all relevant times, Hollymax  
11 and Commbroker operated under his broker license (after June 12, 2006). [¶¶8, 9]

12 Kelli Todd owns Hollymax, Commbroker, and CF Real Estate Loans. [¶¶4, 5,  
13 10]

14 The Defendant agents<sup>1</sup> held/hold real estate sales licenses and conducted their  
15 business through the Hollymax or Commbroker corporate brokerages and used  
16 Plaintiff’s trademarked name “All Cities Realty” in the conduct of their business  
17 without Plaintiff’s permission.

18 (ii) Allegations Concerning Defendants’ Infringement of Plaintiff’s  
19 Registered Mark

20 All Cities Realty® acts as a corporate real estate broker licensed in California  
21 conducting business in most southern California counties including Los Angeles,  
22 Orange, San Bernardino, Riverside, and San Diego. [¶15] Commencing in or about  
23 1997, All Cities Realty® had a superior presence on the Internet and was one of the  
24 pioneers in Internet real estate marketing. Through its own proprietary ingenuity, it

25 \_\_\_\_\_  
26 <sup>1</sup> They are: Kenneth G. Davis, Farzad Andy Dorrani, Allen Jackson, Arianne Kays,  
27 Jeanette Gurza-Junco, (Julia) Jiao Hong Kuleck, Rob O’Sullivan, Shannan  
28 O’Sullivan, Colette Stevens, Susan Williams, Omid Benjamin Arasteh, Glen Beer,  
Maurice Benitah, Nina Dhillon, Matthew Freedman, Jack Khalili, Jihan Kim, Robert  
Melamed, Gina Saeidian, and Simon Shaheri.

1 was able to maintain prime positions on search engines results, making its web site  
2 one of the first places that real estate consumers would visit when conducting real  
3 estate searches. [¶16] Over the years, the Internet grew exponentially with respect to  
4 the real estate consumer. Now, almost all real estate consumers use the Internet for:  
5 locating their prospective real estate agents and brokers, real estate purchases, and  
6 making decisions regarding these purchases. [¶17]

7 In or about late 2002, a company called CF Real Estate Loans, Inc. ("CF"),  
8 another California real estate broker licensee, began doing business as All Cities  
9 Realty, using the name "Re/Max All Cities Realty. [¶18] All Cities Realty® and  
10 Re/Max All Cities Realty are competitors for the same real estate consumers in the  
11 same geographic markets. [¶18] CF has filed many fictitious name statements  
12 including for "Re/Max All Cities Realty." CF's own website states that Re/Max All  
13 Cities Realty was chosen as the adopted "umbrella name" for all arterial  
14 companies/dba (owned by CF) including the Defendant Companies. [¶18]

15 CF, Hollymax, and Commbroker operate the same website for purposes of  
16 internet marketing. [¶19] Commencing in about 2003, CF began extensive marketing  
17 campaigns both in the print media and on the Internet using the names "All Cities  
18 Realty" and "Re/Max All Cities Realty." With regard to the Internet, CF, Hollymax,  
19 and Commbroker created hundreds of websites using the name "All Cities Realty"  
20 and thousands of sub-pages on these websites using the "All Cities Realty" trade  
21 name. This had the effect of diluting All Cities Realty's® trade name and web  
22 presence. [¶20] Defendants were warned in advance, both orally and in writing, by  
23 Plaintiff not to use the All Cities Realty® Federal Trademark but did so anyway.  
24 [¶21] Defendants were aware of Plaintiff's registered mark before they began using  
25 it in the marketing and operation of the businesses. [¶26]

26 Hollymax had NO other corporate website. While Commbroker did have a  
27 secondary website located at [www.commercialrealestatela.com](http://www.commercialrealestatela.com) it purposely shared  
28 its agent and property database with the Re/Max All Cities Realty website.

1 Commbroker displayed its agents, their information and its properties using the All  
2 Cities Realty mark on the Re/Max All Cities Realty website. Additionally on  
3 Commbroker's personal website the All Cities Realty® mark was also used and  
4 displayed as being part of Re/Max All Cities Realty. It was Kelli Todd's intent to  
5 bring all her companies together under "one roof" using the umbrella name All  
6 Cities Realty. Hollymax and Commbroker advertised, made use of, and prominently  
7 displayed the All Cities Realty Federal Trademark for all their real estate agents and  
8 real estate listings on the website. [¶¶22, 24, 26-28, 32] Hollymax and Commbroker  
9 controlled their portions of the website and their business and marketing activities of  
10 Re/Max All Cities Realty caused actual confusion with the real estate consumers  
11 who believed that Re/Max All Cities Realty and All Cities Realty® were either  
12 affiliated or were the same company. [¶¶22, 24, 26-28, 32] The Defendant agents  
13 used the website and maintained it, performing the following activities under  
14 Plaintiff's Re/Max All Cities Realty and All Cities Realty® names: (1) placing new  
15 real estate listings on the website, (2) uploading photos for these real estate listings,  
16 (3) describing and entering the data that would display on the Internet regarding the  
17 real estate listings, (4) controlling the listings making listings active or inactive, and  
18 (5) personally updating bios, contact information, email addresses and personal  
19 photos. [¶¶23, 25, 26-28, 32] The Defendant agents also used the website, print  
20 media, signs, business cards, contractual documents to third parties, and in other  
21 situations unknown to the Plaintiff at this time to market their business under  
22 Plaintiff's name. [¶¶23, 25, 26-28, 32]

