

**IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN  
AND FOR MIAMI-DADE COUNTY,  
FLORIDA**

**CASE NO. 07-43672 (CA 09)**

STATE OF FLORIDA, OFFICE OF FINANCIAL  
REGULATION,

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.

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**MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S MOTION SEEKING  
ENTRY OF AN ORDER: (I) REOPENING THE CASE; (II) AUTHORIZING THE  
DONATION OF UP TO \$77,967.61 IN REMAINING FUNDS WITHIN 6 MONTHS; (III)  
RECLOSING THE CASE, AND (IV) FURTHER DISCHARGING THE RECEIVER**

Michael I. Goldberg, the receiver (the "Receiver") for Defendants Berman Mortgage Corporation ("BMC"), M.A.M.C. Incorporated ("MAMC"), and Relief Defendants DB Atlanta, LLC, *et al.*, respectfully submits this memorandum of law in support of the *Receiver's Motion Seeking Entry of An Order: (I) Reopening the Case; (II) Authorizing the Donation of Up to \$77,967.61 in Remaining Funds Within 6 Months; (III) Reclosing the Case, and (IV) Further Discharging the Receiver Upon Reclosure of Case* ("Motion").

## I. Preliminary Statement and Factual Background

### A. Introduction

1. Pursuant to the terms of the Final Distribution Order (defined herein), the Receiver has made a pro rata Final Distribution<sup>1</sup> to all Lenders (defined herein) totaling \$2,214,695. Post administration of this Final Distribution, the receivership estate has remaining funds on hand totaling approximately \$104,075. The Receiver has consulted with the Executive Committee of Lenders as well as with Mr. Valencia, the receivership estate's Asset Manager, regarding the disposition of the remaining funds. Based upon such discussions, the parties have concluded that the time and expense associated with further distributing the remaining funds on hand—as originally contemplated in the Final Distribution Order—would likely meet and quite possibly exceed the value of any further pro rata distribution to the Lenders.

2. Through the Motion, the Receiver thus seeks to reopen this case so that he may obtain Court authority to donate an amount up to \$77,967.61<sup>2</sup> within 6 months of entry of an Order approving the Motion to a non-profit food bank serving the residents of Miami-Dade County. The Receiver seeks to hold the funds for the 6 months to ensure any residual administrative expenses – including, but not limited to federal, state and/or local taxes – could be paid. Once the Receiver has concluded this final winddown task, the Receiver is to be finally and completely discharged from his role and able to close the receivership without additional Order of the Court. Moreover, except as otherwise provided herein, the Receiver, his agents, employees, independent contractors, attorneys and representatives seek to be further: (a) discharged; (b) released from all claims and liabilities arising out of and/or pertaining to the

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<sup>1</sup> Capitalized terms not otherwise defined herein will take on the meaning ascribed to them in the Final Distribution Motion.

<sup>2</sup> The Receiver intends to donate all funds remaining from the Final Funds on hand *after* the Receiver has paid any final administrative fees and costs incurred, an amount estimated between \$30,000-\$40,000, which amount includes final federal and state taxes as well as legal and accounting fees.

Receiver's final actions taken in his role as the Receiver in the receivership, including, but not limited to making the donation; and (c) relieved of all duties and responsibilities pertaining to the receivership previously established in this action on a final basis.

**B. Case Background**

3. BMC was a licensed mortgage lender whose primary role was to broker hard money, high interest, high risk loans to various real estate ventures. MAMC was also a licensed mortgage lender whose primary role was to act as loan servicing agent for the loans. MAMC would raise capital to make the loans brokered by BMC. BMC and MAMC obtained at least \$192 million from more than 700 individual investors (the "Lenders"). The Lenders' monies were used to fund the acquisition and construction of commercial real estate projects, many of which were incomplete or in default.

4. On December 11, 2007, the Florida Office of Financial Regulation filed a complaint (the "Complaint") in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Case No. 07-43672 CA 09, styled *State of Florida, Office of Financial Regulation v. Berman Mortgage Corporation, et al.* seeking an injunction against BMC, MAMC, Mr. Berman and other related entities (the "Relief Defendants") and requesting the appointment of a receiver.

5. The Complaint alleged that BMC and MAMC sold unregistered securities in the form of fractionalized interests in mortgages, operated as an unregistered securities dealer, made misrepresentations to investors, and misapplied investors' monies in connection with the funding of approximately forty commercial mortgage loans.

**C. Appointment of the Receiver**

6. On December 11, 2007, the Court entered a *Temporary Injunction and Agreed Order Appointing Receiver* (“Receivership Order”) appointing Michael Goldberg as the receiver for BMC and MAMC and the Relief Defendants (collectively, the “Receivership Defendants”) to prevent the waste and dissipation of the Receivership Defendants’ assets to the detriment of the Lenders.

7. Pursuant to the Receivership Order, the Court took exclusive jurisdiction and possession of the assets of the Receivership Defendants.

