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Eric Clark Welling, Mary Katherine Welling, Pheasant Wood LLC,
and Nycom Apartments LLC*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

MANAGEMENT SOLUTIONS, INC., a Texas
corporation; WENDELL A. JACOBSEN;
ALLEN R. JACOBSON,

Defendants.

**MEMORANDUM IN OPPOSITION TO
MOTION TO DISTRIBUTE
PROCEEDS OF PRIVATE SALE OR
RECEIVERSHIP PROPERTY IN
LOGAN, UTAH**

Civil No. 2:11-cv-01165

Judge Bruce S. Jenkins

Intervenors C. Eugene McDermott, Mary Ann McDermott, Forest Hills Apartments LLC,
McKean Enterprises LLC, Eric Clark Welling, Mary Katherine Welling, Pheasant Wood LLC, and
Nycom Apartments LLC (collectively, the “McDermott Family”), by and through their

undersigned counsel, respectfully submit this Memorandum in Opposition to Motion to Distribute Proceeds of Private Sale of Receivership Property in Logan, Utah.

INTRODUCTION

The Receiver recently filed a Motion to Distribute Proceeds of Private Sale of Receivership Property in Logan, Utah (the “Motion”). [Dkt. No. 1404.] By his Motion, the Receiver seeks Court approval to distribute funds received in connection with the sale of the Receivership Property located in Logan, Utah (the “Logan Property”) to tenant in common interest holders, also referred to as “TIC Owners.” While the Motion acknowledges payment of certain expenses related to the Logan Property, it fails entirely to propose any type of repayment to the Receivership Estate of money loaned to the TIC Owners directly for the benefit of the Logan Property. As a result, the distribution, as proposed by the Receiver’s Motion, is unfair to the Receivership Estate.

ARGUMENT

I. The Receiver’s Motion fails to account for his change in position regarding the treatment of TIC Owners.

At the time he sought permission from the Court to move forward with a sale of receivership property located at 1145 North Main Street, Logan, Utah (the “Logan Property”) [Dkt. Nos. 459 and 460], the Receiver took the position that he “intend[ed] to seek authority from the court to treat TIC investors the same as other investors.” [See Dkt. No. 460, ¶ 3.] In his recent Motion, however, the Receiver abandoned his earlier position which would have treated TIC Owners similar to other investors, claiming instead that the “Court provided the Receiver with additional guidance regarding TIC investors.” [See Dkt. No. 1404, pg. 2.] The Receiver now seeks to distribute to TIC Owners in proportion to their tenant in common interest. If the Receiver

is correctly interpreting the guidance from the Court regarding the proper treatment of TIC Owners, then it would be inappropriate for the Receiver to distribute the proceeds from the sale of the Logan Property without first ensuring that all loans made by the Receivership Estate to the Logan Property TIC Owners are repaid in full. Indeed, a distribution without repayment to the Receivership Estate would result in an unjustified windfall to the TIC Owners and a corresponding detriment to the Receivership Estate from which the overwhelming majority of investors will ultimately looking for payment. If, on the other hand, TIC Owners will be treated the same as other investors for purposes of distribution, then the issue of whether the intercompany loans should be repaid will be much less significant.

II. Unless TIC Owners are treated like other investors, any distribution to tenant in common interest holders should only be made after intercompany loans have been repaid.

The Receiver's Motion seeks to distribute the "net proceeds" from the sale of the Logan Property, which the Receiver claims to be in the amount of \$759,863.33, to TIC Owners. To get to the "net proceeds" amount, the Receiver subtracted various expenses from the sale amount, including taxes owed (\$72,492.67), commissions (\$17,100), utilities (\$1,821.50) and other fees associated with the sale (\$3,749.50). Nowhere in the Receiver's accounting, however, is there recognition of the intercompany loans made by two Receivership Entities to the TIC Owners for the benefit of the Logan Property.

As demonstrated by the Declaration of Dustin Barrett, a copy of which is submitted herewith as Exhibit A, at the time the Receiver was appointed in December 2011, the amount owing by the TIC Owners of the Logan Property to other receivership entities was nearly \$112,000.00. [Id. at ¶ 12.] This amount was made up of loans advanced by two Receivership Entities during the 2010 and 2011 time-frame. Indeed, by the end of 2010, the TIC Owners of the

Logan Property had received money in the form of loans from Management Masters (a Receivership Entity) in the amount of \$55,825.00. These loan funds were deposited into the operating account of the Logan Property and used to pay expenses of the Logan Property and distributions to TIC Owners. [*Id.* at ¶ 11.]