23 Defendants placed Plaintiff's "All Cities Realty" name significantly on these  
24 websites which generated 1,000s of web pages with the All Cities Realty Federal  
25 Trademark prominently displayed and embedded in the website (every page of the  
26 site contained the All Cities Realty logo). Thousands of other websites, such as Real  
27 Estate oriented sites, internet directories, online telephone directories, were linked to  
28 these pages and the website using the embedded phrase "All Cities Realty." They

1 also used Plaintiff's "All Cities Realty" name in their "SEO" or Search Engine  
2 Optimization methods so that search engines would index that name and direct  
3 internet users to Defendants' websites rather than Plaintiff's website. Defendants  
4 advertised on the internet using Plaintiff's "All Cities Realty" name, advertised  
5 significantly in periodicals and print media using Plaintiff's "All Cities Realty"  
6 name, and other methods unknown to Plaintiff at this time. By engaging in this  
7 activity and other real estate sales activity not known to Plaintiff at this time, each  
8 named Defendant herein used Plaintiff's registered service mark in commerce,  
9 causing consumer confusion, and derived revenue from that use. **The bottom line is**  
10 **that each named Defendant herein was operating a real estate business using**  
11 **and knowingly benefitted from Plaintiff's registered service mark.** [¶¶26-28, 32]

12 Additionally, the Defendant agents used Plaintiff's "All Cities Realty" name  
13 in the conduct of real estate activity that required a California real estate license,  
14 including, but not limited to advertising (via the websites, internet, and print media  
15 as alleged herein) as agents of others to engage in the purchase, sale and rental of  
16 real estate representing others, and the solicitation of business for that purpose. [¶29]

17 Because the Defendant corporations and agents named herein each had their  
18 own page (or several pages) on the Re/Max All Cities Realty website, it appeared to  
19 the consumer and general public as if they were all part of Re/Max All Cities Realty.  
20 All Corporate Defendants, including Hollymax and Commbroker, and all agent  
21 Defendants were using All Cities Realty's federal trademark without Plaintiff's prior  
22 knowledge or permission. [¶30]

23 In addition, when All Cities Realty® and Re/Max All Cities Realty appeared  
24 side by side on hundreds of Internet search result pages, it created a great likelihood  
25 of consumer confusion even if actual confusion did not always occur. [¶33]

26 According to the public records of the California Department of Real Estate,  
27 Hollymax and Commbroker have filed fictitious name statements to duly obtain and  
28 maintain real estate licenses, but never obtained or were granted a real estate license

1 under the “Re/Max All Cities Realty” or “All Cities Realty” names. [¶¶39, 39] All  
2 Defendant agents named herein worked for Hollymax and/or Commbroker and had  
3 no rights to use the Federal Trademark All Cities Realty® nor did they have real  
4 estate licenses, business licenses or fictitious name statements to use Re/Max All  
5 Cities Realty. The display of these entities and individuals on the Re/Max All Cities  
6 Realty website was confusing, fraudulent and in violation of All Cities Realty’s  
7 federal service mark. [¶40]

8 Each real estate agent who worked with Hollymax and Commbroker  
9 conducted business using the “All Cities Realty” name. Hollymax and Commbroker  
10 also conducted business using the “All Cities Realty” name with no Re/Max  
11 housemark. Many (if not all) of the Defendant agents and brokers who worked with  
12 Re/Max All Cities Realty were informed and notified of the Trademark Lawsuit and  
13 then made the conscious decision to continue to use the Trademark All Cities  
14 Realty® in violation of Plaintiff’s rights. [¶42]

