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7 **SUPERIOR COURT OF ARIZONA**

8 **MARICOPA COUNTY**

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10 STATE OF ARIZONA ex rel. FELECIA A.
ROTELLINI, Superintendent of the Arizona Depart-
ment of Financial Institutions,

11 Plaintiff,

12 v.

13 LANDMARC CAPITAL & INVESTMENT
COMPANY,

14 Defendant.

Case No. CV2009-020595

**RESPONSE AND OBJECTION
TO RECEIVER'S PETITION
NO. 4**

(Assigned to the Honorable
Sam J. Myers)

15 Ryan Rapp & Underwood, P.L.C. ("RRU"), on behalf of the Intervenors (attached
16 list) ("Intervenors"), hereby filed its "Response And Objection To Receiver's Petition No. 4"
17 ("Objection") lodged with the Court on September 17, 2009. Petition No. 4 and the
18 proposed Order for Petition No. 4 filed by the Receiver's counsel contains provisions which
19 are objectionable to the Intervenors and/or are harmful to their rights, titles and interests in
20 assets of the Receivership and fails to provide complete and correct information for the
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1 procedures contemplated for the treatment of such assets in the Receivership. Intervenors'
2 objections are set forth as follows:

3 **I. RRU Provided Receiver's Counsel With Requested Changes, Corrections**
4 **And/Or Additions To Petition No. 4 And Related Documents**

5 RRU discussed with Receiver's counsel Petition No. 4 and a proposed "Agreement to
6 Transfer" that was to implement Petition No. 4 and provide for the transfer of loan assets
7 qualifying under the terms and conditions of Petition No. 4 prior to their filing. Further
8 proposed drafts of a proposed Order for Petition No. 4 and the Agreement to Transfer were
9 provided to Receiver for inclusion in the filing of Petition No. 4, the related order and the
10 Agreement to Transfer, contemplated to be attached as an exhibit to Petition No. 4 and/or the
11 related order. RRU's red-line copy of its requested changes, corrections and/or additions are
12 attached hereto as **Exhibit "A"** (proposed order) and **Exhibit "B"** (agreement to transfer),
13 and incorporated herein.

14 RRU, on behalf of its Intervenors, respectfully requests that the Court consider and
15 grant its request that the changes, corrections and additions reflected on Exhibits A and B be
16 made part of any order entered by the Court on Petition No. 4.

17 **II. The Agreement to Transfer Must be Part Of Any Order**

18 Petition No. 4 merely states (at ¶12) that "Before effectuating the transfer of loans as
19 provided above, all Beneficial Owners of the loan shall execute a joint agreement in a form
20 acceptable to the Receiver that contains the information deemed necessary by the Receiver
21 including ... (specifying information)". The Agreement to Transfer is supposed to be the
22 agreement contemplated by the foregoing language. But, nowhere is it mentioned, nor is it

1 attached to Petition No. 4 and the related proposed order. By failing to provide for and make
2 the Agreement to Transfer a part of the Petition and its order, the procedure becomes
3 arbitrary and lacking in the definitiveness provided by the Agreement to Transfer.

4 The objectionable provision of ¶12 in the Petition No. 4 is carried over to ¶5 of the
5 proposed order on Petition No. 4. As reflected on **Exhibits "A" and "B"**, there are
6 numerous changes, corrections and/or additions that were raised with the Receiver's counsel
7 by RRU on behalf of its Intervenors. But, two issues were salient that RRU stated were
8 unacceptable and unworkable.

9 **III. Unanimous Consent Of The Beneficial Owners Is Unworkable**

10 RRU explained to Receiver's counsel that unanimous consent of the Beneficial Owners
11 of a loan to be transferred under Petition No. 4 was unworkable because (i) one Beneficial
12 Owner of a \$10,000.00 portion of a \$1 million loan could improperly hold up a transfer for
13 all the other Beneficial Owners for any reason whatsoever, and (ii) experience bears out that
14 it is often difficult, and sometimes impossible, to get unanimous consent on anything. RRU
15 explained that this issue is addressed in the bankruptcy context by having the votes of
16 creditors of class carried if by two-thirds in amount of the debt (e.g. \$667,000.00) and one
17 plus one of the number of creditors (e.g. 4 out of 6).

18 RRU requests that the Court consider its recommendation for the transfer of a loan under
19 Petition No. 4, but in any event something less onerous than unanimous consent, which
20 could prove to be unworkable and keep loan assets needlessly held up in the Receivership.

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1 **IV. Indemnification and Release Of Landmarc And Its Agents Is Improper And**
2 **Unacceptable**

3 While RRU and its Intervenors can understand that the Receiver, which is making the
4 determination of a transfer of a loan pursuant to Petition No. 4, may properly request an
5 indemnification and hold harmless form Beneficial Owners for transferring a loan meeting
6 the applicable agreed upon criteria, there is no proper basis for forcing the Beneficial Owners
7 to give the same indemnification and hold harmless to Landmarc and its agents. (See ¶12(f)
8 of Petition No. 4 and ¶5(f) of the related proposed order).

