

IN THE CIRCUIT COURT FOR THE 11th
JUDICIAL CIRCUIT IN AND FOR
MIAMI DADE COUNTY, FLORIDA

STATE OF FLORIDA, OFFICE OF
FINANCIAL REGULATION,

Plaintiff,

CASE NO: 07-43672 CA 09

v.
BERMAN MORTGAGE
CORPORATION, a Florida corporation,
M.A.M.C. INCORPORATED, a Florida
corporation, and DANA J. BERMAN, as
Owners and Management Member,

Defendants.

and

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

Relief Defendants.

**MALLAH FURMAN'S OBJECTION TO THE RECEIVER'S MOTION FOR
APPROVAL OF SETTLEMENT AGREEMENT AND ENTRY OF BAR ORDER
CONDITIONALLY ENJOINING LENDERS FROM PROSECUTING CLAIMS
AGAINST DANA J. BERMAN**

Mallah Furman & Company, P.A. ("Mallah Furman") by and through its undersigned
counsel, files this Objection to the Receiver's Motion For Approval of Settlement Agreement
and Entry of Bar Order Conditionally Enjoining Lenders From Prosecuting Claims Against Dana
J. Berman ("Motion").

I. FACTUAL BACKGROUND

1. On or about December 11, 2007, the Florida Office of Financial Regulation filed
a complaint (the "Subject Complaint") seeking an injunction against BMC, MAMC, Dana J.
Berman (collectively the "Defendants") and other related entities (the "Relief Defendants") and

requesting appointment of a receiver. Specifically, the Florida Office of Financial Regulation sued the Berman Group for: Misrepresentation in a Mortgage Transaction (against MAMC); Failure to Maintain Net Worth (against MAMC); Servicing Audit Violation (against MAMC); Sale of Unregistered Securities In Violation of Section 517.07, Florida Statutes (against Berman Mortgage and MAMC); and Sale of Securities by an Unregistered Issuer or Dealer In Violation of Section 517.12, Florida Statutes, (against Berman Mortgage and MAMC), temporary and permanent injunction, and Appointment of a Receiver.

2. In the Subject Complaint, the Office of Financial Regulation specifically alleges 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 commercial mortgage loans. To that end, the Subject Complaint alleges that the Defendants, including Dana J. Berman ("Berman") violated the provisions of Chapter 494, Florida Statutes, the Florida Mortgage Brokerage and Mortgage Lending Act and of the registration provisions of Chapter 517, Florida Statutes, the Florida Securities and Investor Protection Act, in conjunction with the offer and sale of fractionalized interests in mortgage loans.

3. Further, the Subject Complaint alleges that through February 2007, Defendant Berman Mortgage brokered the funding of at least \$192 million, in mortgage loans, from approximately 700 private investors by offering fractional interests in short-term, hard-equity, acquisition and/or construction, mortgage loans. All loans funded by the private investors are commercial loans. (Subj. Compl. p.2 ¶¶ 2, 3). This money was used to fund the acquisition and construction of commercial real estate projects, many of which are incomplete or in default.

4. At all times material hereto, Berman was the president, chief executive officer of the entities comprising the Berman Group. Compl. ¶ 7.

5. By Order dated December 11, 2007 (the "Receivership Order"), Michael I. Goldberg was appointed as Receiver over the assets of BMC, MAMC, and the Relief Defendants (hereinafter, the "Receivership Defendants").

6. The Receiver is authorized to receive and collect all sums of money due and owing to the Receivership Defendants (Receivership Order at 20). Moreover, the Receiver has standing to institute, defend or compromise court proceedings as may in his judgment be necessary or proper for the collection, preservation and maintenance of Receivership assets and/or on behalf of the Receivership Defendants (Receivership Order at 21).