15 Each of Defendant’s webpages intentionally prominently displayed the name  
16 “All Cities Realty” and the name “Re/Max All Cities Realty” which was in violation  
17 of Plaintiff’s All Cities Realty® service mark. Defendants have performed real  
18 estate services in violation of Plaintiff’s trademark rights and California real estate  
19 law by engaging in the advertising, purchase and sale of real estate, acting as, or  
20 soliciting to be agents representing others in the offering, representation, and the  
21 solicitation to the general public for the purchase, rental, and sale of real estate. The  
22 marketing activities of Hollymax, and Commbroker have created not only a  
23 likelihood of confusion between the names All Cities Realty® and Re/Max All  
24 Cities Realty, but actual confusion between those names. Images on virtually every  
25 page of the Re/Max All Cities Realty website were named “allcitiesrealty” which  
26 were picked up by search engines such as Google, further exacerbating this  
27 confusion issue. [¶¶43-48]

28 ///

1 Based on the above allegations (the complaint sets forth more detail),  
2 Hollymax and Commbroker were sued, as were real estate agents who used  
3 Plaintiff's name, and their brokers of record, Byron Rife, and Dale Eleniak (who is  
4 represented by separate counsel and has brought a companion motion).

5 **IV THE COMPLAINT CONTAINS SUFFICIENT ALLEGATIONS TO**  
6 **HOLD KELLI TODD PERSONALLY LIABLE AS AN ALTER EGO**  
7 **OF HOLLYMAX AND COMMBROKER**

8 In NEC Electronics, Inc. v. Hurt, 208 Cal. App. 3d 772 (1989), the Court  
9 stated the general rule for imposing alter ego liability.

10 "There are two general requirements for disregarding the corporate  
11 entity. First, there must be such unity of interest and ownership that  
12 the separate personalities of the corporation and the individual no  
13 longer exist. Second, it must be demonstrated that if the acts are  
14 treated as those of the corporation alone, an inequitable result will  
15 follow. When considering the application of the alter ego doctrine to  
16 a particular situation, it must be remembered that it is an equitable  
17 doctrine and, though courts have justified its application through  
18 consideration of many factors, their basic motivation is to assure a just  
19 and equitable result."

20 [Id. at 777, internal quote marks and citations omitted.]

21 In Sonora Diamond Corp. v. Superior Court, 83 Cal.App.4th 523, 538-539  
22 (2000), the Court stated:

23 "Among the factors to be considered in applying the doctrine are  
24 commingling of funds and other assets of the two entities, the holding  
25 out by one entity that it is liable for the debts of the other, identical  
26 equitable ownership in the two entities, use of the same offices and  
27 employees, and use of one as a mere shell or conduit for the affairs of  
28 the other. Other factors which have been described in the case law

1 include inadequate capitalization, disregard of corporate formalities,  
2 lack of segregation of corporate records, and identical directors and  
3 officers. No one characteristic governs, but the courts must look at all  
4 the circumstances to determine whether the doctrine should be  
5 applied.” [Internal quote marks and citations omitted.]

6 While the defendant must generally have an ownership interest in the  
7 company, formal ownership is not required. [See Minton v. Cavaney, 56 Cal. 2d 576  
8 (1961); Goldsmith v. Tub-O-Wash, 199 Cal. App. 2d (1962).] Moreover, if Plaintiff  
9 establishes that the alter ego defendant is part of a single enterprise, consisting of  
10 more than one entity acting in concert, liability may be imposed. [Las Palmas  
11 Associates v. La Palmas Center Associates, 235 Cal. App. 3d 1220 (1991).]

12 In NEC Electronics, the sole shareholder of a corporation unable to pay its  
13 debts had taken \$2.8 million in undocumented loans from the corporation (only  
14 partially repaid), had the corporation make his mortgage payments on his house, paid  
15 these expenses of the shareholder’s personal boat, paid for the shareholder’s wife’s  
16 automobile, and when the corporation could not meet its obligations, the shareholder  
17 paid some of those obligations from his personal funds (again undocumented).  
18 Given that the shareholder had diminished the corporations ability to meet its  
19 obligations through these personal payments, the court found that alter ego liability  
20 existed.

21 In Platt v. Billingsley, 234 Cal.App.2d 577, 582 (1965), the court affirmed an  
22 alter ego judgment against controlling shareholders of a corporation who diverted  
23 corporate funds into their personal accounts. [Id. at 583-84; see also Riddle v.  
24 Leuschner, 51 Cal.2d 574, 581 (1959); and Talbot v. Fresno-Pacific Corp., 181  
25 Cal.App.2d 425, 427 (1960).]

26 Under these standards, more than sufficient facts are alleged in the Complaint  
27 to establish alter ego liability against Kelli Todd.

