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Counsel for Mutual of Omaha Bank

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

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

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

Defendants.

**COMPLAINT IN INTERVENTION  
[MUTUAL OF OMAHA BANK]**

Civil Action No. 2:11-cv-01165

Judge Bruce S. Jenkins

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Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, Mutual of Omaha Bank, a federal savings bank (“MOB”), respectfully submits this Complaint in Intervention identifying its claims against the Defendants, the receivership entities formerly controlled or owned by the Defendants, and the assets of the receivership.

### **SUMMARY OF INTERVENTION**

1. MOB is a secured creditor of Lakes Edge, LLC, an Ohio limited liability company (“Lakes Edge”), which is an entity that is subject to this receivership proceeding. The aggregate principal balance of MOB's secured claims exceeds \$8 million. At this time, and without waiving its right in the future, MOB does not seek immediate relief from the pending order freezing the receivership assets, including those assets securing MOB's loan to Lakes Edge. MOB does, however, hold a considerable vested interest in the Lakes Edge property subject to the receivership, and MOB's interests could be adversely affected by the outcome of this proceeding, especially by the relief sought in the Liquidation Plan of Receiver (Docket No. 223) and in Receiver's Second Quarterly Status Report as of June 30, 2012 (Docket No. 409). Accordingly, in order to protect its interests and to object in timely fashion to any actions that may affect MOB's claims or security interests, MOB filed a motion for intervention as a matter of right under Rule 24(a).

### **JURISDICTION AND VENUE**

2. Consistent with Rule 8(a)(1) of the Federal Rules of Civil Procedure, this Court has already exercised jurisdiction over this matter, and this Complaint in Intervention does not require additional jurisdictional support.

3. MOB does not contest that this Court is the proper venue for this receivership proceeding.

#### FACTS

4. MOB is a federal savings bank chartered by the United States Department of Treasury, Office of Thrift Supervision, which maintains its principal office at 3333 Farnam Street, Omaha, Nebraska 68131.

5. On or about December 9, 2008, MOB, as lender, made a loan (the “Loan”) to Lakes Edge, as borrower, of \$9,200,000 to finance the purchase of the Lakes Edge multifamily residential development at 150 Lakes Edge Court, Pickerington, Fairfield County, Ohio (the “Property”). In exchange for the Loan, Lakes Edge executed a note in favor of MOB in the original principal balance of \$9,200,000 (as modified or amended, the “Note”). Lakes Edge also gave MOB an Open-Ended Mortgage and Security Agreement on the Property as security for the Note (as modified or amended, the “Mortgage”). As additional security for the Loan, Wendell A. Jacobson executed a primary and unconditional guaranty (“Guaranty”) in favor of MOB of the full amount of the Loan. The Note, Mortgage, Guaranty and other documents executed in conjunction with the Loan are sometimes hereinafter referred to as the “Loan Documents.”

6. Lakes Edge is identified on the list of entities that was attached to the Court's Order Appointing Receiver, Freezing Assets and Other Relief (the “Freeze Order”) signed December 15, 2011 (Docket No. 4). MOB's first-priority interest in the Property is identified on Exhibit A to the Liquidation Plan of Receiver (Docket No. 223).

7. Specifically, MOB holds a first-priority security interest in the Property as acknowledged and admitted by the Receiver.

|                                      |                      |
|--------------------------------------|----------------------|
| <b>Property Name:</b>                | Lakes Edge, LLC      |
| <b>Location:</b>                     | Pickerington, Ohio   |
| <b>Mortgage:</b>                     | Mutual of Omaha Bank |
| <b>Unpaid Principal Balance:</b>     | \$8,108,734.08       |
| <b>Maturity:</b>                     | February 28, 2013    |
| <b>Receiver's Estimate of Value:</b> | \$16,000,000         |

8. The actual principal balance owed MOB as of August 28, 2012 is \$8,108,734.08. Under the terms of the Note, in addition to the outstanding principal and any unpaid interest, the Receiver, standing in the shoes of Lakes Edge, is contractually obligated to unconditionally pay MOB without limitation: (a) any and all amounts which become payable under the Note or any of the other Loan Documents (Note § 2.6); (b) late charges “in an amount equal to five percent (5.0%) of the amount of such overdue payment” and the “Default Rate” “for so long as any Event of Default exists” and “after the maturity of the Debt” (Note § 2.8); and (c) “Costs of Collection” in connection with Lakes Edge’s “Event of Default” which are “all costs and expenses of collection or incurred by [MOB] or in any such suit or proceeding, including reasonable attorneys’ fees.” (Note § 4.18).

