

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR 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, **DB DURHAM, LLC**, a Florida Limited
Liability Company, **NORMANDY HOLDINGS II,
LLC**, a Florida Limited Liability Company,
NORMANDY HOLDINGS III, LLC, a Florida
Limited Liability Company, **ACQUISITIONS, LLC**,
a Florida Limited Liability Company, **DBKN GULF
INCORPORATED**, a Florida Limited Liability
Company, **OCEANSIDE ACQUISITIONS, LLC**, a
Florida Limited Liability Company, **DB BILOXI,
LLC**, a Florida Limited Liability Company, **DB
BILOXI II, LLC**, a Florida Limited Liability
Company, **DB BILOXI III, LLC**, a Florida Limited
Liability Company, **DBDS VERO BEACH, LLC**, a
Florida Limited Liability Company, **DB TAMPA,
LLC**, a Florida Limited Liability Company, **DB
SIMPSONVILLE, LLC**, a Florida Limited Liability
Company, **DBDS NORTH MIAMI, LLC**, a Florida
Limited Liability Company, **REDLANDS RANCH
HOLDINGS, LLC**, a Florida Limited Liability
Company, **DBDS BISCAYNE PARK, LLC**, a
Florida Limited Liability Company, **DB CARROLL
STREET, LLC**, a Florida Limited
Liability Company,

Relief Defendants.

THE ORIGINAL
FILED ON:
MAR 09 2010
IN THE OFFICE OF
CIRCUIT COURT DADE CO., FL

**RECEIVER'S MOTION FOR AN ORDER APPROVING THE PROPOSED PRIORITY
OF DISTRIBUTION AND PROCEDURES FOR THE DISBURSEMENT OF FUNDS
RECOVERED BY THE RECEIVER IN AN ACCOUNTING PROFESSIONAL
LIABILITY CLAIM**

Michael I. Goldberg, as State Court Appointed Receiver over Defendants Berman Mortgage Corporation, M.A.M.C. Incorporated, et al., and Relief Defendants DB Atlanta LLC, et al., (the "Receiver"), hereby files this Motion for An Order Approving the Proposed Priority and Procedures for the Disbursement of Funds Recovered by the Receiver in litigation being prosecuted against one of the former accounting firms of the Defendants that was recently settled ("The Recovery") and states:

Introduction

1. On December 11, 2007, this Court appointed by Order, Michael Goldberg to be the Receiver (the "Receivership Order") for the Defendants and the Relief Defendants to prevent the waste and dissipation of assets of the Receivership Defendants to the detriment of investors who entrusted over \$192,000,000.00 to the Defendants and the Relief Defendants.

2. The Court's Receivership Order vested the Receiver with the usual powers and duties of equity receivers and authorized the Receiver to take possession and control over the Defendants and Receivership assets for the marshalling, maintenance, and preservation of the Receivership assets for the benefit of the investors who the Receivership was designed to protect. Receivership Order, ¶ 13.

3. The Court's Receivership order authorizes the Receiver "to receive and collect any and all sums of money due and owing to the Receivership Defendants" and "to make such ordinary and necessary payments, distributions and disbursements as he deems advisable or

proper for the marshalling, maintenance or preservation of the Receivership Assets.” Receivership Order, ¶¶ 17, 20.

4. Pursuant to the Receivership Order, the Receiver has sole and exclusive authority to sell and/or wind down the Receivership Defendants’ businesses and assets. The Receiver must establish the validity and priority of all claims against the Relief Defendants and funds recovered as result of the Receiver’s efforts. The Receiver has previously sought disbursement of Receivership funds on a project by project basis, seeking approval of payment of administrative and legal expenses as appropriate from time to time.

5. The Receiver makes the instant motion pursuant to paragraph 28 of the Receivership Order which, among other authority, authorizes the Receiver to apply to this Court for any such additional Orders that are necessary and appropriate to carry out the mandate of the Receivership Court.