28 Hollymax, Commbroker, and CF are all part of the same ownership group (the

1 Todd family). When it became inconvenient to operate Hollymax separately from  
2 Re/Max All Cities Realty, the Todd Family folded Hollymax's agents and the  
3 operations of Hollymax into the operations of Re/Max All Cities Realty, such that  
4 any individuality and separateness no longer exists between the two entities.  
5 Re/Max All Cities Realty has since taken over the operations of Hollymax and is its  
6 successor entity. [¶¶3, 4] Although Hollymax's and Commbroker's operations and  
7 agents have now been combined with Re/Max All Cities Realty, the Todd Family  
8 has kept the two separate corporate entities, Hollymax and Commbroker, alive but  
9 void of agents and ongoing operations. Agents, assets and income have been  
10 transferred to Kelli Todd and Re/Max All Cities Realty, and the Todd family as  
11 controlled by Kelli Todd. [¶5] Each of the defendants was acting in concert and  
12 active participation with each other in committing the wrongful acts alleged herein,  
13 and was the agent of each other and acted within the scope and authority of that  
14 agency and within the knowledge, consent and approval of one another. [¶12]  
15 (These allegations meet the "single enterprise" test.)

16 The remaining alter ego allegations focus on Defendant Kelli Todd personally  
17 and her ownership and control of the Defendant entities. "[T]here existed a unity of  
18 interests between Defendant Todd on the one hand, and Hollymax and Commbroker,  
19 on the other hand, such that the separate corporate or business identity, if any, of  
20 Hollymax and Commbroker should be disregarded, and the corporate entities named  
21 as defendants herein should be treated merely as the alter-egos of the individual  
22 defendant Todd. Adherence to the fiction of separate existence of Hollymax and  
23 Commbroker as entities distinct from the individual defendant Todd, would permit  
24 an abuse of the corporate entities, would sanction fraud and injustice in that the  
25 individual defendant Todd could evade personal liability for her wrongdoing as  
26 alleged in this Second Amended Complaint and could and would continue in the  
27 corporate or limited liability company name to perpetuate the illegal plan, scheme  
28 and device as alleged in this Complaint." [¶13] This allegation sets forth the

1 elements of the alter ego claim and its consequences (ownership, control, and  
2 injustice) in conformity with the above-cited cases.

3 The Complaint then details the alleged conduct of Todd that supports a finding  
4 of alter ego liability: “[D]efendant Todd failed to respect the separate corporate  
5 identity of Defendants Hollymax and Commbroker, as follows:

- 6 a. . . . failed to comply with all pertinent corporate or limited liability  
7 company formalities;
- 8 b. Corporate funds . . . were withdrawn for the personal use of individual  
9 defendant Todd, and/or her family members, either directly or  
10 indirectly, without treating such withdrawals as salaries or dividends;
- 11 c. . . . Todd guaranteed the debts and obligations of Defendants Hollymax  
12 and Commbroker;
- 13 d. . . . Todd commingled her moneys, funds and property with those of  
14 Defendants Hollymax and Commbroker, and vice-versa.
- 15 e. Defendants Hollymax and Commbroker along with CF . . . and . . .  
16 Todd share the same attorneys, accountants, management, and offices;
- 17 f. . . . Todd refers to Hollymax, Commbroker, and CF Real Estate Loans,  
18 Inc. aka Re/Max All Cities Realty as her “family business”;
- 19 g. . . . Todd at all times herein mentioned, completely controlled,  
20 dominated, managed and operated . . . Hollymax and Commbroker; . . .
- 21 h. Defendants Hollymax and Commbroker are, and at all times mentioned  
22 herein were, a mere shell, instrumentality and conduit, without adequate  
23 capital through which the individual defendant Todd carried on her  
24 personal business through her corporate names.
- 25 i. **On information and belief, Kelli Todd is the sole shareholder and**  
26 **controls all important business decisions of Hollymax,**  
27 **Commbroker and CF.”** (Emphasis added.)

28 Plaintiff later alleges that: “At or shortly prior to the time that Hollymax and

1 Commbroker first appeared as offices on the Re/Max All Cities Realty website, their  
2 management was aware of Plaintiff's claims of infringement and made the conscious  
3 decision to conduct real estate business using the "All Cities Realty" name under the  
4 moniker of "Re/Max All Cities Realty". As alleged above, the management teams of  
5 Hollymax and Commbroker were the same people responsible for managing CF Real  
6 Estate Loans, Inc., aka Re/Max All Cities Realty, and were managed, dominated,  
7 and controlled by Defendant Kelli Todd." [¶41]

8 These are detailed facts known to the Plaintiff, not simply conclusions as  
9 argued by Defendants. They must be accepted as true and when proven, will  
10 establish that Todd is personally liable as the alter ego of Hollymax and  
11 Commbroker. [See Associated Vendors Inc. v. Oakland Meat Co., 210 Cal.App.2d  
12 825, 838-840 (1962).] Her Motion to Dismiss should be denied.<sup>2</sup>