9. The Freeze Order currently prevents MOB from pursuing available remedies under the Note, Mortgage, or other Loan Documents, notwithstanding Lakes Edge’s default or maturity of the Loan, without obtaining relief from the Court.

10. The Receiver has filed documents with the Court indicating that it plans to liquidate all of the multifamily properties in the Receivership, including Lakes Edge, as a single

portfolio in a public auction. (Docket No 409.) The Receiver has also expressed his intent to request a distribution procedure that could eliminate a substantial amount of MOB's secured claim, including principal, default interest, late fees, prepayment fees, attorneys' fees and other costs, despite the fact of *the Receiver's own estimate that the fair market value of the Property is worth more than the debt owed*, and recourse against the guarantor Wendell A. Jacobson, and would defer MOB's collection and exercise of remedies beyond the maturity date of the Loan. The Receiver's Liquidation Plan is inequitable, unjust, breaches basic contract law, and seek to enrich unjustly the Receiver and other parties (secured and unsecured) at MOB's expense.

11. The Court granted MOB's request for intervention by Court order entered September 24, 2012 (Docket No. 513).

**FIRST CAUSE OF ACTION  
(Declaratory Relief)**

12. MOB incorporates by reference paragraphs 1 through 11.

13. MOB is the holder of written contracts with Lakes Edge. Lakes Edge is currently under the control and supervision of the Receiver. These contracts include the Note, Mortgage, Guaranty, and other Loan Documents.

14. MOB has a valid, first-priority security interest and lien in the Property.

15. The Freeze Order, subject to further order of the Court, permits the Receiver to sell, and transfer clear title to, all real property in the Receivership Estates. Such a sale would eliminate MOB's security interest in the Property currently securing the indebtedness.

16. MOB is entitled to a declaration by the Court (a) that MOB has a valid, first-priority security interest in the Lakes Edge Property, (b) that MOB's security interest will attach

to all proceeds of any sale of the Property, and (c) that MOB is entitled to payment in the full amount set forth under the Note, Mortgage, and other Loan Documents, including without limitation all principal, unpaid interest, late fees, costs of collection, default interest, and any and all other amounts that are or become due and owing, upon liquidation of the Property by the Receiver.

**SECOND CAUSE OF ACTION  
(Breach of Contract)**

17. MOB incorporates by reference paragraphs 1 through 16.

18. MOB is the holder of valid contracts with Lakes Edge. Lakes Edge is now under the control and supervision of the Receiver.

19. The Loan is currently in default per the terms of the Loan Documents.

20. An Event of Default has occurred under the Mortgage, which defines an Event of Default to include the situation when “Borrower . . . (iii) shall allow the appointment of a receiver, trustee or custodian of Borrower or of the Mortgaged Property or any part thereof, which receiver, trustee or custodian is not discharged within sixty (60) days after the appointment; . . . .” (Mortgage § 6.1(e)). As a result of this Receivership proceeding, an Event of Default has occurred.

21. A Default has occurred under the Guaranty, which includes the “filing of a petition or institution of any proceeding or action by or against [Wendell A. Jacobson] pursuant to any Debtor Relief Law.” (Guaranty § 1.1). As a result of this Receivership proceeding, a Default has occurred.

22. The commencement of this proceeding, and the appointment of a Receiver ultimately to liquidate the receivership assets, is an Event of Default. Furthermore, this proceeding has caused potential impairment to MOB's security interest in the Property.

23. The Note and Mortgage also prohibit any transfer of Lakes Edge's interest in the Property, or any transfer of control over the borrower entity, without MOB's authorization.

24. The transfer of interest and control of Lakes Edge from the Management Solutions, Inc. Defendant to the Receiver therefore also constitutes an Event of Default under the Note, Mortgage, and other Loan Documents.

25. MOB is entitled to various contractual remedies for these events of default, including without limitation acceleration of the loans, imposition of a higher "default rate" interest rate, and foreclosure or trust sale, as permitted under Ohio law.

26. MOB's ability to exercise its enforceable contractual remedies is presently enjoined by the Freeze Order. However, MOB nevertheless has a valid secured claim for the full amount of its indebtedness under the Note, Mortgage, and other Loan Documents, including without limitation all principal, unpaid interest, late fees, costs of collection, default interest, and any and all other amounts that are or become due and owing.

27. MOB seeks intervention in this proceeding to protect its security interest and reserve the right to seek appropriate relief from the Court in the future.

#### **REQUEST FOR RELIEF**

WHEREFORE, Intervenor Mutual of Omaha Bank requests the following relief:







**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served this 9th day of October, 2012 by CM/ECF electronic noticing and, where indicated, by first class U.S. Mail:

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