

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

STATE OF FLORIDA, OFFICE OF FINANCIAL
REGULATION,

CASE NO.: 07-43672 CA 09

Plaintiff,

v.

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

Defendant.

and,

DB ATLANTA, LLC, a Florida Limited Liability
Company, et al.,

Relief Defendants.

THE ORIGINAL
FILED ON:
APR 27 2009
IN THE OFFICE OF
CIRCUIT COURT DADE CO. FL

**PLEASE READ THIS MOTION CAREFULLY AS IT
MAY AFFECT YOUR RIGHTS. PLEASE CONSULT
YOUR ATTORNEY IF YOU HAVE ANY QUESTIONS.**

**THIS COURT WILL HOLD A HEARING AT THE
MIAMI-DADE COURTHOUSE ON TUESDAY, JUNE 23,
2009 AT 2:15 P.M. TO CONSIDER THIS MOTION AND
THE RELIEF REQUESTED HEREIN. IF YOU HAVE
ANY OBJECTION TO THE APPROVAL OF THE
MOTION AND RELIEF REQUESTED, YOU MUST
ATTEND THE HEARING, OTHERWISE YOU WILL BE
BOUND BY THE TERMS OF THE BAR ORDER.**

BERGER SINGERMAN
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**RECEIVER'S MOTION TO TREAT ALL INVESTORS IN
DB BILOXI, LLC PARI PASSU**

Michael I. Goldberg, as State Court Appointed Receiver over Defendants Dana J. Berman, Berman Mortgage Corporation, M.A.M.C. Incorporated, et al., and Relief Defendants DB Atlanta, LLC, et al., by and through undersigned counsel, hereby files this Motion to Treat All Investors in DB Biloxi, LLC *Pari Passu*, and states:

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 this Court.

2. DB Biloxi, LLC (DB Biloxi), one of the Relief Defendants, is a Florida limited liability company formed by Dana Berman which was funded by loans from a third party bank and loans from certain lender groups. The capital structure for DB Biloxi includes a first mortgage in favor of TransCapital Bank and junior mortgages in favor of the lender groups. The junior mortgages were serviced by Defendant M.A.M.C., Incorporated.

3. In April 2005, DB Biloxi purchased an 11-acre parcel located at 2660 Beach Boulevard on the Gulf Coast in Biloxi, Mississippi (the "Property"). The improvements on the Property included a 140-unit apartment complex, known as Edgewater Garden Apartments (the "Units"), which DB Biloxi was converting to condominiums. However, the Units suffered substantial damage from Hurricane Katrina and were subsequently demolished. DB Biloxi currently owes approximately \$2.5 Million to TransCapital Bank, the first mortgage-holder and loans totaling approximately \$10,465,000 to approximately 234 individuals (collectively, the "Lenders") in relation to the Edgewater Gardens Apartments Property.

4. To acquire the Property, DB Biloxi obtained a \$ 7 Million first mortgage from Ambit Funding ("Ambit") and a second mortgage from one set of M.A.M.C. Lenders in the

amount of \$ 3.5 Million. Upon information and belief, DB Biloxi misrepresented to the Lenders that their mortgage would be a first mortgage on the property.

5. Pursuant to a "splitter" agreement, the Property was divided into a 2.9-acre "Front Parcel" and an 8-acre "Back Parcel."

6. When the Ambit mortgage matured, DB Biloxi substituted a \$ 3.5 Million mortgage from TransCapital Bank on the Front Parcel and a \$3.5 Million mortgage from a *second* set of MAMC Lenders on the Back Parcel by assuming the first mortgage and creating a splitter agreement. The previous \$3.5 Million mortgage from the first Lender set remained on the entire Property in second position.

7. The \$ 3.5 Million TransCapital mortgage encumbers the Front Parcel in first position while the \$ 3.5 Million mortgage from the second Lender set was placed in first position on the "Back Parcel."

8. Upon information and belief, without the Lender's approval, the \$ 3.5 Million second mortgage held by the first set of Lenders encumbering the entire property (see paragraphs 4 and 6) remained subordinated to both the TransCapital mortgage on the Front Parcel and to the second Lender set's mortgage on the Back Parcel.

