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**FROM:** ALLEN P. PEGG, ESQ.

**DATE:** June 16, 2008

**FILE NUMBER:** 02084-000

**RE:** IBEX v. Berman Mortgage et al.

Number of Pages including this cover page 7  
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IN THE CIRCUIT COURT OF THE 11<sup>TH</sup>  
JUDICIAL CIRCUIT IN AND FOR MIAMI-  
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE No. 07-43672 CA (09)

STATE OF FLORIDA, OFFICE  
OF FINANCIAL REGULATION,

Plaintiff,

vs.

BERMAN MORTGAGE CORPORATION,  
a Florida corporation *et al.*,

Defendants.

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**NON-PARTY IBEX CHEOAH I, LLC'S  
MOTION FOR RELIEF FROM STAY OF LITIGATION**

Non-Party IBEX Cheoah I, LLC ("IBEX"), by and through undersigned counsel and pursuant to this Court's December 11, 2007, Temporary Injunction and Agreed Order Appointing Receiver (the "Injunction Order"), hereby moves the Court for the entry of an Order lifting the stay of litigation with respect to the prior-commenced lawsuit styled IBEX Cheoah I, LLC v. Berman Mortgage Corporation et al., Case No. 07-17149 CA (22) (the "Lender Liability Case"). Because good cause exists for the requested relief, because the lift of the stay would benefit the Receivership estate, and because equity will otherwise be served by granting the relief requested herein, this Motion should be granted, in further support of which IBEX states as follows:

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I. IBEX Files and Prosecutes the Lender Liability Case

1. IBEX originally filed the Lender Liability Case in June 2007. The case generally involves the breach by the Defendants named therein of their contractual agreement to lend IBEX \$4,000,000.00 to purchase and develop a tract of land in North Carolina (the "Project"). The Defendants lent IBEX half of that amount and then defaulted on their agreement by failing to provide any additional funding, as they were contractually obligated to do. A true and correct copy of the Amended Complaint in the Lender Liability Case is attached hereto as Exhibit "A."

2. The Defendants in the Lender Liability Case include Berman Mortgage Corporation ("BMC"), Dana J. Berman, and some sixty-six other individuals and corporate entities (collectively, the "Lender Liability Defendants"). The litigation against these other sixty-six Lender Liability Defendants would not be subject to the Injunction Order's stay of litigation but for the fact that BMC and Dana Berman were also named as Defendants in the Lender Liability Case.

3. From the time of filing the Lender Liability Case until the entry of the Injunction Order, IBEX undertook a variety of document and other discovery in order to prosecute that litigation. This discovery included propounding various requests for production, responding to interrogatories from BMC, taking two records-custodian depositions, and subpoenaing materials from various other non-parties.

4. Throughout this time period, and because of the lack of funding, the Project could not move forward, meaning among other things that the funds that

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IBEX had invested in the project remained (and indeed, remain) unproductive.

II. A Receiver Is Appointed and the Injunction Order Is Entered, Staying All Litigation Involving the Berman Entities

5. On or about December 14, 2007, counsel for the Lender Liability Defendants filed a "Notice of Receivership" in the Lender Liability Case, advising that "[p]ursuant to an Injunction issued by Judge Thomas Wilson, Jr. [in the instant lawsuit], all pending litigation against parties to the receivership [including EMC and Dana Berman, both of whom are Lender Liability Defendants] is stayed as a matter of law." A true and correct copy of the Notice of Receivership is attached hereto as Exhibit "B." One of the stated objectives of the Injunction Order is to protect receivership property in imminent danger of being "further dissipated." Injunction Order ¶ 2.

6. Notwithstanding that there are at least sixty-six Lender Liability Defendants that are not the subject of the Injunction Order (i.e., they are not Berman-related individuals or entities), since the entry of the Injunction Order, IBEX has not been able to undertake any further activity in the Lender Liability Case. IBEX has been unable to prosecute its allegations that the Lender Liability Defendants defaulted on their contractual obligation to fund the second half of the loan they had agreed to make to IBEX, and IBEX has been unable to move forward with the project for which the funds were sought. In short, IBEX is stymied in its ability at this time to establish the Lender Liability Defendants' breaches and to prove up its damages resulting from those breaches simply because BMC and Dana Berman are two of the sixty-eight defendants named in the Lender Liability Case.