9 Based upon the Complaint and Order To Show Cause establishing the Receivership and
10 the Receiver's Expert Report supporting same that sets forth the wrongdoings and
11 improprieties engaged in by Landmarc and its agents in connection with the Beneficial
12 Owners' loan assets, it would be improper to require the Beneficial Owners to provide any
13 release, indemnification and/or hold harmless to Landmarc and its agents as a condition of
14 having their loan assets transferred; and such a provision is unacceptable to RRU's
15 Intervenors. It should be noted that Section 5 of Receiver's proposed Agreement to Transfer
16 requires a complete release by Intervenors of Landmarc and its agents for virtually
17 everything. Releasing Landmarc and its agents for their wrongdoings cannot be a condition
18 for the release of Intervenors' assets.

19 **V. Review Of Receiver's Refusal To Transfer A Loan Should Be More Timely**

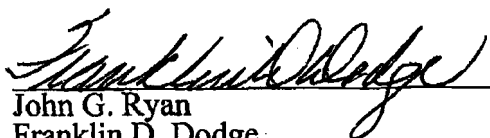
20 Petition No. 4 provides that if a Beneficial Owner is aggrieved by the Receiver's refusal
21 to transfer a loan thereunder, it must wait for sixty (60) days following the entry of the order
22 on Petition No. 4. The Beneficial Owners have been waiting since the commencement of the

1 Receivership in June 2009 for the release of their loan assets, another 60 days from the entry
2 of an order could put matters into the end of the year of next year after filings and a hearing
3 (See ¶13 of Petition No. 4). It is submitted that the loans subject to Petition No. 4 have
4 already been identified and reviewed by the Receiver and that once the order on Petition No.
5 4 is entered, a Beneficial Owner should not have to wait any longer than twenty (20) days to
6 file a petition for release of its loan asset.

7 In light of the foregoing, RRU, on behalf of its Intervenors, respectfully requests that
8 the Court accept the proposed order for Petition No. 4 and the Agreement for Transfer (as
9 may be further amended herein), and, specifically make such amended Agreement to
10 Transfer a part of the order, change the requirement of unanimous consent and do away with
11 the requirement of indemnification for Landmarc and its agents.

12 DATED this 30th day of September 2009.

13 **RYAN RAPP & UNDERWOOD, P.L.C.**

14 
15 John G. Ryan
16 Franklin D. Dodge
17 Timothy C. Dietz
18 Attorneys for Intervenors

17 ORIGINAL electronically filed with
18 the Clerk of the Court this 30th day
19 of September, 2009

19 COPY hand-delivered this 1st day
20 of October, 2009, to:

20 Honorable Sam J. Myers
21 Judge of the Superior Court
22 201 West Jefferson
Phoenix, Arizona 85003

1 COPIES mailed this 30th day of
September, 2009 to:

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7 Department of Financial Institutions
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8 Phoenix, Arizona 85018

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Special Deputy Receiver
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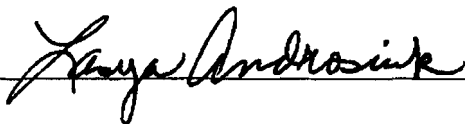
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LIST OF INTERVENORS

TBM Associates, LLC

Eugene and Lenore Schupak Family Trust, dated April 4, 1991

Mark A. Greenberg

Geoff & Katie Ball

Lydia Ball c/o Dr. Richard Ball

Deborah Ball

EXHIBIT "A"

Guttilla Murphy Anderson, P.C.

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Attorneys for the Receiver

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA ex rel. FELECIA
A. ROTELLINI, Superintendent of the
Arizona Department of Financial
Institutions,

Plaintiff,

v.

LANDMARC CAPITAL &
INVESTMENT COMPANY,

Defendant.

Cause No. CV2009-020595
ORDER APPROVING PROCEDURES
FOR TRANSFERING TO NEW
SERVICING AGENT LOANS IN WHICH
OWNERSHIP IS NOT IN DISPUTE
RE: PETITION NO. 4

(Assigned to Judge Robert H. Oberbillig)

The Receiver having filed Petition No. 4, and the Court having considered same, and it appearing to the Court that the matters requested by Petition No. 4 are reasonable, just and appropriate:

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The Receiver is authorized to transfer to a new servicing agent any loan being serviced by Landmarc that meets the following criteria:

a. All of the beneficial owners of the loan must be evidenced by duly recorded Deeds of Trust identifying the beneficial owners or by duly recorded assignments of the beneficial interests under the Deed of Trust and Promissory Note or assignments of a participation interest under the Deed of Trust and Promissory Note (hereafter referred to as the "Beneficial Owners").

b. All Beneficial Owners must agree on the terms of the transfer and the identity of the new servicing agent.

c. The Receiver does not have actual knowledge of a failure or inadequacy of consideration by the Beneficial Owners or the existence of an adverse claim of ownership or security interest in the loan or promissory note.

d. A trustee's sale of the underlying security for the loan has not taken place.

