

David AND Joseph P.L.
ATTORNEYS AT LAW

1001 Brickell Bay Drive, Suite 2002
Miami, Florida 33131

(786) 364-7990
(786)364-7995 Facsimile
ajoseph@davidjosephlaw.com

FACSIMILE COVER PAGE	
DATE:	June 2, 2010
TO:	Michael R. D'Lugo, Esq. Facsimile: (407) 649-8118
	James D. Gassenheimer, Esq. Facsimile: (305) 714-4340
	David Chalet, Esq. Facsimile: (954) 894-8015
OUR FILE	283.00
CLIENT/MATTER:	State of Florida, Office of Financial Regulation v. Berman Mortgage Corp. Miami-Dade Case No.: 07-43672 CA (09)
ATTORNEY:	Allan A. Joseph, Esq.
TOTAL PAGES:	5, including cover page
DOCUMENT SENT:	Motion for Court to Determine Whether Axis Surplus Insurance Company May Proceed with Declaratory Judgment Action
COMMENTS: Please see attached. Exhibits to follow with hardcopy via regular mail. Thank you.	

The information contained in this facsimile message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service. If you do not receive all the pages, please call us back as soon as possible. Tel: (786) 364-7990.

ORIGINAL DOCUMENT:	<input type="checkbox"/> WILL NOT BE SENT			
	<input checked="" type="checkbox"/> WILL BE SENT	<input checked="" type="checkbox"/> U.S. MAIL	<input type="checkbox"/> OVERNIGHT MAIL	

**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,

Florida Bar Number: 893137

v.

BERMAN MORTGAGE CORPORATION, *et al.*

Defendants.

**MOTION FOR COURT TO DETERMINE WHETHER AXIS SURPLUS INSURANCE
COMPANY MAY PROCEED WITH DECLARATORY JUDGMENT ACTION**

Jerilynn Gidney ("Gidney"), putative Class Representative (along with Michael Goldberg, as Receiver for the benefit of Lenders), hereby moves this Court to determine whether Axis Surplus Insurance Company may proceed with a Declaratory Judgment Action against, *among others*, the Receiver, and as grounds states follows:

1. In May 2008, this Court approved the retention of David and Joseph, P.L. as the Receiver's special litigation counsel to recover monies for claims which may be covered under certain errors and omissions policies. The Receiver was authorized to recover the monies on behalf of the individual Lenders who lost their investment due to the negligence of Dana Berman (and others, including Mitchell Morgan).
2. As this Court is aware, the damages suffered by the Lenders is approximately \$168 million.
3. The Receiver and Lenders looked to two insurance policies for relief. Each policy had a \$1 million policy limit.

State of Florida vs. Berman Mortgage Co.
Case No.: 07-43672 CA (09)

4. The Receiver was successful in recovering the policy limits on one of the two policies. Axis Surplus Insurance Co. ("Axis"), however, refused to tender any monies, despite having almost a year to investigate the claims.

5. Axis refused to tender any monies based on its theory that it had no notice of *any* of the alleged claims during the claims made policy period.

6. After almost a year, the Receiver, on behalf of the Lenders, and as joined by Jerilynn Gidney, had no choice but to withdraw their demand for policy limits, and they brought a class action negligence lawsuit against Messrs. Berman and Morgan.

7. As this Court is aware, the underlying order appointing the Receiver enjoined any action against the Receiver without first receiving this Court's permission. *See* ¶15(a) of the Order appointing the Receiver, a copy of which is attached hereto as Exhibit A.

8. Despite conceding that it had full knowledge of the Court's injunction, Axis filed and served a Complaint for Declaratory Judgment against the Receiver in federal court. *See* Exhibit B.

9. The Receiver moved to dismiss the federal court action based upon principles of abstention.

10. The federal court (through Judge Seitz) held a hearing on the motion, at which time the parties were requested to seek this Court's opinion on whether the federal court action should proceed.

