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9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
10
11 IN AND FOR THE COUNTY OF MARICOPA

12 STATE OF ARIZONA ex rel. ROBERT)
13 D. CHARLTON, Superintendent of the)
14 Arizona Department of Financial)
15 Institutions,)
16 Plaintiff,)
17 v.)
18 LANDMARC CAPITAL &)
19 INVESTMENT COMPANY,)
20 Defendant.)

Cause No. CV2009-020595

PETITION NO. 105

PETITION FOR APPROVAL OF
SETTLEMENT AGREEMENT WITH
CHASE BANK RE: LEHMAN LOAN

(Assigned to the Honorable Daniel Martin)

21 Robert D. Charlton, as the Superintendent of the Arizona Department of Financial
Institutions and the court appointed Receiver in this matter, respectfully petitions the Court as
follows:

1. On June 24, 2009, this Court entered its *Order Appointing Receiver and Order to Show Cause*, which appointed the Superintendent of the Arizona Department of Financial Institutions as Receiver of Landmarc Capital & Investment Company (“Landmarc”). On July 10, 2009, this Court entered its *Order Appointing Permanent Receiver and Injunction*. On February 27, 2010, the Court entered its *Order Placing Hayden Investments, LLC, Desert*

1 *Trails Holdings, LLC and Arizona Valuation Company, LLC in Receivership*. On May 12,
2 2010, the Court entered its *Amended Order Appointing Permanent Receiver and Injunction*
3 (collectively “Receivership Order”). The Receivership Order appointed Thomas Giallanza as
4 Deputy Receiver to carry on the day to day business of Landmarc.

5 **The Landmarc Loan to Philip & Kristian Lehman (#07061129)**

6 2. On July 12, 2007, Landmarc made a loan to Philip and Kristian Lehman (the
7 “Lehmans”) in the amount of \$317,000.00 and evidenced by a promissory note dated July 12,
8 2007 (the “Landmarc Loan”). The Landmarc Loan was secured by that certain Deed of Trust
9 recorded on July 20, 2007, as Instrument No. 200828155, with the Maricopa County
10 Recorder (the “Landmarc Deed of Trust”) constituting a valid and proper lien upon
11 residential real property located at 8002 N. 5th Ave., Phoenix, AZ 85021 (“Property”).

12 **Beneficial Ownership of the Landmarc Loan**

13 3. The electronic database of Landmarc shows that the beneficial interests in the
14 Lehman Loan as of the date of the commencement of this receivership were held by the
15 following (collectively referred to hereafter as the Participants”):

16 Landmarc (80.97)
17 Walkerton Investments, LLC (19.03%)

18 4. Walkerton Investments, LLC (“Walkerton”) failed to file a claim with the
19 Receiver regarding its interest in the Landmarc Loan. However, the Receiver believes that
20 this failure may be excusable and that to the extent there are any funds available under the
21 Landmarc Loan for distributions to the beneficial owners, Walkerton’s interest in the
Landmarc Loan should be recognized by the Court.

1 **The Chase Loan**

2 5. On or about August 29, 2008, Premium Capital Funding, LLC (“Premium
3 Capital”) made a loan to the Lehmans in the principal amount of \$351,443.00. The Premium
4 Capital loan was secured by a deed of trust encumbering the Property recorded September 17,
5 2008 as Instrument No. 2008803922 with the Maricopa County Recorder (the “Premium
6 Capital Deed of Trust”).

7 6. The Premium Capital loan and the Premium Capital Deed of Trust were
8 subsequently assigned to JPMorgan Chase Bank (“Chase”) pursuant to an Assignment of
9 Deed of Trust recorded on April 5, 2012, as Instrument No. 20120284776, with the Maricopa
10 County Recorder (the “Chase Loan”). The lien of the Premium Capital Deed of Trust was
11 insured by Fidelity National Title Company (“Fidelity”).

12 **Modification of the Landmarc Loan**

13 7. On August 28, 2008, Landmarc and the Lehmans entered into a Modification
14 Agreement under which Landmarc agreed to reduce the principal balance due under the
15 Landmarc Note to \$56,500 as part of the Lehmans effort to obtain a loan from Premium
16 Capital. It was apparently contemplated by the parties that Landmarc would subordinate the
17 Landmarc Deed of Trust to the Premium Capital Deed of Trust. For reasons that remain
18 unknown or in dispute, Landmarc never executed or recorded a subordination agreement
19 subordinating its lien to the lien obtained by Premium Capital and subsequently assigned to
20 Chase.