9. Subsequently, a future advance from a *third* set of M.A.M.C. Lenders of \$1.5 Million brought the first position mortgage on the Back Parcel from \$3.5 Million to \$ 5 Million

10. Further, a new second mortgage from a *fourth* set of M.A.M.C. Lenders for \$1.5 Million was placed on the Front Parcel also priming the first Lender set's \$ 3.5 Million dollar mortgage without their consent. Finally, a future advance from a *fifth* set of M.A.M.C. Lenders for \$ 465 Thousand was added to the new second mortgage also priming the first Lenders and also without their consent. Thus, the Front Parcel's second position mortgage from the two

groups of Lenders totals \$ 1.965 Million, comprised of a \$ 1.5 Million mortgage and a \$465,000.00 future advance.

11. The table below summarizes the debt structure for the Property.

<u>Position</u>	<u>Front Parcel</u>	<u>Back Parcel</u>
1st	TransCapital - \$3.5 Million	<i>Second Lender Set</i> \$ 3.5 Million <i>Future Advance from Third Lender Set</i> \$ 1.5 Million Total \$ 5 Million
2nd	<i>Fourth Lender Set</i> \$ 1.5 Million <i>Future Advance Fifth Lender Set</i> of \$ 465,000.00 Total 1.965 Million	<i>First Lender Set</i> \$ 3.5 Million
3rd	<i>First Lender Set</i> \$ 3.5 Million	N/A

12. Pursuant to the Receivership Order, all of assets of the Defendants and Relief Defendants are subject to the receivership. In fact, in the Receivership Order, Judge Wilson specifically states that all receivership assets, including the assets belonging to DB Biloxi, LLC, 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 DB Biloxi 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).

13. By virtue of unauthorized subordination of the first set of Lenders' \$5 Million mortgage on the Property to mortgages held by the second, third, fourth and fifth sets of Lenders, as well as the misrepresentation to the first set of Lenders that they would hold a first mortgage on the Property, there is a conflict among the set of Lenders in the DB Biloxi project.

14. The Receiver is attempting to market the Property in the best interest of the Lenders, which group the Receivership was designed to protect. The Receiver seeks to prevent conflicts relating to the members of the Lender group claiming lien priority as to their competing loans. Instead, the Receiver seeks to have the members of the Lender group share *pari passu* in the proceeds from the sale, liquidation, or the like, of DB Biloxi LLC and its assets.

15. A dispute among the Lenders will serve to delay the case, extend the time to complete the litigation and may more significantly impair the Lenders and further reduce their recovery than if a consensus is reached to share the recovery with all Lenders in proportion to their investment.

16. The Receiver had established a Loan Committee made up of Lenders in DB Biloxi project that includes Lenders from all lender sets. The Committee has unanimously voted to seek court approval to treat all Lenders equally in the recovery. The granting of this motion will allow the sale of the Property and repayment of the Lenders to proceed in an orderly manner.

17. Upon information and belief, DB Biloxi continued to generate loans to new sets of Lenders to pay interest to earlier sets of lenders in the nature of a Ponzi scheme. The Receiver

believes that collapsing the interests of the various sets of Lenders and treating the Lenders in *pari passu* fashion is consistent with the Receivership Order and equitable under the circumstances.

WHEREFORE, the Receiver moves this Court for entry of an Order Granting its Motion to Treat All Investors in DB Biloxi, LLC *Pari Passu*, and any other relief deemed necessary by this Court.

Respectfully submitted,

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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 and U.S. Mail on this 27th day of April 2009, 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 **Charles W. Throckmorton, Esquire, Attorneys for Dana Berman**, KOZYAK TROPIN THROCKMORTON, P.A., 2525 Ponce de Leon

Boulevard, 9th Floor, Coral Gables, Florida 33134; and to **Valerie Tompkins, Esquire**, Counsel for Doris Tompkins, Investor/Lender in DB Biloxi II, LLC; for Paula Tompkins, as Investor/Lender in DB Biloxi I, LLC; and for Valerie Tompkins, as Investor/Lender in DB Biloxi, LLC, DB Biloxi II, LLC and DB Biloxi III, LLC, Redlands Ranch, LLC and DB Simpsonville, LLC, LAW OFFICES OF VALERIE TOMPKINS, 12865 West Dixie Highway, Second Floor, North Miami, Florida 33161.

Respectfully submitted,

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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*)
Posted to the Berman Mortgage Website

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