11. This Court held a status conference on November 23, 2009, at which time the issue of abstention was discussed. *See* Transcript, attached hereto as Exhibit C. At the hearing, this Court held that it would recommend to Judge Seitz that the federal court action should be abated until such time as the State Court Class Action was completed. Transcript at pgs. 10-11.

State of Florida vs. Berman Mortgage Co.
Case No.: 07-43672 CA (09)

12. Based in this Court's recommendation that the federal court action be abated until the State Court Class Action was completed, Judge Seitz *dismissed* (as opposed to abated) the Federal Court action. *See* Exhibit D.

13. Notwithstanding this Court's clear and unambiguous preference that the Declaratory Judgment Action be abated until the completion of the State Court Class Action, Axis simply re-filed its Complaint in State Court. (Case No.: 10-11393 CA (10)). *See* Exhibit E.¹

14. Significantly, Axis did not first seek permission of this Court before filing its second Declaratory Action. To the contrary, Axis *again* deliberately refused to seek this Court's permission, particularly because this Court has already advised that it was its preference to allow the State Court to proceed first.²

15. The Receiver, as joined by Ms. Gidney, moved to dismiss Axis's second-filed Declaratory Judgment Action. At the hearing on the Motion (before the Honorable Judge Jon Gordon, sitting for Judge Margarita Esquiroz), Judge Gordon deferred ruling until such time as the Parties appeared before this Court to determine *whether* the Axis Declaratory Judgment action may proceed. *See* Exhibit F.

16. So as not to lose any further delay, movants (as opposed to Axis) respectfully request that this Court enter an order determining: (a) whether Axis's state court-filed Declaratory Judgment action is in violation of this Court's injunction prohibiting suits against the Receiver (and if the second-filed Axis suit is in violation, the appropriate remedy or sanction for such violation); (b) whether Axis's state court-filed Declaratory Judgment action should be dismissed, *inter alia*, for violating this Court's injunction; (c) whether Axis's state court-filed

¹ The Complaints are attached hereto without their respective exhibits to conserve paper.

² Equally shocking is the fact that Axis filed its second Action after Dana Berman sought the personal protection afforded by the United States Bankruptcy Court. Axis' lawsuit intentionally violates the automatic stay provisions.

State of Florida vs. Berman Mortgage Co.
Case No.: 07-43672 CA (09)

Declaratory Judgment action should be abated pending the determination of the State Court class action; *and/or* (d) whether Axis's state court-filed Declaratory Judgment action may proceed (and if so, which judicial division should said action proceed); *and/or* (e) whether this Court should impose any additional relief.

WHEREFORE, Gidney respectfully requests that this Court dismiss this action with prejudice, and award such further relief as this Court deems just and proper.

Respectfully submitted,

DAVID AND JOSEPH, P.L.
Attorneys for Gidney
1001 Brickell Bay Drive, Suite 2002
Miami, Florida 33131
Telephone: (786) 364-7990
Facsimile: (786) 364-7995
Email: ajoseph@davidjosephlaw.com

By: _____

ALLAN A. JOSEPH
Florida Bar Number: 893137

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular mail on this 2nd day of June, 2010 on: **Michael R. D'Lugo, Esq.**, Wicker Smith O'Hara McCoy Graham & Ford, counsel for Plaintiff, 390 N. Orange Avenue, Suite 109, Orlando, FL 32802; **James D. Gassenheimer, Esq.**, Berger Singerman, P.A., counsel for Goldberg and BMC; 200 South Biscayne Boulevard, Suite 1000, Miami, Florida 33131; and **David Chalet, Esq.**, Eisinger, Brown, Lewis, Frankel, Chalet & Krut, P.A., counsel for Morgan, Presidential Circle, 4000 Hollywood Boulevard, Suite 265-S, Hollywood, Florida 33021.

By: _____

ALLAN A. JOSEPH
Florida Bar Number: 893137