IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI –DADE COUNTY, FLORIDA

CASE NO.: 07-43672 CA 09

STATE OF FLORIDA, OFFICE OF FINANCIAL REGULATION,

Plaintiff,

vs.

BERMAN MORTGAGE CORPORATION, a Florida corporation, M.A.M.C. INCORPORATED, a Florida corporation, DANA J. BERMAN, as Owner and Managing Member,

Defendants,

and,

DB ATLANTA, LLC, a Florida limited liability company, et al.,

Relief Defendants.
_____/

RECEIVER'S MOTION TO ESTABLISH PROCEDURES TO ISSUE AND SELL RECEIVER'S CERTIFICATES TO RAISE FUNDS NECESSARY TO PRESERVE ASSETS OF OCEANSIDE ACQUISITIONS, LLC OR IN THE ALTERNATIVE TO SURCHARGE LENDERS, OR IN THE ALTERNATIVE TO ABANDON ASSETS

Receiver, Michael Goldberg, by and through undersigned counsel, moves this Court for an Order *Establishing Procedures by which the Receiver is authorized to sell Receiver's Certificates to Raise Funds Necessary to Preserve Assets of Oceanside Acquisitions, LLC, or in the Alternative to Surcharge Lenders, or in the Alternative to Abandon Assets*, and as grounds therefore states:

The Receiver Is Appointed

1. On December 11, 2007, this Court appointed Michael Goldberg (the "Receiver") to be the Receiver for the Defendants and the Relief Defendants. See Temporary Injunction and Agreed Order Appointing Receiver ("Receivership Order"), previously filed with the Court.

2. Among the Relief Defendants is Oceanside Acquisitions, LLC.

3. In the Receivership Order, Judge Wilson specifically states that all receivership assets, which includes the assets belonging to the relief defendants, are subject to the exclusive jurisdiction of Judge Wilson in the Circuit Court of the Eleventh Judicial Circuit, and such assets shall be under the exclusive control of the Receiver:

> The Court hereby takes exclusive jurisdiction and possession of the assets of the Defendants, Berman Mortgage, M.A.M.C., and Relief Defendants [including Oceanside Acquisitions, LLC], the "Receivership Assets", which includes, but are not limited to: files, records, documents, leases, mortgages, investments, contracts, effects, lands, agreements, judgments, bank accounts, books of accounts, rents, goods, chattels, rights, credit claims, both asserted and unasserted, pending court actions and appeals, files and documents in the possession of attorneys and accountants of all of the Defendants and Relief Defendants, all other property, business offices, computers, servers, electronic data storage units, offsite storage locations, safety deposit boxes, monies, securities, choses in action, and properties, real and person, tangible and intangible, of whatever kind and description, wherever situation of the Defendants ... and Relief Defendants. The Receiver shall retain custody and control of all of the foregoing pursuant to the terms of this Agreed Order.

Receivership Order, ¶ 3 (emphasis added).

4. The Receiver Order also authorizes the Receiver to investigate the manner in which the affairs of the Receivership Defendants, including Oceanside Acquisitions, LLC, were conducted to defend actions against the estate's assets and to institute actions on behalf of the Receivership Defendants as deemed necessary by the Receiver to collect funds or assets wrongfully misappropriated from the Receivership Defendants:

> The Receiver is hereby authorized and specifically has standing to institute, defend, compromise or adjust such actions or proceedings in state or federal courts now pending and hereafter instituted, as may in his discretion by advisable or proper for the protection of the Receivership Assets or proceeds thereof, and to institute, prosecute, compromise or adjust such actions or proceedings in state or federal courts as may in his judgment be necessary or proper for the collection, preservation and maintenance of the Receivership Assets and/or on behalf of the Receivership Defendants.

Receivership Order, ¶ 21 (emphasis added).

The Receiver Exercises his Authority Over Oceanside Acquisitions, LLC, and Fulfills his Obligations, But Remains Unpaid

5. The aforementioned authority was granted to the Receiver so that he could properly protect the receivership assets, which was necessary because the evidence tended to show that there was an "imminent danger that the property of the Defendants and Relief Defendants may be further dissipated and/or commingled if a Temporary Injunction and the appointment of a receiver" was not issued. Receivership Order, ¶2. The Receiver was entrusted with the duty to "prevent immediate and irreparable injury to the investors who have entrusted over $192,000,000 to the ... Relief Defendants," Receivership Order, ¶4, and otherwise "prevent further waste and dissipation of the assets of the ... Relief Defendants, to the detriment of its investors." Receivership Order, ¶7.