13 **V THE COMPLAINT STATES VALID CLAIMS AGAINST HOLLYMAX**

14 Hollymax tenders several arguments which are facially invalid and should be  
15 rejected. Taking them in order:

16 1. Hollymax argues that the allegations concerning CF do not establish  
17 liability of Hollymax. While these factual allegations are background detail, they do,  
18 in fact, form a basis for Hollymax's liability under the "single-enterprise" doctrine.  
19 [Las Palmas Associates v. La Palmas Center Associates, 235 Cal. App. 3d 1220  
20 (1991).]

21  
22 <sup>2</sup> Defendants incorrectly argue that because the brokers of record are ultimately  
23 responsible for the real estate activities of the company, Kelli Todd could not control  
24 the companies for alter ego purposes. That argument fails for several reasons. First,  
25 Defendants inconsistently argue that the brokers of record do not control the  
26 companies. This argument is made to attempt to extricate Rife and Eleniak from  
27 liability to Plaintiff. Defendants cannot have it both ways. Second, control of the  
28 decision making of the companies for all purposes (which Todd did) is very different  
from being legally responsible for the real estate activities of the company under the  
California Business & Professions Code and the regulations promulgated thereunder  
as detailed in Section VI below. It is an apples vs. oranges argument.

1           2. Hollymax next argues that the allegations against it are merely  
 2 conclusions that should be disregarded. Not so. As detailed above, the Complaint  
 3 sets forth a detailed account of Hollymax's active participation in the illegal use of  
 4 Plaintiff's service mark. Plaintiff alleges in considerable factual detail that: (i)  
 5 Hollymax's management established the offending website with advance knowledge  
 6 of Plaintiff's service mark; (ii) used Plaintiff's mark in commerce without obtaining  
 7 permission; and (iii) caused both actual and potential confusion. It more than  
 8 satisfies the Rule 8 standards.

9           3. Finally, Hollymax argues that the Complaint does not plead facts of  
 10 actual use of Plaintiff's mark or an infringing use. That argument is tendered in bad  
 11 faith. Paragraphs 19-32 set forth a detailed scheme by Hollymax to use Plaintiff's  
 12 mark, its actual use, and the details of how it was used by Hollymax in commerce.

13 **VI THE COMPLAINT SETS FORTH SUFFICIENT FACTS TO**  
 14 **ESTABLISH LIABILITY AGAINST DEFENDANT BYRON RIFE, JR.**

15           In Defendants' Motion to Dismiss the First Amended Complaint, Defendants  
 16 argued that a broker of record could not be liable to a third party even though he is,  
 17 by statute and regulation, expressly charged with being responsible for the real estate  
 18 activities of the brokerage firm.<sup>3</sup> Thus, Defendants concluded that Rife, as the  
 19 broker of record for Hollymax and Commbroker, could not be personally liable to  
 20 Plaintiff for Hollymax's and Commbroker's infringement of Plaintiff's mark in the  
 21 conduct of their residential and commercial real estate activities.

22           In the opposition, Plaintiff pointed out that in Holley v. Crank, 386 F.3d  
 23 1248 (9<sup>th</sup> Cir. 2004), the broker of record was held liable for employment  
 24

25 <sup>3</sup> Defendant relied on only one 30 year old case in support of his argument – Walters  
 26 v. Marler, 83 Cal. App. 3d 1 (1978). Importantly, in the 30 years following this  
 27 decision, the Walters case has **never** been cited for that proposition. In fact, the case  
 28 has been overruled both by a superseding statute (B&P Code §10159.2), and by case  
 law [Gray v. Don Miller & Associates, 35 Cal. 3d 498, 507 (1984), disapproving  
Walters on other grounds.]

1 discrimination by virtue of his position as the broker of record for the company.

2 [Id. at 1253, citing California Business & Professions Code §§10130, 10158, and  
3 10211, Cal. Code Regs. Title X, §2740, and Amvest Mortgage Corp. v. Antt, 58 Cal.  
4 App. 4<sup>th</sup> 1239, 1243 (1997).] The Court summarized the broker’s general scope of  
5 responsibility as:

6 “The statute provides that the officer/broker designated by a corporate  
7 broker licensee shall be responsible for the supervision and control of  
8 the activities conducted on behalf of the corporation by its officers  
9 and employees as necessary to secure full compliance with the  
10 provisions of this division, including the supervision of salespersons  
11 licensed to the corporation in the performance of acts for which a real  
12 estate license is required.