8. The Receivership Order directed and authorized the Receiver to, among other things, take such action as he deems advisable or proper for the marshalling, maintenance or preservation of the receivership assets; conduct the business operations of the Receivership Defendants and any entity it controls; receive and collect all sums of money due and owing to the Receivership Defendants; to institute, defend, or compromise pending and hereafter instituted proceedings in state or federal courts and file actions against any persons or entities to recover property of the Receivership Defendants.

9. The Receivership Order further authorized the Receiver to apply to the Court for issuance of such other orders as may be necessary and appropriate to carry out the mandate of the Receivership Order.

**D. The Final Distribution Motion and the Closing of the Case**

10. As provided for and contemplated by the Receivership Order, the Receiver administered the assets of the receivership estate, resolved all of the legal disputes, disposed of the real properties and made multiple distributions from the monies recovered from the proceeds of litigation and sale of properties.

11. Accordingly, on August 20, 2020, the Receiver filed his *Motion for Authority to (I) Make a Final Distribution to Lenders on a Pro Rata Basis; (II) Distribute Unclaimed Funds on a Pro Rata Basis; (III) Destroy Records; and (IV) Close Case, and for the Entry of an Order Discharging the Receiver Upon Closure of Case* (the “Final Distribution Motion”).

12. In the Final Distribution Motion, the Receiver sought Court authority: (i) to make a pro rata Final Distribution from the \$2,358,899 in funds on hand to all Lenders; (ii) to provide the Lenders with a period of 90 days to redeem their Final Distribution, at which time any check issued but not yet deposited were to become null and void (the “Unclaimed Funds”); (iii) to redistribute any resulting Unclaimed Funds to the other Lenders on a pro rata basis; (iv) to destroy records and discharge the Receiver upon completion of all final administrative tasks; and (v) to close the case.

13. On August 20, 2020, the Court entered its *Unopposed Order Dismissing Case and Granting Receiver's Motion* (the “Final Distribution Order”).

## **II. Relief Requested**

14. The Receiver thus seeks, through the Motion, to reopen this case so that he may obtain Court authority to donate an amount up to \$77,967.61<sup>3</sup> to a non-profit food bank serving the residents of Miami-Dade County. The Receiver will donate the funds no later than 6 months post entry of an Order approving this Motion. The Receiver seeks to hold the funds for the 6 months to ensure any residual administrative expenses – including, but not limited to federal, state and/or local taxes – can be paid.

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<sup>3</sup> The Receiver intends to donate all funds remaining from the Final Funds on hand *after* the Receiver has paid any final administrative fees and costs incurred, an amount estimated between \$30,000-\$40,000, which amount includes final federal and state taxes as well as legal and accounting fees.

15. Once the Receiver has concluded this final winddown task, the Receiver seeks to be finally and completely discharged from his role and able to close the receivership without additional Order of the Court.

16. Moreover, except as provided herein, the Receiver, his agents, employees, independent contractors, attorneys and representatives seek to be further: (a) discharged; (b) released from all claims and liabilities arising out of and/or pertaining to the Receiver's final actions taken in his role as the Receiver in the receivership, including, but not limited to making the donation; and (c) relieved of all duties and responsibilities pertaining to the receivership previously established in this action on a final basis.

### **III. Legal Standard**

17. A receivership is equitable in nature, derived from the courts' inherent equity powers, and not dependent on statute. *Granada Lakes Villas Condominium Ass'n, Inc. v. Metro-Dade Investments Co.*, 125 So. 3d 756 (Fla. 2013). Under Florida law, a receiver is a custodian for the court through which the court controls the receivership estate. *In re Chira*, 343 B.R. 361 (Bankr. S.D. Fla. 2006), *aff'd*, 367 B.R. 888 (S.D. Fla. 2007). In executing the court's orders, a receiver acts as and for the court, which must supervise and independently approve the receiver's actions. *Lehman v. Trust Co. of America*, 57 Fla. 473, 49 So. 502 (1909).

18. A receiver's primary purpose is to preserve the value of the property of the receivership estate for those to whom it is ultimately determined that the property belongs so to accommodate all claims possible. 44 Fla. Jur 2d Receivers § 2. Funds in the receiver's possession are considered to be in the hands of the court, held for the benefit of all lawful claimants. *Sunland Mortg. Corp. v. Lewis*, 515 So. 2d 1337 (Fla. 5th DCA 1987). When property is placed under the court's control by the appointment of a receiver, the court ultimately

controls transfer of the property. *In re Mariner Enterprises of Panama City, Inc.*, 131 B.R. 190 (Bankr. N.D. Fla. 1989).

19. If a receiver determines that a particular asset has so little value as to make its administration unprofitable, the receiver may petition the court for an instruction to abandon the asset as worthless. 65 Am. Jur. 2d Receivers § 102 (*citing* Campbell v. Hargraves, 181 Ark. 492, 26 S.W.2d 876 (1930)). When property is thus abandoned, title reverts to the debtor unless otherwise provided. *Id.* Receivers have no authority to abandon property or otherwise dispose of it absent a court order. *Ferguson v. Cramer*, 349 Md. 760, 709 A.2d 1279 (1998).