6. Among the Relief Defendants is Oceanside Acquisitions, LLC ("Oceanside"). Oceanside is an entity formed by Dana Berman and Keith Novak, which purchased condominium units some of which were sold prior to the Receivership, a total of 17 units remain unsold (the "Units") at Gulf Island Resort in Pasco County, Florida. To complete its purchase of the Units, Oceanside borrowed $1,655,000 from approximately 42 individuals (the "Lenders").

7. Oceanside is essentially broke and does not have sufficient funds to pay the property taxes, association dues and insurance on the Units. Accordingly, tax certificates have

been issued on the Units which become due in April 2009. If not paid, the Units will be lost and the Lenders will recover nothing. The Association has initiated foreclosure litigation for the unpaid assessments and dues which will result in a judgment and sale of the property with no return to the unit owners. Moreover, Oceanside has been involved in long, drawn-out litigation with the previous contracts purchasers and owners of the Units, which litigation has affected title to the Units and has made it impossible to sell units.

a. *Robert H. Abajian and Deborah R. Abajian v. Oceanside Acquisitions, LLC*, Case No. 51-07-CA-2370-WS;

b. *Cyril Latona v. Oceanside Acquisitions, LLC*, Case No. 51-2007-CA3925-WS;

c. *James R. Patterson and Eileen M. Patterson v. Oceanside Acquisitions, LLC*, 51-2007-CA-3925-WS;

d. *Cunningham and Elias v. Oceanside Acquisitions, LLC*, Case No. 51-2007-CA-4792-WS;

e. *Tina Hinton v. Oceanside Acquisitions, LLC*, Case No. 51-2007-CA-4238-WS; and

f. *Bistricer et al., v. Coastal Real estate Assoc., Berman Mortgage Corp., Dana Berman, Oceanside Acquisitions, LLC*, Case No. 51-2007CA-942-ES. (collectively, the "Pasco County matters") impossible for Oceanside to sell the Units and pay off the Lenders.

8. At this point in time and based on current market conditions, it is doubtful that Oceanside has any equity in the Units over and above what is owed to the Lenders. Accordingly, the prosecution of the aforementioned litigation, the payment of the property taxes and the payment of insurance are for the Lenders' sole benefit.

9. Notwithstanding that it is in their best interest to pay the foregoing expenses to preserve their collateral, many Lenders have preferred to take a "wait and see" attitude with respect to their decision whether or not to forward the funds necessary to the Receiver to

preserve the Units – including the attorney fees and costs of litigation and the aforementioned taxes and association dues. Accordingly, the Receiver has been unable to timely pay these necessary expenses.

10. The Receiver understands and is sympathetic that many Lenders are financially strapped and unable to forward the requisite funds. The Receiver also understands how some Lenders do not wish to forward funds when every other Lender is not contributing his or her fair share. Unfortunately, despite this understanding, the Receiver needs to pay the bills necessary to preserve the Units for the very benefit of the Lenders who are not forwarding the funds necessary to do so.

11. The Receiver realizes that the Lenders are comprised of numerous individuals that believe they were somehow defrauded by MAMC and is extremely sympathetic to their plight. That being said, the Receiver believes that these Lenders need to take some ownership responsibility for preserving their collateral and cannot simply wait and see if the title issues are resolved favorably or if the market comes back. Just because Lenders may have been a victim of fraud does not excuse them from this responsibility. If a financial institution were in this same position, the institution would necessarily have to pay its professionals, taxes, dues and insurance---or lose its collateral.

12. The Receiver can no longer continue administering Oceanside without paying his professionals, receivership fees, taxes, dues and insurance.

Previous Attempts To Generate Capital To
Pay the Receiver and his Retained Personnel and Professionals Have Failed

13. The Receiver has previously sought through application to this Court authority to raise funds to cover expenses. This Court has, through two separate Orders, authorized the

Receiver to raise funds from the Investor Group. On a third and most recent occasion, the Court authorized the following:

1. The Receiver to collect and deposit into an operating account 2% of the principal amount of the recover from the monetization of each account.

2. The funds held in this special designated operating account shall be used a the Receiver's discretion to repay the monies advanced to the Receiver and to Alan Goldberg, by certain investors, to cover operating expenses and thereafter used to repay any future advances made by the investors on operating expenses and otherwise used for operating expenses.

3. The Receiver is authorized to continue to raise funds from the investor group to cover short falls for operating expenses, and is authorized to repay these future advances from the funds recovered from the 2% principal collected pursuant to this Order.

4. At the conclusion of the Receivership, excess funds collected and held in the operating budget account, shall be held in escrow and distributed in accordance with Order of this Court.