6. The Receiver seeks an Order from the Court establishing the priority and procedure for the distribution of funds recovered by the Receiver in relation to litigation being prosecuted against the former accounting firms of the Defendants.

Proposed Procedures

The Receiver requests an order authorizing the Receiver to distribute, from The Recovery in the following order of priority, to be denominated the “waterfall” of the Receivership Estate, for the reasons set forth more fully in this motion.

(Tier 1) Payment of all accrued and outstanding invoices of the Receiver and his retained professionals including accountants and lawyers. The Receiver and his counsel Berger Singerman, P.A. have been financing the legal and representation work in this case as there have not been sufficient funds to pay the invoices for professional services as incurred. The invoices

have been submitted to the executive committee of lenders on a monthly basis and no objection has been received from the Committee. The Receiver will post to the Receiver's web page a listing of amounts paid for the services subject to a right of any investor to file a written objection with this court within ten (10) days of the posting of the filing. The Receiver will also pay loans made by lenders to the Receiver to assist in trying to save projects from the claims of senior lien holders and where the efforts were unsuccessful and there are no assets to repay these loans.

(Tier 2) Repayment of loans made by the lenders to cover M.A.M.C. Incorporated's operating expenses pre-receivership which loans were solicited by the Chief Restructuring Officer of M.A.M.C. and payment of pre-receivership attorneys' fees and costs¹ incurred by Berman Mortgage Corporation and M.A.M.C. Incorporated in representing the interests of the companies and the lenders which were in the nature of loans to the company. The loans made by lenders and the legal work provided allowed the company to marshal assets and aided the subsequent receivership.

(Tier 3) Payment of inadvertently misdirected funds due to certain lenders in January 2007 due to accounting mismanagement and relating to the Exclusive Vacations loan.

(Tier 4) Payment of the 2% withheld from each project sold by the Receiver and used to fund overhead.

(Tier 5) Payment of 50% of the money that was misdirected by the company from loans on insider projects known as the "DB" projects to other "DB" entities rather than investing them

¹The Source of funds for the payment of pre-receivership fees shall include funds on deposit in James D. Gassenheimer P.A.'s trust account in the amount of \$50,000, funds on deposit with respect to the Desert Inn Project in the amount of \$27,000 and \$50,000 from the Recovery. A total of \$90,000 of pre-receivership fees are being written off by Berger Singerman PA and James D Gassenheimer P.A.

in each intended project – these transfers have been previously referred to as unauthorized intercompany loans.

Tier 1: Administrative expenses

The Receiver seeks to pay the outstanding invoices of the Receiver and his professionals and to repay certain loans made to the Receiver on projects where the asset was lost to senior lien holders. As a general rule of receivership law, a receiver is entitled to reasonable compensation for his services and payment of the authorized, proper, and necessary expenses incurred by the receiver in marshalling and preserving receivership property from the income or corpus of the receivership property, as a first charge. *Orr v. Dade Developers, Inc.*, 138 Fla. 122, 190 So. 20 (Fla. 1939); *Knickerbocker Trust Co. v. Green Bay Phosphate Co.*, 62 Fla. 519, 56 So. 699 (Fla. 1911); *City of Kissimmee v. Dep't of Environmental Regulation*, 753 So. 2d 770 (Fla. 5th DCA 2000). Pursuant to this Court's Receivership Order, the Receiver is authorized to:

employ, without further order of the Court, such employees, accountant, and attorneys, consultants, investigators, and other professionals (“Outside Professionals”) as is necessary and proper for the collection, preservation, maintenance and operation of the Receivership Assets, including the entities of which the Receiver is a shareholder, to furnish legal, accounting and other advise to the Receiver for such purposes as may be reasonable and necessary during the period of the receivership.