20. It is not uncommon in receivership cases for *de minimis* assets to be abandoned or disposed of through donation by a receiver to a non-profit. *See SEC vs. Ash Naran et al.*, D.E. 222, No. 3:16-cv-1417-M (N.D. Tex. Feb. 24, 2020) (“All Receivership Assets remaining in the possession or control of the Receiver after payment of all administrative expenses and authorized distributions are hereby deemed abandoned. The Receiver is authorized to donate such of the abandoned assets as he can to a charity located in the Northern District of Texas and to destroy or dispose of the rest in his sole and absolute discretion.”).

21. Likewise, liquidating trusts in bankruptcy cases commonly receive nominal payments where distribution would either require a wasteful administrative expense, or violate a *de minimis* payment provision in a reorganization plan. Bankruptcy Courts have thus authorized the donation of such surplus assets to 501(c)(3) charities (as the Bankruptcy Code itself is silent on the issue). *See In re Elcom Hotel & Spa, LLC, et al.*, D.E. 457, No. 13-10029 (Bankr. S.D. Fla. Nov. 22, 2013) (“Unclaimed Property ...will be distributed to the Southern District of Florida Bankruptcy Bar Association, a not-for-profit, non-religious organization dedicated to, *inter alia*, promoting the pro bono legal representation of the indigent”).

#### IV. Argument

22. The Receiver has concluded the tasks of winding down the receivership estate, paying administrative costs and fees to date, and has made a Final Distribution on a pro rata basis totaling \$2,214,695 to the Lenders as authorized by the Final Distribution Order.<sup>4</sup>

23. As of filing of the Motion, the receivership estate has remaining funds on hand totaling approximately \$104,075.00 (the “Final Funds”). (Valencia Decl. ¶ 13). Of that amount \$51,783.34 constitutes Unclaimed Funds; the remaining \$52,291.66 represents funds reserved by the Receiver for administrative expenses. (Valencia Decl. ¶ 13).

24. The Receiver has fulfilled his obligation to preserve the value of the property of the receivership estate for those to whom it is ultimately determined that the property belongs—the Lenders—so to accommodate all claims possible.

25. The Receiver has consulted with the Executive Committee of Lenders as well as with Mr. Valencia, the Asset Manager. (Valencia Decl. ¶ 14). After much deliberation the Executive Committee of Lenders have reached the conclusion that the time and administrative expense associated with further distributing the Unclaimed Funds on a pro rata basis to the approximately 1000 Lenders, as originally contemplated in the Final Distribution Order, would quite likely meet and more than likely exceed the value of any such further distribution to the Lenders. (Valencia Decl. ¶ 14).

26. As administration of the Unclaimed Funds has been deemed unprofitable, the Receiver therefore seeks Court approval to abandon such funds by virtue of a donation of an

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<sup>4</sup> See Declaration of Antonio Javier Valencia, Asset Manager, attached to the Motion as Exhibit A.



amount up to and including \$77,967.61<sup>5</sup> to a non-profit food bank serving the residents of Miami-Dade County. The Receiver will donate the funds no later than 6 months post entry of an Order approving this Motion. The Receiver seeks to hold the funds for the 6 months to ensure any residual administrative expenses – including, but not limited to federal, state and/or local taxes – can be paid.

27. Court authority is required in order for the Receiver to make the donation, as the Receiver has no authority to abandon property or otherwise dispose of it absent a court order.

#### V. Notice

28. In order to provide sufficient notice to all of the Lenders, a copy of the Motion and supporting Memorandum of Law will be served by e-mail and will also be posted upon the receivership web-page. Furthermore, once the 6 months have elapsed and the Receiver has made the donation, the Receiver will serve notice by e-mail of the amount of the donation and the identity of the selected non-profit Food Bank. Such information will also be posted to the receivership web-page.

**WHEREFORE**, Michael I. Goldberg, in his capacity as Receiver of MAMC and related entities, respectfully requests this Court enter an Order (i) granting this Motion; (ii) reopening this case; (iii) authorizing the Receiver to donate an amount up to \$77,967.61 within 6 months of entry of the Order approving the Motion; (iv) reclosing the case; (v) further releasing and discharging the Receiver upon such reclosure of the case; and (vi) granting any such further relief as is just and proper.

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<sup>5</sup> The Receiver intends to donate all funds remaining from the Final Funds on hand *after* the Receiver has paid any final administrative fees and costs incurred, an amount estimated between \$30,000-\$40,000, which amount includes final federal and state taxes as well as legal and accounting fees.

Dated: October 15, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this October 15, 2021, a true and correct copy of the forgoing was furnished to the parties on the attached Service List by U.S. mail, to the Lenders by e-mail and a copy of this motion will be posted on the receivership web-page.

/s/ Catherine D. Kretzschmar