

ORIGINAL

IN THE SUPREME COURT OF OHIO

BERNARD NIEDERST, :  
: Supreme Court Case No. 14-1119  
Relator, :  
: ORIGINAL ACTION IN  
v. : PROHIBITION  
: RICHARD J. McMONAGLE, :  
: Respondent. :

**MOTION TO INTERVENE AS RESPONDENT  
(REVISED IN ACCORDANCE WITH S.CT.PRAC.R. 3.13)**

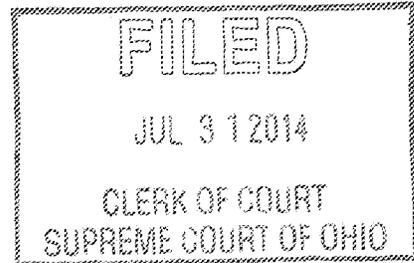
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MOTION TO INTERVENE

Pursuant to Civ.R. 24(A)(2) and (B), David B. Niederst, Michael D. Niederst, Niederst Management, Ltd., Niederst Management Group, Ltd., Niederst Management Group II, Ltd., Niederst Management Group III, Ltd., Niederst Management Group IV, Ltd., Henninger Apartments, LLC, Niederst Olde River Yacht Club, LLC, Niederst Wyoga Lake, LLC, Niederst Richmond Park, LLC, Niederst Blossom Village, LLC, Frv-Elyria, LLC, Evergreen Residential Partners, LLC, Niederst Parma Woods Apartments, LLC, Sunset Townhouses, LLC, Niederst Bent Tree, LLC, Niederst Indian Hills, LLC, Niederst Erie Shore, LLC, 12834-12836 State Rd, LLC, Niederst Lake Park Towers, LLC, Niederst Richmond Hills, LLC, Niederst Forest Ridge, LLC, Westbury Holdings, LLC, and 9800 Tower, LLC (collectively, the "*Niederst Parties*") hereby move to intervene as of right or, alternatively, permissively, in the above-captioned case. Pursuant to S.Ct.Prac.R. 12.04(A) and Civ.R. 24(C), the Niederst Parties attach an Answer as Exhibit A. A memorandum in support follows.

## MEMORANDUM IN SUPPORT

### I. Introduction

This action arises from a judgment that Relator Bernard Niederst (“*Relator*”) wrongfully took on a \$1,000,000 cognovit note (the “*Note*”). The Niederst Parties have paid every single dollar owed to date under the Note and Relator accepted and deposited all amounts paid. However, in 2013, eight months after accepting approximately \$257,000 in payments, Relator improperly took judgment on the Note. Relator and Niederst Parties have now fully briefed a Civ.R. 60(B) Motion for relief from judgment in the trial court (the “*60(B) Motion*”) and the court set a hearing on the motion.<sup>1</sup>

However, Relator then filed this action in a bald-faced attempt to prevent the Honorable Judge Richard J. McMonagle (“*Respondent*”), who previously vacated judgment under exigent circumstances, from hearing any evidence of the Niederst Parties’ meritorious defenses to the entry of the cognovit judgment. The Niederst Parties now file their Motion to Intervene because they have a clear right and interest in the outcome of these proceedings. This action will directly impact the Niederst Parties’ ability to present their meritorious defenses to the entry of the cognovit judgment.

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<sup>1</sup> Due to the confidential nature of the settlement agreement, the 60(B) Motion was filed under seal with the trial court. The Niederst Parties are filing a motion to file documents under seal in this action.

## II. Background Facts

The Note, executed in connection with a confidential settlement agreement (the "*Settlement Agreement*"), is payable in equal quarter-million dollar installments due on January 5, 2013, January 5, 2014, January 5, 2015 and January 5, 2016. *See* Compl. at Exh. 2. The Niederst Parties have paid Relator every penny of the January 5, 2013 and January 5, 2014 installments, totaling \$521,684.38.