Receivership Order, ¶ 19. Additionally, pursuant to the Loan Origination and Servicing Agreement (“LOSA”) signed by each investor, M.A.M.C. Incorporated is authorized to retain professionals and expend reasonable professionals’ fees and costs to prosecute actions to recover on defaulted loans and to realize on collateral pledged as security for the loans. In paragraph 10(k) of the LOSA, the investors agreed to reimburse the reasonable expenses, including all attorneys’ fees and costs in connection with M.A.M.C.

Tier 2: Payment of Pre-Receivership Attorneys' Fees and Costs and Funds Advanced by Certain Lenders Pre-Receivership.

As part of Tier 2 of the waterfall, the Receiver seeks to repay monies advanced or loaned by certain lenders to M.A.M.C. Incorporated to fund its operations and to pay pre-receivership professional services invoices. Prior to the Receivership, M.A.M.C. Lenders asked Dana Berman to step aside as the Chief Executive Officer of his companies and to agree to the appointment of a Chief Restructuring Officer (CRO) to operate the companies. Alan Goldberg was hired in this capacity on March 12, 2007. Prior to the Receivership, on or about August 2007, Alan Goldberg wrote to all Lenders stating that M.A.M.C. Incorporated had no available funds to pay bills and continue operations.² Consequently, Mr. Goldberg asked the Lenders to advance funds that would be repaid by a withholding of one percent on all future principal distributions as loans were monetized. As of the date of this motion, approximately \$362,213.00 of funds advanced by the Lenders remain unpaid. The Receiver seeks to reimburse the Lenders for these advanced funds to cover expenses as a priority after payment of the Receivership's administrative expenses and professionals' fees and costs, subject to this fund continuing to be paid down from monies recovered through the sale of the remaining assets which are subject to a surcharge for this purpose.

As part of Tier 2 of the waterfall, the Receiver also seeks to pay attorneys' fees and costs incurred by Berman Mortgage Corporation and M.A.M.C. Incorporated in representing the interests of the companies and the Lenders in the marshalling and preservation of assets and in the discharge of the general duties of the companies, which duties the Receiver has undertaken

² The Receiver has also borrowed funds from the Lenders, which funds have been or are being repaid in full.

after the institution of the Receivership. Pursuant to the LOSA signed by each investor, M.A.M.C. Incorporated was authorized to retain professionals and expend reasonable professionals' fees and costs to prosecute actions to recover on defaulted loans and to realize on collateral pledged as security for the loans. In paragraph 10(k) of the LOSA, each investor agreed to reimburse M.A.M.C. Incorporated's reasonable expenses, including all attorneys' fees and costs in connection with M.A.M.C. Incorporated's responsibilities to prosecute actions to recover on defaulted loans.

To these ends, Alan Goldberg hired Berger Singerman, P.A. to act as general counsel to advise on legal issues related to the attempted restructuring of Dana Berman's companies and hired James D. Gassenheimer, P.A. d/b/a The Gassenheimer Law Firm to handle certain litigation matters to recover on defaulted loans and to foreclose on certain mortgages held by M.A.M.C. Lenders. As the MAMC companies did not have sufficient funds to pay legal fees as they were incurred, it was agreed that to the extent that the firm's extended credit, the firm's would receive a priority in repayment from recovered funds and these terms were included in the retainer agreements. However, on the date of the issuance of the Receivership Order and incorporated stay, certain funds had already been provided to The Gassenheimer Law Firm as retainers.

Berger Singerman, P.A. is owed \$80,782.76. Berger Singerman had agreed to accept \$30,000 and write off the balance of the pre-receivership fees provided the Motion is granted and the \$30,000 payment is received.

As set forth in the affidavit of James D. Gassenheimer previously filed with this Court at the institution of the Receivership in January of 2008, M.A.M.C. Incorporated owed the

Gassenheimer law firm in excess of \$200,000, which has been paid down³ to \$168,528.56⁴, incurred in pre-Receivership litigation with regard to assets that eventually became part of the Receivership. Also disclosed in this affidavit was the information regarding the amounts on deposit in the Firm's Trust Account. This affidavit was filed as part of the motion to approve the retention of counsel which received no opposition. Therefore, the Receiver seeks to pay The Gassenheimer Law, first by payment from funds in this firm's trust account, second through the use of project specific funds on account with MAMC related to the Desert Inn project and third from The Recovery is the amount of \$20,000.