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III. The Stay of the Lender Liability Case  
Is Harming the Receivership Assets

7. The stalemate created by the stay of litigation is not benefiting the Receivership. Quite to the contrary, the stay of litigation is actually harming the Receivership Assets insofar as the stay is prejudicing IBEX's ability to mitigate the damages it incurred upon the Lender Liability Defendants' breach of their funding obligation. Particularly given the current real estate and credit market conditions, no lender has been willing to take a secondary position or refinance the partially funded senior loan of \$4,000,000.00.<sup>1</sup> As a result, the potential liability against the Receivership Assets is steadily increasing.

8. One example of the magnitude of this potentially increasing liability is the looming expiration of an erosion permit that may greatly increase the cost of developing the land that is subject to the Lender Liability Defendants' mortgage. Additionally, the stalled Project is subject to the whims of local government, which could change building density and land usage, or even impose a building moratorium that could render the land useless for its current intended purpose.<sup>2</sup> In brief, continued enforcement of the litigation stay to prevent IBEX's prosecution of the Lender Liability Case creates an ever-increasing risk to the Receivership Assets, thus violating the Injunction Order's stated purpose to protect receivership property in imminent danger of being "further dissipated." Injunction Order ¶ 2.

<sup>1</sup> While only \$2,000,000.00 of the \$4,000,000 loan commitment was funded by the Lender Liability Defendants, the lien on the property is for the full \$4,000,000.00.

<sup>2</sup> In addition to the risks associated with changes in zoning and usage, IBEX has carrying costs, such as insurance and taxes, and a multitude of various other development and start-up costs that would have to be incurred anew.

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IV. The Injunction Order Contemplates a Lift of the Stay of Litigation in Circumstances Such as Those at Bar

9. The Injunction Order anticipates this scenario by providing that "[t]he Receiver may abandon Receivership assets to duly secured or lien creditors, if after due investigation and notice to parties in interest, he determines that either the Receivership Defendants have no equity in such asset(s) or such asset(s) are burdensome to the estate or are of inconsequential value and harmful to the Receivership estate." Injunction Order ¶ 20. To this end, the Injunction Order vests the Receiver with the power to "[ ] defend, compromise or adjust such actions or proceedings in state or federal courts now pending . . . as may in his discretion be advisable or proper for the protection of the Receivership Assets or proceeds thereof." Injunction Order ¶ 21.

10. Lifting the stay of litigation and allowing the Lender's Liability Case to go forward is consistent with the Injunction Order's stated purpose of preventing "further dissipation" of receivership property. Injunction Order ¶ 2. Moreover, there is no reason to believe that the Receiver's task will be hampered by allowing the Lender Liability Case to proceed. Indeed, the Receiver has been actively engaged in a number of other litigation matters throughout the life of the receivership. Moreover, resolution of the Lender Liability case, regardless of the outcome, will add certainty to the value of the receivership property. Accordingly, this Court should exercise its discretion to modify the Injunction Order to allow the Lender Liability Case to move forward.

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**CONCLUSION**

For all of the foregoing reasons, IBEX respectfully requests that the Court grant this Motion and enter an Order lifting the stay of litigation with respect to the Lender Liability Case.

Respectfully submitted,

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By: 

Allen P. Pegg  
Florida Bar No. 597821  
Javier A. Reyes  
Florida Bar No. 688487

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing Motion for Relief from Stay was served via facsimile (w/o Exhibits) and U.S. Mail (w/ Exhibits) this 16th day of June, 2008, on James Gassenheimer, Esq., Counsel for Receiver, Berger Singerman, 200 South Biscayne Boulevard, Suite 1000, Miami, FL 33131, Fax: (305) 714-4340; and Cristina Saenz, Esq., Assistant General Counsel, State of Florida Department of Financial Regulation, 401 NW 2nd Avenue, Suite N-708, Miami, FL 33128, Fax: (305) 810-1100.