7. On or about February 24, 2009, Michael J. Goldberg, as Receiver for Berman Mortgage Company, et al. and David Eastis and Gail Korenblum, on behalf of themselves and all others similarly situated (collectively the "Plaintiffs") sued Mallah Furman who served as an independent auditor for MMAC in connection with audit functions in 2005 and 2006 (MF Compl. ¶ 15) for professional negligence, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and negligence (the "MF Complaint").

8. Although Mallah Furman has not filed a response to the Complaint to date, it vehemently denies the allegations in the MF Complaint. Notwithstanding, in light of the clear *in pari delicto* issues regarding Berman's fraudulent acts, Mallah Furman has the right to seek indemnification and contribution from Berman, as well as Berman Mortgage Corporation ("BMC") and M.A.M.C. Incorporated ("MAMC").

9. On February 19, 2009, the Receiver filed the Motion, seeking approval of a settlement with Berman. However, a significant part of this settlement entails the release of claims against Berman by non-parties to this case, such as Mallah Furman. For purposes of this Objection, the salient terms of the settlement are that the Receiver will receive \$65,000 from Berman, and, in exchange, a bar order will be entered in favor of Berman in regard to all matters

arising in connection with Berman's dealings with the Receivership Defendants, except as expressly limited by the terms of the release (the "Bar Order"). See proposed order attached to Motion as Exhibit C-3.

10. The Bar Order permanently bars and enjoins those parties identified on the attached Exhibits A and B, including Mallah Furman, from bringing any claims against Berman. See proposed order attached to Motion as Exhibit C-3.

11. Respectfully, the Court does not have the subject matter jurisdiction to force Mallah Furman, who is a non-party to this case, to release any claims it may have against Berman. Given the foregoing, despite the Receiver's best intentions to recover settlement proceeds, no matter how nominal, for the benefit of the BMC, MAMC and the Relief Defendants, the Court simply and plainly does not have the power to curtail the rights of Mallah Furman or other non-parties in the process.

12. Based on the facts and law more specifically set forth below, the Court should deny the Motion.

II. ARGUMENT

13. The Court must consider whether the Berman settlement is "fair and equitable" based on factors focusing on the complexity, duration and expense of the underlying litigation, as well as other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. See Protective Committee v. Anderson, 390 U.S. 414 (1968), In re: Justice Oaks, II, Ltd., 898 F.2d 1544, 1549 (11th Cir. 1990). The burden is on the proponent of the settlement, in this case the Receiver, to demonstrate that the settlement is both reasonable and in the best interests of the Receivership Defendants. In re: Vazquez, 325 BR. 30, 35 (Bankr. S.D. Fla. 2005).

14. In this case, the Receiver's analysis in the Motion regarding the reasonableness of the settlement (\$65,000), given the amount of money that BMC and MAMC obtained (alleged to be at least \$192,000,000 from more than 700 individual investors) in exchange for the settlement, is not persuasive and severely lacking in equity and fairness.

15. However, the element of the Bar Order, which is clearly the lynchpin for the settlement, is beyond the Court's authority and power to sanction. Simply put and as demonstrated below, the settlement sought for approval by the Receiver seeks to accomplish through a Bar Order what Berman could not have obtained directly; namely, court jurisdiction over the direct claims of non-parties, such as Mallah Furman against Berman.

16. While a court has jurisdiction to determine whether a settlement is fair and equitable, looking only to the fairness of the settlement as between the parties, the Receiver and Berman (and ignoring the rights of non-parties such as Mallah Furman) contravenes a basic notion of fairness." See In re: Zale, 62 F.3d 746, 754 (5th Cir. 1995) (quoting from In re: AWECO, Inc., 725 F.2d 293, 298 (5th Cir. 1984)). "[W]here the rights of one who is not a party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval" and requiring a determination that "no one has been set apart for unfair treatment") Zale, 62 F.3d at 754 (quoting from Cullen v. Riley (In re: Masters Mates & Pilots Pension Plan), 957 F.2d 1020, 1026 (2nd Cir. 1992)).