James D. Gassenheimer, P.A. holds approximately \$55,00.00⁵ in its trust account paid by M.A.M.C. Incorporated as a retainer in connection with the pre-Receivership litigation matters. James D. Gassenheimer, P.A. claims an equitable retaining lien on these funds. *See Boroff v. Bic Corp.*, 718 So. 2d 348, 349-50 (Fla. 2d DCA 1998) (attorney's retaining lien attaches to all funds, including advanced funds, in trust account for fees and costs owed by the client even if incurred in separate actions and only one action yields trust funds); *Wintter v. Fabber*, 618 So. 2d 375, 375 (Fla. 4th DCA 1993) (an attorney is entitled to a retaining lien on all property of the client coming into the attorney's possession as security for payment of fees, which lien a court may not disregard and order return of the client's property). The Receiver seeks this Court's authorization to apply the trust account funds to the bills of the Gassenheimer law firm owed by M.A.M.C. Incorporated.

³ As certain assets have been sold, accrued attorney's fees and costs related to the project have been paid pursuant to court order.

⁴ All of the outstanding invoices have been provided to the executive committee of lenders for review.

⁵ \$5000 relates to a project specific retainer regarding the Melendez case and shall remain in trust.

In addition, M.A.M.C. Incorporated holds approximately \$27,000.00 in an account regarding the previous mortgage on the Bayview Apartments property also known as "Desert Inn." The Funds represent original loan proceeds not disbursed to the borrower and escrowed for an appraisal that was never ordered. James D. Gassenheimer, P.A. seeks an order allowing these funds to be applied to the amounts owed by M.A.M.C. Incorporated to the Gassenheimer Law firm as the efforts of the P.A. in the foreclosure action brought the asset into the Receivership estate. James D. Gassenheimer P.A. has agreed to accept a payment of \$20,000 from Tier Two and to write off \$40,000 of pre-receivership fees provided the Motion is granted and the Payment is received.⁶

Tier 3: Payments to Resolve January Interest Reserve Accounting Issues

On or about February 20, 2007, the Chief Financial Officer of M.A.M.C., Inc produced the check run to pay lenders for principal payments received by M.A.M.C. from borrowers in January 2007 and interest due to the Lenders for the month of January 2007. It was subsequently learned that this check run inadvertently contained payments of interest for the month of January 2007 on both performing and nonperforming loans. Additionally, it was learned that M.A.M.C. maintained only one bank account where all principal and interest monies for all loans were comingled. It was subsequently determined that M.A.M.C. had inadequate control procedures to enable it to operate properly with only one bank account. Up to that time, M.A.M.C. had sufficient funds of its own in this single bank account to cover payments made on nonperforming loans. But the amount of excess cash had dwindled to zero by the end of January 2007. Consequently, when this check run was produced and signed and distribution commenced on

⁶ This motion does not resolve the fee claim of James D Gassenheimer P.A in regard of the Bella Vista Project which shall be handled from the sale to the Bella Vista Asset.

February 20, 2007, there were insufficient funds to cover it. On March 4, 2007, Gibraltar Bank was notified to close M.A.M.C.'s bank account as funds were not available to meet the checks being presented. Over the subsequent several months, an analysis was done through which it was determined that funds were inadvertently paid [to lenders as interest on numerous nonperforming loans] that should not have been paid as these funds were not remitted by the borrowers to M.A.M.C. These misdirected funds were, therefore, not paid to Lenders to whom it was due. As an example, M.A.M.C. received a \$ 1 million principal payment from Exclusive Vacations in early February, 2007, which amount was the full payoff of that loan. These funds would otherwise have been due and payable to the holders of that note and mortgage on March 20, 2007 when principal payments received during the month of February would normally have been distributed. As there was no segregation of funds, these funds were used to fund the nonperforming interest payments paid on the check run issued on February 20, 2007. In calculating the payments due to each lender, M.A.M.C. intends to recover payments made to that lender on non performing loans that should not have been made. The Receiver seeks to remedy this misdirection of funds in the disbursement of funds by making payments to the respective Lenders as Tier 3 payments.