13 [Id., citing California Business & Professions Code §10159.2(a).] And:

14 “Among the officer/broker's obligations for supervision is ‘the  
15 establishment of policies, rules, procedures and systems to review,  
16 oversee, inspect and manage . . . [f]amiliarizing salespersons with the  
17 requirements of federal and state laws . . . .’”

18 [Id.] The Court relied in part upon the legislative history of §10159.2 to support its  
19 conclusion that the broker is responsible for the actions of the corporation:

20 “The only way that the active participation of the licensed individual  
21 may be ensured is by “piercing the corporate veil” and making the  
22 individual licensee vulnerable to action on account of corporate  
23 misdeeds, or on account of failure to fulfill corporate responsibilities. .  
24 . . The granting of the corporate license is predicated upon the  
25 qualifications of the designated officer in the first place. It is no  
26 injustice to demand that the person standing for the corporation at  
27 licensing continue to stand for the corporation. That is an implicit  
28 assumption of the law anyway.”

1 [Id. at 1254.] And:

2 “The statutory provisions regulating the real estate profession,  
3 particularly after the 1979 AMENDMENT with its legislative  
4 history, places a direct, personal responsibility on the designated  
5 officer/broker of a real estate corporation to supervise the  
6 salespersons to assure compliance with the state and federal laws.  
7 This personal obligation is independent from that of the normal  
8 responsibilities of a corporate officer or of the corporation itself.”

9 [Id. at 1254, emphasis added.]

10 In Valdez v. Downey S&L Ass'n, 2007 U.S. Dist. LEXIS 31290 (N.D. Cal),  
11 the Court addressed claims by a third party who accused a real estate lender (a  
12 mortgage broker who must hold a real estate license) of loan fraud. The Court  
13 specifically held that the broker of record could be personally liable to the third party  
14 borrower by virtue of allowing the corporate entity to use his real estate license. [Id.  
15 at 23, citing California Business & Professions Code §§10131 and 10159.2.]

16 There are several significant conclusions from the 2007 Valdez holding. First,  
17 the Valdez Court followed the 2004 Holley decision. Second, in Valdez, as in  
18 Holley, the Court held that the broker of record’s responsibility is not limited to acts  
19 of real estate sales – it encompasses compliance with all state and federal laws.  
20 Third, the broker of record’s responsibility extends to persons outside the  
21 corporation, i.e., persons with whom the corporation interacts or affects by virtue of  
22 its business activities.

23 Under the California Code of Regulations §2731(a) [10 CCR 2731 (2008)],  
24 “[a] licensee shall not use a fictitious name in the conduct of any activity for which a  
25 license is required under the Real Estate Law unless the licensee is the holder of a  
26 license bearing the fictitious name.” Neither Hollymax nor Commbroker held any  
27 real estate license bearing the fictitious name “All Cities Realty.” As the broker of  
28 record, Rife was responsible for these violations.

1 Under §2725 of the Regulations [10 CCR 2725 (2008)], a broker must  
2 “oversee, inspect and manage . . . (e) Advertising of any service for which a license  
3 is required.” As the broker of record, Rife was responsible for Hollymax’s and  
4 Commbroker’s advertising (in whatever form it took, including maintenance of  
5 websites) under the name “All Cities Realty.”

6 In its October 20, 2009 ruling, this Court decided that in order to state a claim  
7 against the brokers of record (Rife and Eleniak), Plaintiff must allege that they  
8 exercised “joint ownership or control over the mark with Hollymax and  
9 Commbroker.” (See pp. 15-16 of the ruling, emphasis added.) Despite the Court’s  
10 ruling, Defendants regurgitate the same arguments again, almost word for word.

11 However, Plaintiff heeded the Court’s ruling and amended the pleading to  
12 contain the allegations that the Court ruled were necessary to state a claim. For  
13 example, in the Second Amended Complaint, Plaintiff alleges:

14 “[W]ith the knowledge and participation, and under the authority of  
15 Kelli Todd, and the responsible managing parties and brokers of  
16 record of both Hollymax, Commbroker (Dale Eleniak and Byron  
17 Rife), created hundreds of websites using the name “All Cities  
18 Realty” and thousands of sub-pages on these websites using the “All  
19 Cities Realty” trade name. This had the effect of diluting All Cities  
20 Realty’s® trade name and web presence. As alleged below, in or  
21 about 2005, both Hollymax and Commbroker joined in those  
22 marketing efforts, promoting their businesses on the internet (and  
23 other media as well) under the name “Re/Max All Cities Realty” or  
24 simply just as “All Cities Realty”. [¶20]