For the period January 1, 2011 to October 2011, the TIC Owners of the Logan Property borrowed additional money from Texas Apartments (a Receivership Entity), in the amount of \$8,300.00, and Management Masters (a Receivership Entity), in the amount of \$47,800.00. [*Id.* at ¶ 12.] Once again, these loans were deposited into the operating account of the Logan Property and used to pay expenses of the Logan Property and distributions to TIC Owners. [*Id.*] Specifically, in 2011, the monthly payments to TIC Owners, which were facilitated by the intercompany loans, were in the following amounts:

i. Willow Park, LLC	\$250.00
ii. Management Masters	\$0.00
iii. Ande Equipment LTD	\$1,825.00
iv. Woods #1, LLC	\$1,260.00
v. Woods #4, LLC	\$875.00
vi. Truman Clawson	\$1,575.00
vii. Rosalind B. Mayfield	\$0.00
viii. Gordon Kimball	\$1,000.00

[*Id.* at ¶ 14.] For the years 2010 and 2011, the TIC Owners undisputedly received a direct and tangible benefit from intercompany loans. These loans, however, have not been repaid.

If the Receiver had not changed his position between his filing with the Court in August 2012 and his Motion in November 2013 regarding the proper treatment of TIC Owners, the issue with intercompany loans would largely be moot. As it stands, however, if the Court were to adopt the Receiver's current position and authorize a pro-rata distribution of the net proceeds from the sale of the Logan Property without accounting for the intercompany loans, then the TIC Owners

would receive an unjustified windfall at the expense of all of the other investors. Allowing a distribution to occur to TIC Owners in the manner contemplated in the Receiver's Motion fails to comply with the Court's charge to the Receiver to manage the Receivership assets in a manner that is "most beneficial to the Receivership Estate." *See* Order Appointing Receiver, Freezing Assets and Other Relief [Dkt. No. 4], ¶¶ 38, 39, 40.

CONCLUSION

For the foregoing reasons, the McDermott Family objects to the Receiver's Motion and requests that Court order all intercompany loans to be repaid to the Receivership Estate prior to any funds being distributed to TIC Owners.

DATED this 3rd day of December, 2013.

PARR BROWN GEE & LOVELESS, P.C.

/s/Royce B Covington

Robert S. Clark

Joseph M.R. Covey

Royce B. Covington

Attorneys for the McDermott Family

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2013, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, which sent notification of such filing to those registered to receive notice in the underlying case.

In addition, I hereby certify that on this 3rd day of December, 2013, a true and correct copy of the foregoing was mailed via U.S. mail, postage prepaid, to the following:

Greg B. Bailey
P.O. Box 298
Fountain Green, UT 84632

Douglas M. Durbano
DURBANO LAW FIRM
476 W. Heritage Park Blvd., Ste. 200
Layton, UT 84041

/s/ Royce B. Covington

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

MANAGEMENT SOLUTIONS, INC., a Texas
corporation; WENDELL A. JACOBSEN;
ALLEN R. JACOBSON,

Defendants.

**DECLARATION OF DUSTIN
BARRETT**

Civil No. 2:11-cv-01165

Judge Bruce S. Jenkins

I, Dustin Barrett, declare as follows:

1. I am over twenty-one year of age, I have not been convicted of a felony, and I am competent to make this Declaration.
2. The facts stated within this Declaration are true and correct based upon my personal knowledge and based on my review of the documents referenced below.
3. I make this declaration based upon my personal knowledge of the facts stated herein, and if called upon to testify, I could and would competently testify thereto.
4. I received a Bachelor's degree in accounting from Utah Valley University in 2002.
5. I worked as a book keeper and later as the Chief Financial Officer of Management Solution, Inc. ("MSI") under the direction and control of Wendell Jacobson from July 2001 – December 15, 2011, and I am familiar with the Quickbooks kept by MSI.
6. I was hired by the Receiver, John Beckstead, after he was appointed as the Receiver on or about December 15, 2011, and thereafter provided the following services: tax

preparation, tax filing and returns, book keeping, assisting Deloitte and the Receiver with any questions or documentation that were needed.

7. I worked for the Receiver until May 2012.
8. During my employment with the Receiver, I provided the Receiver and other parties with declarations and affidavits to support motions filed in this case.
9. I have reviewed the MOTION TO DISTRIBUTE PROCEEDS OF THE PRIVATE SALE OF RECEIVERSHIP PROPERTY IN LOGAN, UTAH filed by the receiver on 11/20/2013 (the "Receiver's Motion").
10. I have also reviewed the financials in Quickbooks of the Management Masters – Logan Office, which is the Logan Property that is addressed in the Receiver's Motion.
11. In 2010, the TIC Owners of the Logan Property borrowed money from Management Masters (a receivership entity). The loans were made to the operating account and these funds were used for operations including expenses and distributions to TIC Owners. These loans were recorded as notes receivable by Management Masters. At year end 2010, the balance sheet of Management Masters-Logan Office reflected an accrued balance on these loans of \$55,825.00. A copy of the Management Masters-Logan Office balance sheet is attached hereto as Exhibit 1.
12. From January 1, 2011 through October 2011, the TIC Owners of the Logan Property borrowed money from Texas Apartments (a receivership entity), in the amount of \$8,300.00 and Management Masters (a receivership entity), in the amount of \$47,800.00. See Exhibit 1. These loans were made to the operating account and the funds were used for operations including expenses and distributions to TIC Owners. These loans were recorded as notes receivable by Management Masters. At the time of the Receivership

Order in December 2011, the accrued loan balance for loans made to the TIC Owners of the Logan Property was \$111,925.00. The Management Masters – Logan Office Quickbooks contains an exact accounting of the disbursements of the loaned funds to the TIC Owners.