5. The Receiver shall separately escrow the 2% principal and shall not use or distribute these funds without further Order of this Court on the Atlantic Beach and V-Strategic pending the filing by investor, Jack Attias, as to a specific objection thereto and/or further motion of the Receiver seeking a final determination on the obligation of these specific loan projects to participate in the operating expenses.

14. However, these measures have proven insufficient to generate enough capital to cover expenses, including payments for the Receiver and the Receiver's retained personnel and professionals. Moreover, the Receiver believes that it is inequitable to require successful projects to pay specific expenses of other projects as the lender group from project to project varies in composition.

15. As such, the Receiver finds it necessary for the Court to allow the Receiver to act as follows (listed in order of preference):

a. Issue and Sell Receiver certificates allowing the Receiver' expenses to take priority over pre-existing liens, or in the alternative,

b. Surcharge the members of the Investor Group; or in the alternative,

c. Abandon the projects.

This Court Should Issue Receivership Certificates

16. The Receiver believes the Court should allow him to issue receiver's certificates in connection with Oceanside in order to pay the costs of preserving the collateral. The Receiver believes this is the fairest course of action as it will affect each Lender equally while at the same time giving all Lenders the opportunity to realize the ultimate benefit of preserving the Units.

17. Florida law provides that "[t]he court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and his or her counsel from the assets of the corporation or proceeds from the sale of the assets." Florida Statutes, §607.1432.

18. Further, the Florida Supreme Court has concluded that receivership expenses **take priority over pre-existing liens**:

> The appointment of a receiver to protect and preserve property pending litigation does not ipso facto affect the status of liens existing upon the property; but, where a receiver is lawfully appointed at the instance and for the benefit of lien creditors, all proper charges, expenses, and liabilities incurred as incident to duly conferred receivership powers and duties may be a charge upon the earnings and corpus of the property **superior to the lien creditors** who take part in or expressly or impliedly consent to or acquiesce in the receivership proceedings.
>
> The ordinary duties of a receiver of a private corporation are to protect and preserve the property pending the litigation, and all expenses duly authorized and properly incurred by the receiver in the discharge of such duties, including a reasonable compensation for his services, may constitute a first charge upon the income of the property, if any, or, if none, upon the corpus of the property **even postponing prior lienholders**.

Knickerbocker Trust Co. v. Green Bay Phosphate Co., 62 Fla. 519, 56 So. 699, 699 (Fla. 1911) (emphasis added).

19. Courts of many states have recognized that where a Court Appointed Receiver requires funds to preserve the existence of Receivership property, the appointing Court is authorized to issue and sell Receiver's Certificates which shall have priority over all other liens. Only in the case of certificates issued for purposes other than preservation of the Receivership property will the certificates be subordinate to existing liens. Florida Courts have recognized and authorized a Receiver to issue and sell Receiver's Certificates. *Beach Resort Hotel v. Wider*, 79 So.2d 659 (Fla. 1955). Although Florida Courts have not addressed the priority of a Receiver's certificate issued to raise money to pay the expenses incurred by the Receiver in preserving the assets of the estate, Florida Courts have recognized the priority of Receivership expenses. Using this same principal other courts have held where a Receiver's certificate is issued to pay taxes, which are a first lien on the property, the Receiver certificate becomes a substitute lien priming all other liens. *Union Trust Company of New York v. Illinois Midland Railing Company*, 117 US 434 (1886); *Jeffers vs. New Jersey and Pennsylvania Railroad Company,* 86 N.E.EQ. 68 (Ch. 1916); Flecher cyclopedia of the law of corporations Chapter 64, Section 7885 (Power to Issue – Consent of Creditors – Receivership).

20. Thus it is recognized that in the case of a private corporation run by a Receiver, the appointing court is authorized to issue Receiver's certificates so the Receiver can continue the operation of the business without the consent of prior lienholders, provided such operation is necessary to preserve the existence of the Receivership property. In other words, there are only two exceptions under which a Receiver may be authorized to issue certificates entitled to priority over existing liens in the case of a private corporation: (1) where all the lienholders consent; and