When making the initial 2013 installment payment, there was a less than one month delay in the payment of nominal interest (which totaled less than \$7,000) because: (1) the Note is not dated and, therefore, the interest was not readily calculable; (2) the parties never agreed to an amortization or payment schedule that clearly set forth the amount of nominal interest due, leaving the Niederst Parties to request and then make the nominal interest calculation; (3) none of the parties knew when the interest calculation was supposed to start because there was delay in the execution of the confidential Settlement Agreement, which governs and controls the interpretation of the Note; and (4) the confidential Settlement Agreement is ambiguous as to the timing of the payment of nominal interest and, in fact, is inconsistent with the Note. Despite this situation, the Niederst Parties timely made the January 5, 2013 \$250,000 installment payment and made the nominal interest payment on February 1, 2013.<sup>2</sup>

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<sup>2</sup> At least one Ohio court has held that a party may only obtain a cognovit judgment under R.C. 2323.13 for a default of nonpayment. *Henry County Bank v. Stimmels, Inc.*, 3rd Dist. Henry No. 7-12-19, 2013-Ohio-1607. Moreover, as fully briefed in the

The Niederst Parties fully set forth these facts and the law supporting their request for relief from judgment in the 60(B) Motion. However, Relator filed this action, which has prevented the Respondent from conducting a hearing or ruling on the 60(B) Motion.

### III. Procedural History

On October 2, 2013, Relator filed his Complaint seeking a cognovit judgment against the Niederst Parties in the action styled *Bernard Niederst v. David B. Niederst, et al.*, Cuyahoga County Court of Common Pleas Case No. CV-13-814870 (the "*Lawsuit*"). That same day, the trial court entered the cognovit judgment. The following week, on October 9, 2013, and after hearing the Niederst Parties' oral motion for relief from judgment, the court granted relief from the judgment, vacating it in its entirety. The Relator appealed.

On June 5, 2014, the Eighth District Court of Appeals found that, due to the "sparse record," it had "no choice but to sustain the first assignment of error." See *Niederst v. Niederst*, 8th Dist. Cuyahoga No. 100616, 2014-Ohio-2406, ¶ 4. The Eighth District's opinion was purely procedural and drew no conclusions concerning the merits of the Niederst Parties' position. Instead, the court held that "[t]his cause is reversed to the trial court for further proceedings consistent with this opinion." *Id.* at ¶ 5.

As a result of the Eighth District Court of Appeals' journal entry and opinion, the Niederst Parties filed motions with the trial court, including the 60(B) Motion

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60(B) Motion, the Niederst Parties have not committed any non-monetary events of default.

and a motion to stay judgment. On June 24, 2014, the trial court granted the Niederst Parties' motion to stay judgment and subsequently set a hearing on the 60(B) Motion for Monday, July 7, 2014.

On or about July 3, 2014, and without providing any notice to the undersigned, Relator filed his Complaint for a Writ of Prohibition and Procedendo (the "*Writ*") seeking to prevent the Honorable Judge Richard McMonagle, Judge of the Cuyahoga County Court of Common Pleas ("*Respondent*"), from continuing to preside and have jurisdiction over the case. *See* Compl. at p. 1. In essence, Relator argues that because the Eighth District Court of Appeals' opinion in *Niederst*, 2014-Ohio-2406, did not contain the express word "remand," the case was not reversed and remanded to the trial court and Respondent has no authority to rule on the 60(B) Motion. Relator attempts to make this argument even though the Eighth District's journal entry and opinion provided that the case was reversed "*to the trial court* for further proceedings consistent with this opinion." *See Niederst* at ¶ 5 (emphasis added). Moreover, Relator's argument ignores the procedural posture of this cognovit action and the purpose and mechanism behind a Civ.R. 60(B) Motion, which, inherently, is a motion seeking relief from a *final* judgment.

#### **IV. Law and Argument**

##### **A. The Niederst Parties Have the Right to Intervene Pursuant to Civ.R. 24. Alternatively, this Court Should Permissively Allow the Niederst Parties to Intervene.**

Civ.R. 24(A)(2) allows a party to intervene as of right where "the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a

practical matter impair or impede the applicant's ability to protect that interest." Under Civ.R. 24(B), the Court may also allow an applicant to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." Courts construe Civ.R. 24 liberally to permit intervention. *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 22.