13. It is my understanding that MSI's outside accountant, Kenneth Bement, would have sent tax documents to the various TIC Owners of the Logan Property showing the amounts from each of the loans that each owner had accrued. Each TIC Owner shared on a pro rata basis all the income, expenses and assets and liabilities on the balance sheet.

14. In 2011, the TIC Owners in the Logan Property who are listed below were paid monthly as follows:

i. Willow Park, LLC	\$250.00
ii. Management Masters	\$0.00
iii. Ande Equipment LTD	\$1,825.00
iv. Woods #1, LLC	\$1,260.00
v. Woods #4, LLC	\$875.00
vi. Truman Clawson	\$1,575.00
vii. Rosalind B. Mayfield	\$0.00
viii. Gordon Kimball	\$1,000.00

I declare under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge, information and belief.

DATED this 3 day of December, 2013.



Dustin Barrett

EXHIBIT 1

Balance Sheet

As of December 31, 2011

	<u>Dec 31, 08</u>	<u>Dec 31, 09</u>	<u>Dec 31, 10</u>	<u>Dec 31, 11</u>
ASSETS				
Current Assets				
Checking/Savings				
CHASE BANK 880 659 669	0.00	0.00	0.00	-911.44
FAR WEST 8600600056	-22,880.37	-28,323.54	-36,059.13	0.00
Total Checking/Savings	<u>-22,880.37</u>	<u>-28,323.54</u>	<u>-36,059.13</u>	<u>-911.44</u>
Other Current Assets				
NOTES RECEIVABLE				
INS & OUTS	0.00	0.00	0.00	-8,300.00
MGT MASTERS	0.00	0.00	-55,825.00	-103,625.00
Total NOTES RECEIVABLE	<u>0.00</u>	<u>0.00</u>	<u>-55,825.00</u>	<u>-111,925.00</u>
REAL ESTATE				
ACCUM DEPRECIATION	-57,388.00	-112,474.00	-167,560.00	-167,560.00
LOGAN OFFICE BUILDING	1,515,000.00	1,515,000.00	1,515,000.00	1,515,000.00
LOGAN OFFICE BUILDING LAND	100,000.00	100,000.00	100,000.00	100,000.00
Total REAL ESTATE	<u>1,557,612.00</u>	<u>1,502,526.00</u>	<u>1,447,440.00</u>	<u>1,447,440.00</u>
Total Other Current Assets	<u>1,557,612.00</u>	<u>1,502,526.00</u>	<u>1,391,615.00</u>	<u>1,335,515.00</u>
Total Current Assets	<u>1,534,731.63</u>	<u>1,474,202.46</u>	<u>1,355,555.87</u>	<u>1,334,603.56</u>
TOTAL ASSETS	<u><u>1,534,731.63</u></u>	<u><u>1,474,202.46</u></u>	<u><u>1,355,555.87</u></u>	<u><u>1,334,603.56</u></u>
LIABILITIES & EQUITY				
Equity				
RETAINED EARNINGS	-421.13	-20,890.83	0.00	0.00
TIC PARTNER				
ANDE EQUIPMENT	343,465.11	326,112.13	304,212.13	284,219.28
GORDON R. KIMBALL	188,202.84	178,697.61	166,697.61	155,745.17
MANAGEMENT MASTERS	596.04	1,355.82	1,355.82	1,834.43
MOUNT OLYMPUS HILLS	258,258.85	261,475.38	231,475.38	230,243.73
TRUMAN & MARILYN CLAWSON TRUST	296,419.14	281,448.25	262,548.25	245,297.89
WILLOW PARK, LLC	47,044.99	44,661.88	41,661.88	38,918.38
WOODS #1	236,699.81	224,725.22	209,605.22	194,931.50
WOODS #4	164,044.85	155,726.17	145,226.17	136,515.49
Total TIC PARTNER	<u>1,534,731.63</u>	<u>1,474,202.46</u>	<u>1,362,782.46</u>	<u>1,287,705.87</u>
Net Income	<u>421.13</u>	<u>20,890.83</u>	<u>-7,226.59</u>	<u>46,897.69</u>
Total Equity	<u>1,534,731.63</u>	<u>1,474,202.46</u>	<u>1,355,555.87</u>	<u>1,334,603.56</u>
TOTAL LIABILITIES & EQUITY	<u><u>1,534,731.63</u></u>	<u><u>1,474,202.46</u></u>	<u><u>1,355,555.87</u></u>	<u><u>1,334,603.56</u></u>