25 Plaintiff further alleges that it was the joint decision of the management teams of  
26 Hollymax, Commbroker and CF, including Todd, Rife and Eleniak, to use Plaintiff’s  
27 mark in commerce. [¶¶22, 24, 26] In ¶29, Plaintiff alleges:

28 “Additionally, the Defendant agents used Plaintiff’s “All Cities

1 Realty” name in the conduct of real estate activity that required a  
2 California real estate license, including, but not limited to advertising  
3 (via the websites, Internet, and print media as alleged herein) as  
4 agents of others to engage in the purchase, sale and rental of real  
5 estate representing others, and the solicitation of business for that  
6 purpose. The Defendant agents acted under the management,  
7 direction and control of Defendants Kelli Todd, Dale Eleniak, and  
8 Byron Rife. Only with active brokers licenses, using either  
9 Eleniak or Rife as the brokers of record, did the Defendant  
10 Corporations and agents have the authority and ability to bind  
11 real estate license related contractual obligations such as listing  
12 real estate for sale acting as an agent of the seller, or acting as an  
13 agent in a real estate transaction, as the agent for the buyer, as a  
14 state licensed real estate agent of Re/Max All Cities Realty, through  
15 Hollymax and/or Commbroker as the corporate entities.” (Emphasis  
16 added.)

17 In ¶31, Plaintiff alleges:

18 “Knowing that All Cities Realty, Inc. was protected by its  
19 Federal Trademark, Kelli Todd, Dale Eleniak, and Byron Rife  
20 knowingly and willfully permitted and actively encouraged Hollymax,  
21 Commbroker and all named agents to make use of the All Cities  
22 Realty® registered Federal Trademark causing significant damage to  
23 All Cities Realty, Inc. Each of these three individuals had the ability  
24 to prevent these damages by stopping or preventing the use of the  
25 name and registered mark, but made the willful decision to continue  
26 with the infringing activity.”

27 Without belaboring the point, Defendant Rife is personally responsible for the  
28 trademark infringement activities of Hollymax and Commbroker because Rife acted

1 as their broker of record during the relevant period of time and was actively involved  
2 in the supervision and decision making. Simply said, Mr. Rife (who did have the  
3 power to yank the licenses of the company at any time) had two choices – 1.) to  
4 continue doing business using the registered federal trademark with the full  
5 knowledge that it was trademarked and registered to Plaintiff or 2.) to quit using the  
6 mark and change the name being used. He chose to use the Plaintiff's mark.

7 Lastly, Defendants make the same standing argument they previously made  
8 and which the Court implicitly rejected in its ruling. Without repeating the full  
9 contents of prior pleadings, suffice it to say that under Holley v. Crank, 400 F.3d  
10 667 (9<sup>th</sup> Cir. 2004), and the other authority cited above, Rife is directly liable to the  
11 owner of the trademark (Plaintiff), and Plaintiff may sue him directly for those  
12 violations because they occurred during Defendants' conduct of the sale of real  
13 estate.

14 **VII THE COMPLAINT PROPERLY ALLEGES TRADEMARK**  
15 **INFRINGEMENT AGAINST THE AGENT DEFENDANTS**

16 The "agent" Defendants argue that their use of the Hollymax and  
17 Commbroker websites do not constitute commercial use as a matter of law and thus  
18 no infringement claim is stated. Defendants also argue that the allegations of the  
19 agents' marketing their business under Plaintiff's mark is too conclusory to be  
20 "plausible." Defendants then argue that under Rule 8 standards, Plaintiff is required  
21 to allege with particularity exactly which agents did what in their individual  
22 capacity. In support of these arguments, Defendants cite no case law (except a  
23 generic case stating that there is a commercial use requirement).

24 In order for Defendants' arguments to succeed, this Court would have to  
25 disregard lengthy and specific allegations that the agents marketed their businesses  
26 for commercial purposes using Plaintiff's trademark. The factual allegations are set  
27 forth above, but for context they are summarized here as well.

28 The Defendant agents used the website and maintained it, performing the

1 following activities under Plaintiff's Re/Max All Cities Realty and All Cities  
2 Realty® names: (1) placing new real estate listings on the website, (2) uploading  
3 photos for these real estate listings, (3) describing and entering the data that would  
4 display on the Internet regarding the real estate listings, (4) controlling the listings  
5 making listings active or inactive, and (5) personally updating bios, contact  
6 information, email addresses and personal photos. [¶¶23, 25, 26-28, 32] The  
7 Defendant agents also used the website, print media, signs, business cards,  
8 contractual documents to third parties, and in other situations unknown to the  
9 Plaintiff at this time to market their business under Plaintiff's name. [¶¶23, 25, 26-  
10 28, 32]

11 These allegations contain specific facts about what the agents did and how  
12 they marketed "**their business**" under Plaintiff's name. This alone is sufficient to  
13 establish a claim under Rule 8. However, the Complaint contains more detail.