Additionally, Ohio courts "generally allow parties to an underlying action to intervene as respondents to a petition for a writ ... which is directed to a trial judge and which concerns a motion, decision or judgment in the underlying case." *State ex rel. Danzinger*, 6th Dist. Sandusky No. S-06-034; 2006-Ohio-6811, ¶ 6 (citing *State ex rel. City of Northwood v. Court of Common Pleas*, 109 Ohio App.3d 487, 672 N.E.2d 695 (6th Dist. 1996) (rev'd on other grounds)); *see also, State ex rel. Mullins v. Curran*, 131 Ohio St.3d 441, 2012-Ohio-685, 966 N.E.2d 267, ¶ 6.

Here, the Niederst Parties are entitled to intervene as of right or, alternatively, permissively. The Niederst Parties claim an interest in this action—the Writ is inextricably intertwined with the Lawsuit and the wrongful entry of the cognovit judgment. Moreover, the Writ was filed because the Niederst Parties filed the 60(B) Motion. The Court's decision on the Writ will directly impact the Niederst Parties' rights and interests. The Writ could prevent the Niederst Parties from being able to present their meritorious defenses to the entry of the cognovit judgment and otherwise force the Niederst Parties to pay hundreds of thousands of

dollars that they simply do not owe.<sup>3</sup> As the Niederst Parties made clear in their 60(B) Motion, the Niederst Parties have simply not defaulted under the terms of the Note and have a meritorious defense to the entry of judgment—payment.

Moreover, the Niederst Parties' interests are not adequately represented by the existing parties. Although Respondent will likely argue that the Writ usurps his judicial power to determine his own jurisdiction and that it is a procedural end-run around a direct appeal from the trial court's determination, he is also a respected member of Ohio's independent and impartial judiciary. *See State ex rel. Vanni v. McMonagle*, 8th Dist. Cuyahoga No. 99507, Slip Op. 2013-Ohio-500, ¶ 5 (*aff'd* 137 Ohio St.3d 568, 2013-Ohio-5187 (citing *State ex rel. Rootstown Local School Dist. Bd. of Ed. v. Portage Cty. Court of Common Pleas*, 78 Ohio St.3d 489, 678 N.E.2d 1365 (1997); *State ex rel. Bradford v. Trumbull Cty. Court*, 64 Ohio St.3d 502, 1992-Ohio-132, 597 N.E.2d 116) ("a party challenging the court's jurisdiction possesses an adequate remedy at law through an appeal from the court's judgment that it possesses jurisdiction")); *see also, Wisner v. Probate Court of Columbiana County*, 145 Ohio St. 419, 422, 61 N.E.2d 889 (1945). Accordingly, Respondent is not, nor should he be, an advocate or defender of the Niederst Parties' interests.

For these reasons, the Niederst Parties meet the requirements for intervention under both Civ.R. 24(A)(2) and 24(B). Accordingly, the Court must

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<sup>3</sup> The Note contains an unenforceable penalty provision where default interest accrues on the Note from 2011 at a rate of 15%. The Relator now argues the amount due under the Note is over \$900,000, even though the remaining principal due on the Note is only \$500,000.

allow the Niederst Parties to intervene in this action and fully brief why the Writ should be denied, if not dismissed.

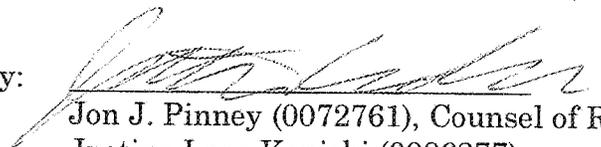
Finally, this Motion is timely. Respondent's answer is not yet due,<sup>4</sup> and the Niederst Parties' proposed Answer to the Complaint is attached to this Motion. Accordingly, intervention will not delay the proceedings or prejudice any party.