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(2) where the purpose is not merely to operate the business, but to preserve the property. We can find no Florida Court that has addressed the issue of the priority of a Receiver's certificate were issued for the purposes of preserving assets of the estate. In *Lehman v. Trust Company of America*, 57 FLA 473 (Fla. 1909) is the only Florida Court to have ruled on the issue of priority of Receiver's certificates. However, the issue addressed was the priority of expenses to operate the business. Courts that have addressed the issue of the priority of a Receiver's certificate were issued to preserve assets, overwhelmingly find that this is a first priority lien where the Courts are raising funds for paying expenses that would otherwise be a first priority lien within the case. *Montgomery Corp. v. Allais,* 3 SW 2d 180. *Hooper v. Central Trust Company,* 32 A. 505; *Bailey v. Bailey,* 247 NW 160; *Sibley County Bank of Henderson v. Crescent Milling Company,* 201 NW 618; *Rhode Island Hospital Trust Company v. S.H. Greene & Sons Corp.*, 146 A. 765; *Old Royd v. McCrea,* 235 P. 580; *Karn v. Rover Iron Company,* 11 SE 431. Thus, as Florida recognizes the priority of expenses incurred by the Receiver to preserve the assets it should likewise recognize the priority of a Receiver's certificate issued to raise funds to preserve the assets of the estate.

21. Moreover, the members of the Investor Group, i.e., lienholders, have expressly, let alone impliedly, acquiesced in the receivership proceedings as more fully explained below. As such, this Court should issue an order granting this Motion authorizing the sale of Receiver Certificates as a priority over existing lienholders.

The Receiver Should Surcharge Members of the Investor Group Pursuant to the Agreement Between M.A.M.C. Incorporated and Members of the Investor Group

22. If this Court refuses to issue Receivership Certificates – and it should not in light of the aforementioned precedent – in the alternative, the Receiver should be entitled to surcharge members of the Investor Group. In fact, the Lender Group has already agreed to such surcharge

in the Loan Origination and Loan Servicing Agreement entered by MAMC Incorporated (which is exclusively controlled by the Receiver and is an asset of the Receivership pursuant to the Receivership Order), and the members of the Investor Group:

> Lender(s) shall reimburse M.A.M.C. for M.A.M.C.'s reasonable out-of pocket expenses so incurred, including all reasonable attorneys' fees and costs in connection with any such foreclosure, acquisition or in connection with any other out-of-pocket expenses incurred by M.A.M.C. pursuant to M.A.M.C.'s responsibilities under this Section ....

Loan Origination Agreement, attached hereto as Exhibit "A."

23. As per the terms of the Loan Origination Agreement between the members of the Investor Group and MAMC Incorporated, this Court should authorize the Receiver to surcharge members of the Investor Group so that he and his retained personnel and professional can receiver payment for the work that they obligated to do pursuant to the Receivership Order.

24. Receiver anticipates that some Lenders may not fund surcharge demands in which case the Receiver seeks authority in this order, at his discretion, to sell the interests of the Lenders who fail to timely fund a surcharge demand.

The Receiver Should be Authorized to Abandon Oceanside Acquisitions, LLC, to the Extent Necessary

25. Assuming this Court refuses to issue the Receiver Certificates, and (in contradiction to the terms of the Loan Origination Agreement entered by the very parties that this Motion effects) refuses to allow the Receiver to surcharge members of the Investor Group, or the secured lenders refuse to be surcharged, the Receiver seeks to Abandon Oceanside Acquisitions, LLC's. In certain instances, the Receiver will (and in fact has) had to manage projects that have no value and no equity beyond secured claims, leaving the Receiver to dedicate resources that could be dedicated to expenses to valueless projects. In such instances, this Court should give the Receiver the authority to abandon such projects from the Receivership proceedings. In fact

this Court has previously allowed the Receiver to abandon valueless projects such as DB Durham, LLC, and DB Simpsonville, LLC.

WHEREFORE, the Receiver moves this Court for an Order authorizing the aforementioned relief, and for such other relief as the Court deems just and appropriate to complete the intended purpose of the motion.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail/Facsimile/Hand-Delivery and/or U.S. Mail on this **22nd day of October 2008**, to: **Cristina Saenz, Assistant General Counsel,** STATE OF FLORIDA, OFFICE OF FINANCIAL REGULATION, 401 N.W. 2nd Avenue, Suite N-708, Miami, Florida 33128; to **Alan M. Sandler, Esquire,** *Counsel for Defendants, Joel and Deborah Sokol, Darlene Levasser, Robert Dzimidas IRA, Lawrence Meyer IRA, Lawrence Meyer Roth IRA and Mary Joe Meyer SD IRA and Mary Joe Meyer Roth IRA*, of SANDLER & SANDLER, 117 Aragon Avenue, Coral Gables, Florida 33134; to **Allan A. Joseph, Esquire,** *Counsel for The Amadi Companies and Amedia Family Investors*, DAVID AND JOSEPH, P.L., 1001 Brickell Bay Drive, Suite 2002, Miami, Florida 33131; to **Richard R. Robles, Esquire,** LAW OFFICES OF RICHARD ROBLES, P.A., *Counsel for the Four Ambassadors Association, Inc.*, 905 Brickell Bay Drive, Tower II, Mezzanine, Suite 228, Miami, Florida 33131; to **Daniel Kaplan, Esquire**, *Counsel for Deborah A. Berman*, at the LAW