21

1 **Foreclosure Proceedings and the Lehman Bankruptcies**

2 8. The Lehmans defaulted under the Chase Loan and on June 14, 2016, Chase
3 caused a Notice of Trustee’s Sale to be recorded. The Lehmans failed to make payments
4 under the Landmarc Loan, as modified, and on September 28, 2016, the Receiver caused a
5 Notice of Trustee’s Sale to be recorded.

6 9. In response to the foreclosure actions by Chase and the Receiver, Philip
7 Lehman filed a voluntary petition in bankruptcy under Chapter 13 on January 3, 2017. This
8 bankruptcy filing resulted in Chase and Landmarc being stayed from completing their
9 respective foreclosure actions under 11 U.S.C. §362. The Philip Lehman bankruptcy was
10 later dismissed. However, before Chase and Receiver could conduct their trustee sales,
11 Kristian Lehman filed a voluntary petition in bankruptcy under Chapter 13 (the “Kristian
12 Lehman Bankruptcy”), again staying Chase and Landmarc from completing their respective
13 foreclosure actions.

14 **Adversary Litigation in Bankruptcy Court**

15 10. Chase asserted among other things that its lien was superior to that held by
16 Landmarc and the Receiver disagreed. As part of that dispute, on February 28, 2018, Chase
17 sought representation from Fidelity and Fidelity filed an adversary complaint in the name of
18 Chase (Adversary No. 2:18-ap-00073-BKM) (the “Chase Complaint”) against the Lehmans
19 and Landmarc.

20 11. The Chase Complaint sought, among other things, a declaration that the
21 Landmarc Deed of Trust is junior to the Premium Capital Deed of Trust that had been

1 assigned to Chase (the “Lien Priority Dispute”). Landmarc has contested the relief sought by
2 Chase in the Chase Complaint and the Lehmans took no position as to which lienholder is in
3 first lien position.

4 12. Chase and Landmarc agreed to mediate the Lien Priority Dispute before the
5 Honorable Paul Sala. At the outset of the mediation, counsel for Kristian Lehman
6 encouraged Chase and Landmarc to resolve the Lien Priority Dispute but did not participate
7 further in the mediation. As a result of this mediation, Chase and Landmarc settled the Lien
8 Priority Dispute as reflected in the Settlement Agreement attached to this Petition as **Exhibit**
9 **“1”**. The Settlement Agreement is conditioned on the approval of the Receivership Court in
10 the Receivership Action.

11 13. Although it is unclear whether stay relief is required, in an abundance of
12 caution Chase and Landmarc filed a joint motion seeking an order modifying the automatic
13 stay of 11 U.S.C. §362 for the limited purpose of obtaining approval by the Receivership
14 Court of the Settlement Agreement. On August 7, 2018, the Court in the Kristian Lehman
15 Bankruptcy granted the requested stay relief by entering its *Order Granting Motion for Relief*
16 *from the Automatic Stay*, a copy of which is attached hereto as **Exhibit “2”**. This Petition
17 was then filed by the Receiver to obtain such approval.

18 WHEREFORE, the Receiver respectfully requests that the Court enter an order:

- 19 1. Approving the Settlement Agreement attached hereto as **Exhibit “1”**;
- 20 2. Authorizing the Receiver to apply the proceeds received under the Settlement
21 Agreement to reimburse the receivership for the expenses incurred in preserving the

1 Landmarc Loan, including the legal fees incurred in connection with the Lehman
2 Bankruptcies and the Lien Priority Dispute, and then distributing any remaining funds, if any,
3 to the beneficial owners in the percentages reflected in the records of Landmarc and set forth
4 above; and

5 3. Granting such other relief as the Court deems appropriate.

6 Respectfully submitted this 28th day of August, 2018.

7 GUTTILLA MURPHY ANDERSON, P.C.

8 /s/Patrick M. Murphy
9 Patrick M. Murphy
10 Attorneys for the Receiver

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12 1157-001 (329198)