**B. Conclusion**

For the foregoing reasons, the Niederst Parties respectfully request that the Court grant their motion to intervene. A proposed Answer to Relator's Complaint is attached to this Motion.

Respectfully submitted,

By:

  
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Justine Lara Konicki (0086277)  
KOHMAN JACKSON & KRANTZ PLL  
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*Counsel for Proposed Intervenors*

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<sup>4</sup> Service was obtained on the Respondent on July 10, 2014; accordingly, pursuant to S.Ct.Prc.R. 12.04 his answer is due to be served on or before July 31, 2014.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 30th day of July, 2014, a copy of the foregoing was sent via Regular U.S. Mail, postage prepaid, to the following:

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Justine Lara Konicki

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ANSWER

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#### **FIRST DEFENSE**

1. The Niederst Parties deny the allegations contained in this paragraph to the extent that the document attached to the Complaint as Exhibit 2 speaks for itself. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

2. The Niederst Parties admit that Judge Richard J. McMonagle is a judge with the Cuyahoga County Court of Common Pleas.

3. The Niederst Parties deny the allegations contained in this paragraph to the extent they call for a legal conclusion. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

4. The Niederst Parties deny the allegations contained in this paragraph.

5. The Niederst Parties deny the allegations contained in this paragraph because the documents attached to the Complaint speak for themselves. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

6. The Niederst Parties admit that they paid Relator \$250,000 on January 5, 2013, and further admit that they paid nominal interest totaling \$6,684.38 less than one month later. The Niederst Parties admit that they paid Relator \$265,000 on January 1, 2014. The Niederst Parties deny that they have breached or otherwise defaulted under the Note (whether monetarily or otherwise). The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

7. The Niederst Parties admit that Relator wrongfully took judgment on a cognovit note on or about October 2, 2013. The Niederst Parties specifically deny that they have defaulted under the cognovit note. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

8. The Niederst Parties admit that Judge Nancy Fuerst, as part of her duties as the then administrative judge in the Cuyahoga County Court of Common Pleas, entered judgment against the Niederst Parties. However, the Niederst Parties aver that the entry of judgment was wrongful. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

9. The Niederst Parties admit that on October 9, 2013, Respondent Judge Richard J. McMonagle ("*Respondent*") vacated judgment. The journal entry provides: "[o]n 10/02/2013 plaintiff filed a cognovit complaint and judgment was rendered in favor of plaintiff by confession in the amount of \$750,000. A hearing was held on 10/09/2013. As a result of the hearing, the 10/02/2013 judgment in favor of plaintiff is hereby vacated. A hearing is scheduled for 10/18/2013, at 2:30 p.m. on plaintiff's oral motion to reconsider. Notice issued." The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

10. The Niederst Parties deny the allegations contained in this paragraph.

11. The Niederst Parties admit that the Relator filed an appeal to the Eighth District Court of Appeals. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

12. The Niederst Parties admit that on June 5, 2014, the Eighth District Court of Appeals issued a journal entry and opinion in *Niederst v. Niederst*, 8th Dist. Cuyahoga No. 100616, 2014-Ohio-2506, and state that the opinion speaks for itself. The Niederst Parties deny that the Eighth District "immediately reversed" anything since the appeal was filed on October 9, 2013, and the Eighth District

Court of Appeals did not release its journal entry and opinion until June 5, 2014. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

13. The Niederst Parties deny the allegations contained in this paragraph.

14. The Niederst Parties admit that, based on the Eighth District Court of Appeals' decision, Judge McMonagle properly exercised jurisdiction over the case. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

15. The Niederst Parties admit that they filed a Motion to Stay Execution with the Cuyahoga County Court of Common Pleas on or about June 18, 2014. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

16. The Niederst Parties deny the allegations contained in this paragraph.

17. The Niederst Parties deny the allegations contained in this paragraph.

18. The Niederst Parties deny the allegations contained in this paragraph because Respondent granted the Motion to Stay after the Relator had filed his Brief in Opposition to the Motion to Stay. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