Tier 4: Amount withheld from assets sold by the Receiver

During this case the Receiver has recovered assets and sold the assets. At the time of each sale the Receiver held back 2% of the sale proceeds to pay overhead. The Receiver plans to pay as Tier 4 the amounts previously withheld.

Tier 5: Repayment of Inter-Company Loans

In February 2007, it was learned that The Berman Group's Chief Financial Officer had loaned monies from one "DB" company to another to provide operating funds as needed. It was learned at that time that this had been an on-going practice among the DB entities for several years. Consequently, due to this accounting mismanagement, monies invested by lenders to be used for a specific project were redirected to other projects with the intention of repaying them when funds were available from the recipient projects. Therefore, this resulted in certain Lenders' investments being misdirected to other entities rather than investing them in the respective project as contemplated by the loan documents executed at the funding of the loans. A thorough analysis was performed by the Receiver, which investigation found that \$5,153,535.00 of net receivables are due to the Lenders as funds that were misdirected from the projects for which they were intended. The Receiver seeks to remedy the situation created by the inter-company loans by making payments to lenders in projects from which funds were loaned as part and return 50% of the misdirected funds.

Procedure for Waterfall

The procedure followed by the Receiver to determine a fair and equitable distribution of the Recovery was undertaken by a three member committee of the Executive Committee of lenders who made significant investment of time, along with the Receiver and his professional staff at MAMC to determine a fair and equitable distribution of the funds. The Three person subcommittee presented their recommendation to the executive board with nine (9) of the eleven (11) members attending. The Executive Committee of lenders voted 9-0 to approve the proposed and recommended distribution of funds.

Notice to All Parties and Request for Final Order

Pursuant to the procedure previously established by the Court, a copy of this Motion and Notice of Hearing thereon are being posted on the Receiver's website, which is available to all MAMC Lenders and potential creditors of the Receivership Estate. Notice of the posting is simultaneously emailed to all MAMC Lenders.

The Receiver seeks an Order authorizing the Receiver to distribute litigation recovery of the Receivership for claims against the Defendants' former accounting firm the manner and order prescribed herein without further order of the Court and barring all objections or challenges to the established waterfall and claims procedure subsequent to the hearing on this Motion.

WHEREFORE, the Receiver moves this Court for entry of an Order:

- a. finding that the posting and distribution procedures established by the Court and followed by the Receiver provide adequate notice of the instant Motion and of the hearing thereon to interested parties;
- b. authorizing the Receiver to distribute any settlement or litigation recovery of the Receivership against the Defendants' former accountant firm in the manner and order prescribed herein without further order of this court with the exact amounts of the distributions to be posted to the Receivership Web page and subject to objection within 10 days only to dispute the amounts of the distribution as erroneous;
- c. authorizing the Receiver to retain the balance of the recovery to pay future professional fees and operating expenses in accordance with the Receivership Order previously entered by this Court; and

- d. authorizing the Receiver to otherwise retain on deposit in an interest bearing account the remaining funds to be used to make loans to specific ongoing projects subject to approval of the Receiver, the Executive Committee of Lenders and this Court and to otherwise be distributed at the close of the case in accordance with a procedure to be recommended by the Executive Committee of Lenders and approved by this Court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this **9th day of March 2010**, to the attached Service List.

Respectfully submitted,

BERGER SINGERMAN, P.A.

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SERVICE LIST

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cc: The Honorable Gerald bagley. *(via U.S. Mail)*
 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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