2. The Receiver shall disburse any accumulated payments under the loan held in Landmarc's trust account to the Beneficial Owners in proportion to their respective ownership, after reimbursing Landmarc for any unpaid and earned servicing fees or reimbursable expenses to which Landmarc may be entitled.

3. If Landmarc has no interest in the loan (other than for unpaid and earned servicing fees or reimbursable expenses or a holdback for trust shortage) the Receiver shall, upon receipt of the agreement described in paragraph 5 below, deliver the Loan Documents to (a) the sole Beneficial Owner for servicing by that owner, (b) to an entity designated by Beneficial Owners holding at least 66% of the aggregate beneficial interest of the loan to which beneficial ownership and servicing is transferred, or (c) to a new servicing agent

designated by Beneficial Owners holding at least 66% of the aggregate beneficial interest of the loan, which servicing agent shall be a person licensed as an escrow agent under A.R.S. §6-801 *et seq* or an attorney licensed to practice law in Arizona and exempt from licensing as an escrow agent under A.R.S. §6-811(1).

4. If Landmarc has an interest in the loan, including but not limited to an interest to a portion of the interest payments or a fractional participation interest in the loan, the Receiver shall, upon receipt of the agreement described in paragraph 5 below, ~~obtain new escrow instructions executed by all Beneficial Owners~~ and deliver those instructions and all Loan Documents to a new servicing agent designated by Beneficial Owners holding at least 66% of the aggregate beneficial interest of the loan, which servicing agent shall be a person licensed as an escrow agent under A.R.S. §6-801 *et seq* or an attorney licensed to practice law in Arizona and exempt from licensing as an escrow agent under A.R.S. §6-811(1).

5. Before effectuating the transfer of loans as provided above, all Beneficial Owners of the loan shall execute a joint agreement in a form acceptable to the Receiver that contains the information deemed necessary by the Receiver including (a) an identification of the person who is to receive the loan documents, (b) a release of the Receiver and the Receiver's agents from any liability to the Beneficial Owners of the loan, and (c) an indemnification and hold harmless of the Receiver and their agents from any liability arising from the transfer of the loan. In addition, the Servicing Agent must accept the terms of the transfer.

6. At such time that any portion of the trust shortage is recovered by the Receiver, the Receiver shall disburse the pro-rata share due to the Beneficial Owners in accordance

with the instructions of the Beneficial Owners concerning the distribution of trust funds contained in the agreement described in paragraph 5 above.

Dated this ___ day of _____, 2009.

Judge of the Superior Court

1157-001(86700)

EXHIBIT "B"

**AGREEMENT TO TRANSFER SERVICING OF LOAN
TO NEW SERVICING AGENT**

This Agreement is made ~~between~~ among the Landmarc Capital & Investment Company, ~~and~~ its Receiver appointed by the Arizona Superior Court in the case of *State of Arizona v. Landmarc Capital & Investment Company*, cause number CV2009-020595 (referred to as the "Receiver"), and the Beneficial Owners identified below, regarding the following Loan:

Loan Number: _____

Original Principal Amt: _____

Loan Status: _____

Borrower: [name and address]

Servicing Agent: [name and address]

Beneficial Owner(s): [name and address]

NOW, THEREFORE, it is mutually agreed between the Receiver and the Beneficial Owners that:

1. The Receiver has provided the Beneficial Owners with an accounting of the funds previously received and disbursed by Landmarc under the above Loan and the Beneficial Owners accept that accounting and waive any objection thereto.
2. The Receiver shall transfer the above described loan to the Servicing Agent for servicing in accordance with the terms of this Agreement and shall deliver to the Servicing Agent a copy of Landmarc's loan servicing file, the original Promissory Note, and a copy of the accounting described in paragraph 1 above.
3. The Receiver shall notify the Borrower by first class mail addressed to the Borrower at the address for the Borrower shown above that the servicing for this loan has been transferred and that all future payments and communications regarding the Loan must be directed to the Servicing Agent.
4. The Beneficial Owners hereby, on their own behalf and on behalf of their attorneys, employees, partners, agents, predecessors, successors, assigns, and legal representatives, release and forever discharge the Receiver and the Receiver's attorneys, employees, agents, predecessors, successors, assigns, assignors, and legal representatives from any and all claims of any kind or nature arising out of the above Loan.
5. ~~The Beneficial Owners hereby, on their own behalf and on behalf of their attorneys, employees, partners, agents, predecessors, successors, assigns, and legal representatives, release and forever discharge Landmarc from any and all claims of any kind or nature arising out of the above Loan, provided that this release does not bar the Beneficial Owners from filing with the~~