19. The Niederst Parties deny the allegations contained in this paragraph because Respondent granted the Motion to Stay after the Relator had filed his Brief in Opposition to the Motion to Stay. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

20. The Niederst Parties deny the allegations contained in this paragraph.

21. The Niederst Parties deny the allegations contained in this paragraph.

22. The Niederst Parties deny the allegations contained in this paragraph.

23. The Niederst Parties admit that on or about June 11, 2014 they filed a Civ.R. 60(B) Motion for Relief from Judgment but deny that they argued that the Respondent did not have jurisdiction to rule on the Motion. The Niederst Parties respectfully submit that Respondent does have jurisdiction to rule on their written Civ.R. 60(B) Motion for Relief from Judgment. The Niederst Parties admit that Respondent scheduled a hearing for July 7, 2014 but state that the hearing was continued because of the filing of this action. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

24. The Niederst Parties admit that Relator filed a motion to transfer the case to the docket of Judge Nancy Fuerst and further admit that they filed a brief in opposition to Relator's motion. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

25. The Niederst Parties deny the allegations contained in this paragraph.

26. The Niederst Parties deny the allegations contained in this paragraph because the cases *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 391 N.E.2d 343 (1979); *State ex rel. v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 378 N.E.2d 162 (1978); *Edwards v. Lopez*, 8th Dist. Cuyahoga Nos. 97917 and 98510, 2013-Ohio-571; *Enyart v. Columbus Metro. Area Comm. Action Org.*, 10th Dist. Franklin No. 96APE06-790, 1996 Ohio App. LEXIS 4935, 1996 WL 660918 (1996) speak for

themselves. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

27. The Niederst Parties deny the allegations contained in this paragraph because the case *Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410 (1984) speaks for itself. The Niederst Parties deny any allegations contained in this paragraph not specifically addressed herein.

28. The Niederst Parties deny the allegations contained in this paragraph.

29. The Niederst Parties deny the allegations contained in this paragraph.

30. The Niederst Parties deny the allegations contained in this paragraph.

31. The Niederst Parties deny the allegations contained in this paragraph.

32. The Niederst Parties deny the allegations contained in this paragraph.

33. The Niederst Parties deny the allegations contained in this paragraph.

34. The Niederst Parties deny the allegations contained in this paragraph.

#### SECOND DEFENSE

35. Relator fails to state a claim upon which relief can be granted.

#### THIRD DEFENSE

36. Relator has an adequate remedy at law.

#### FOURTH DEFENSE

37. Relator lacks standing.

#### FIFTH DEFENSE

38. Relator fails to demonstrate entitlement to a writ of prohibition.

#### SIXTH DEFENSE

39. Respondent does not patently and unambiguously lack jurisdiction.

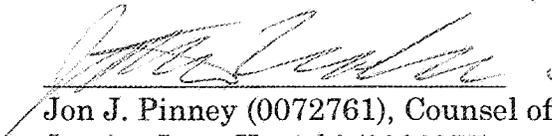
**SEVENTH DEFENSE**

40. The Niederst Parties reserve the right to raise additional affirmative defenses discovered and/or determined as a result of this action.

**WHEREFORE**, The Niederst Parties pray that the Court deny Relator's request for a Writ of Prohibition and Writ of Procedendo.

Respectfully submitted,

By:

  
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Justine Lara Konicki (0086277)  
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CERTIFICATE OF SERVICE

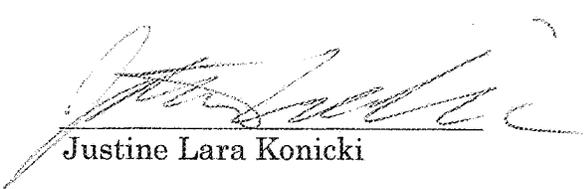
The undersigned counsel hereby certifies that on this 30th day of July, 2014, a copy of the foregoing was sent via Regular U.S. Mail, postage prepaid, to the following:

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