17. Other courts have held that a bar order enjoining the prosecution of claims by non-parties, who are not defendants in the subject litigation being settled is prohibited based on the court's lack of jurisdiction to enter such an order. See In re: Arter & Hadden, LLP, 373 BR. 31 37 (Bankr. ND. Ohio 2007) (holding that settlement agreement between trustee and defendant banks, which sought to enjoin actions by any party against the banks, requested relief that was too pervasive and far in excess of the court's jurisdiction) The Arter court explained: "[p]arties,

through negotiated efforts, cannot confer jurisdiction upon a court where Congress has not bestowed such jurisdiction in order to achieve a compromise. Even the equitable powers of the bankruptcy court are not without limitation." Id. See Devon Capital Management, Inc., 261 BR. 619, 625-626 (Bankr. W.D. Pa 2001) (approving modified version of settlement agreement by eliminating claims bar order because claims bar order was too broad in scope).

18. Further, simply because a proceeding is equitable "does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be." The Official Committee of Equity Security Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987), cert. denied, 485 U.S. 962 (1988) (quoting In re: Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, 791 F.2d 524, 528 (7th Cir. 1986)).

19. In this case, the potential indemnification claim that Mallah Furman has against Berman is not within the Court's equitable jurisdiction to pass on. Although he may try, the Receiver cannot manufacture court jurisdiction through use of the Bar Order in order to facilitate the settlement with Berman and receipt of settlement sums where court jurisdiction would not otherwise lie.

20. Finally, Mallah Furman is receiving nothing in exchange for the forcible release of its claims against Berman. Notwithstanding the fact that there is no attempt to even provide fair and equitable consideration to non-party, Mallah Furman, in exchange for trampling on its rights to sue Berman, the Subject Complaint discloses sufficient facts that make clear the possibility of Mallah Furman's indemnification claim against Berman in the face of the MF Complaint. In the event that the Receiver obtains a judgment against Mallah Furman, it is entitled to seek indemnification from Berman for its reliance on Berman's representations. That claim belongs to Mallah Furman and is not property of the Receiver.

III. CONCLUSION

21. Based on the foregoing facts, law and analysis, the Receiver has failed to carry his burden for approval of the settlement with Berman as set forth in the Motion and, accordingly, the Motion should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by facsimile and regular

U.S. Mail on this 27th day of March, 2009, upon:

Michael A. Hanzman, Esq.
Hanzman Gilbert, LLP.
252 Ponce de Leon Boulevard, Suite 700
Coral Gables, Florida 33134
Attorneys for Michael I. Goldberg
Fax: [305.529.1612]

Paul C. Huck, Jr., Esq.
Dean Colson, Esq.
Colson Hicks Eidson
255 Aragon Avenue, 2nd Floor
Coral Gables, FL 33134
Attorneys for Steering Committee
Fax: [305.476.7444]

Charles W. Throckmorton, Esq.
Kozyak Tropin & Throckmorton
2525 Ponce de Leon Blvd., 9th Floor
Coral Gables, FL 33134
Attorneys for Dana Berman
Fax: [305.372.3508]

Cristina Saenz, General Counsel
State of Florida Financial Regulation
401 NW 2nd Avenue, Ste. N-708
Miami, FL 33128
Fax: [305-810-1100]

James Gassenheimer, Esq.
Berger Singerman, P.A.
200 S. Biscayne Blvd.; Ste. 1000
Miami, FL 33131
Counsel for Receiver
Fax: [305. 714-4340]

Michael I. Goldberg, Receiver
Akerman Senterfitt
Las Olas Centre II, Ste. 1600
350 East Las Olas Boulevard
Ft. Lauderdale, FL 33301
Fax: [954.463.2224]

SHENDELL & POLLOCK, P.L.
Attorneys for Mallah Furman
One Park Place
621 N. W. 53rd Street
Suite 310
Boca Raton, FL 33487
Phone: (561) 241-2323
Fax: (561) 241-2330



Gary R. Shendell
Florida Bar No. 964440
Kenneth S. Pollock
Florida Bar No: 0069558