14 Additionally, the Defendant agents used Plaintiff's "All Cities Realty" name  
15 in the conduct of real estate activity that required a California real estate license,  
16 including, but not limited to advertising (via the websites, internet, and print media  
17 as alleged herein) as agents of others to engage in the purchase, sale and rental of  
18 real estate representing others, and the solicitation of business for that purpose. [¶29]

19 Each real estate agent who worked with Hollymax and Commbroker  
20 conducted business using the "All Cities Realty" name. Hollymax and Commbroker  
21 also conducted business using the "All Cities Realty" name with no Re/Max  
22 housemark. Many (if not all) of the Defendant agents and brokers who worked with  
23 Re/Max All Cities Realty were informed and notified of the Trademark Lawsuit and  
24 then made the conscious decision to continue to use the Trademark All Cities  
25 Realty® in violation of Plaintiff's rights. [¶42]

26 Each of Defendant's webpages intentionally prominently displayed the name  
27 "All Cities Realty" and the name "Re/Max All Cities Realty" which was in violation  
28 of Plaintiff's All Cities Realty® service mark. Defendants have performed real

1 estate services in violation of Plaintiff's trademark rights and California real estate  
2 law by engaging in the advertising, purchase and sale of real estate, acting as, or  
3 soliciting to be agents representing others in the offering, representation, and the  
4 solicitation to the general public for the purchase, rental, and sale of real estate.

5 [¶¶43-48]

6 These allegations, if proven, are sufficient to establish intentional use by the  
7 Defendant agents of Plaintiff's mark for commercial use.

8 The motion to dismiss should be denied.

9 **VIII THE REQUEST FOR A STAY SHOULD BE DENIED**

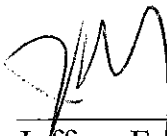
10 Without a declaration or any evidence at all, moving parties again request that  
11 this action be stayed. As the Court may recall, this action was previously stayed by  
12 Judge Carney, and then he partially lifted the stay for purposes of discovery. Then,  
13 through Defendants' tactics, no discovery occurred. This case was then reassigned  
14 to Judge Stotler who later lifted the stay for purposes of pleading motions, but did  
15 not allow the parties to conduct discovery. Now Defendants request a stay again  
16 without any authority or reason. Without a legal or factual basis for this request,  
17 Plaintiff cannot address it and the request should be denied.

18 **IX CONCLUSION**

19 Based upon the foregoing, the motion should be denied in its entirety. If any  
20 portion of the motion is granted, leave to amend should be given.

21  
22 Dated: November 25, 2009

LAW OFFICES OF JEFFREY F. SAX

23  
24  
25 By:   
26 Jeffrey F. Sax, Attorneys for Plaintiff  
27 All Cities Realty, Inc.  
28

**PROOF OF SERVICE**

1 STATE OF CALIFORNIA )  
2 ) ss.  
3 COUNTY OF LOS ANGELES )

4 I am employed in the County of Los Angeles, State of California. I am over  
5 the age of eighteen (18) years and not a party to the within action; my business  
6 address is: 333 S. Hope Street, 36<sup>th</sup> Floor, Los Angeles, CA 90071.

7 On February \_\_\_, 2008, I served the following described as: on the interested  
8 parties in this action by placing a true copy thereof enclosed in a sealed envelope  
9 addressed as follows:

10  (MAIL) I am readily familiar with the firm's practice of collection and  
11 processing correspondence by overnight mailing. Under that practice it would  
12 be deposited with U.S. postal service on that same day with postage fully  
13 prepaid at Los Angeles, California in the ordinary course of business. I am  
14 aware that on motion of the party served, service is presumed invalid if postal  
15 cancellation date or postage meter date is more than one day after date of  
deposit for mailing in affidavit.

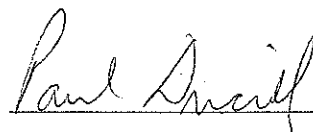
16  (BY TELECOPY) I caused such document to be delivered by telescope  
17 transmission to the offices of the addressee.

18  (BY PERSONAL DELIVERY) I caused such envelope to be delivered by  
19 hand to the offices of the addressee.

20  (STATE) I declare under penalty of perjury under the laws of the State of  
21 California that the above is true and correct.

22  (FEDERAL) I declare that I am employed in the offices of a member of this  
23 Court at whose direction the service was made.

24 Executed on February 25, 2008, at Los Angeles, California.

25  
26   
27  
28