OFFICES OF DANIEL KAPLAN, P.A., Turnberry Plaza, Suite 600, 2875 N.E. 191st Street, Aventura, Florida 33180; to **Howard N. Kahn, Esquire**, *Attorneys for Intervenor, Ira Sukoff*, KAHN, CHENKIN & RESNIK, P.L., 1815 Griffin Road, Suite 207, Dania, Florida 33304; to **Charles Pickett, Esquire and Linda Dickhaus Agnant, Esquire,** *Attorneys for Johns Manville*, CASEY CIKLIN LUBITZ MARTENS & O'CONNELL, P.A., 515 North Flagler Drive, Suite 1900, West Palm Beach, Florida 33401; to **Helen Schwartz Romañez, Esquire**, *Attorneys for Turnberry Bank & Bank of Coral Gables*, The Romañez Law Firm, 255 Alhambra Circle, Suite 850, Coral Gables, Florida 33134; to **Charles W. Throckmorton, Esquire**, *Attorneys for Dana Berman*, KOZYAK TROPIN THROCKMORTON, P.A., 2525 Ponce de Leon Boulevard, 9th Floor, Coral Gables, Florida 33134; to **James S. Telepman, Esquire**, *Attorneys for Jericho All-Weather Opportunity Fund, LP*, COHEN, NORRIS, SCHERER, WEINBERGER & WOLMER, 712 U.S. Highway One, Suite 400, North Palm Beach, Florida 33408-7146; to **J. Andrew Baldwin, Esquire**, *Attorneys for Regions Bank*, THE SOLOMON LAW GROUP, P.A., 1881 West Kennedy Boulevard, Tampa, Florida 33606-1606; to **Rey Hicks and Javier Castillo** of COMPLETE PROPERTY MANAGEMENT, at Post Office Box 402507, Miami Beach, Florida 33140; to **Daren Schwartz,** BERMAN MORTGAGE CORPORATION D/B/A M.A.M.C., INC., at 402 Continental Plaza, 3250 Mary Street, Coconut Grove, Florida 33133; to **Norman S. Segall, Esquire**, *Attorneys for Skilled Services of Tampa Bay, LLC*, RUDEN MCCLOSKY SMITH SCHUSTER & RUSSELL, P.A., 701 Brickell Avenue, Suite 1900, Miami, Florida 33131; to **Norman Malinski, Esquire**, *Counsel for Giles Construction*, 2875 NE 191st Street, Suite 508, Aventura, Florida 33180; **Gabrielle D'Alemberte, Esquire**, LAW OFFICES OF ROBERT PARKS, 2121 Ponce de Leon Boulevard, Suite 505, Coral Gables, Florida 33134; to **Robert B. Miller, Esquire**, *Attorneys for Atlantic Lending, LLC*, TABAS, FREEDMAN, SOLOFF & MILLER, P.A., The Ingraham Building 25 SE 2nd Avenue, Suite 919, Miami, Florida 33131-1538; to **Richard P. Cole, Esquire, Edward S. Polk, Esquire and/or Crystal Leah Arocha, Esquire**, *Attorneys for Meland Russin Hellinger & Budwick, P.A.* COLE SCOTT & KISSANE, P.A., Pacific National Bank Building, 1390 Brickell Avenue, Third Floor, Miami, Florida 33131; to **David A. Wheeler, Esquire,** *Counsel for Various Unit Owners at Le Chateau Condominiums at DB Biloxi II, LLC* WHEELER & WHEELER, PLLC, 185 Main Street, Biloxi, Mississippi 39530; **Michael A. Hanzman, Esquire**, HANZMAN GILBERT, LLP, 2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, Florida 33134; to **Dean C. Colson, Esquire**, COLSON HICKS EIDSON, 255 Aragon Avenue, Second Floor, Coral Gables, Florida

33134; and to **Jason S. Miller, Esquire**, *Counsel for Flagstar Bank,* ADORNO & YOSS, LLP, 2525 Ponce de Leon Boulevard, Suite 400, Coral Gables, Florida 33134.

Respectfully submitted,

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By: _____
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cc: The Honorable Thomas Wilson, Jr. *(via Hand-Delivery)*
Michael Goldberg, Esq., as Receiver *(via e-mail)*
The Investor(s)/Lender(s) Group *(via e-mail)*

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