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

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. 100
PETITION
FOR QUIET TITLE AND OTHER
RELIEF
(Assigned to the Honorable Daniel Martin)

21 _____)
22 ROBERT D. CHARLTON,)
23 Superintendent of the Arizona)
24 Department of Financial Institutions, as)
25 Receiver of Landmarc Capital &)
26 Investment Company,)
27 Petitioner,)
28 v.)
29 TODD POIRIER, and WESTEND)
30 INVESTMENTS, LLC, an Arizona)
31 limited liability company,)
32 Respondents.)

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

4 **The Parties**

5 1. Petitioner is Robert D. Charlton, the Superintendent of the Arizona Department
6 of Financial Institutions, in his capacity as the Receiver of Landmarc Capital & Investment
7 Company (“Landmarc”), Hayden Investments, LLC, Desert Trails Holdings, LLC, Arizona
8 Valuation Company, LLC, Hayden Insurance Ltd., and Desert Trails Insurance Co. (“Desert
9 Trails”). On June 24, 2009, the Court entered its *Order Appointing Receiver and Order to*
10 *Show Cause*, which appointed the Superintendent of the Arizona Department of Financial
11 Institutions as Receiver of Landmarc. On July 10, 2009, the Court entered its *Order*
12 *Appointing Permanent Receiver and Injunction*. On February 27, 2010, the Court entered its
13 *Order Placing Hayden Investments, LLC, Desert Trails Holdings, LLC and Arizona*
14 *Valuation Company, LLC in Receivership*. On February 27, 2010, the Court entered its
15 *Order Placing Hayden Insurance Ltd. and Desert Trails Insurance Co. in Receivership*. On
16 May 12, 2010, the Court entered its *Amended Order Appointing Permanent Receiver and*
17 *Injunction*. The above orders are referred to hereafter collectively as the “Receivership
18 Order”. The Receivership Order appointed Thomas Giallanza as the Deputy Receiver to
19 carry on the day to day business of the receivership.

20 2. Respondent Todd Poirier (“Poirier”) is believed to currently reside in the State
21 of Oregon.

1 3. Respondent Westend Investments, LLC (“Westend”), is an Arizona limited
2 liability company originally formed by Robert J. Palm (“Palm”) and Poirier to develop the
3 property that is the subject of this action.

4 **The Secured Loan to Westend Investment, LLC**

5 4. On or about April 18, 2006, Landmarc loaned \$2,500,000 to Westend which
6 was secured by approximately 664 acres of vacant rural land under a deed of trust recorded
7 with the Yavapai County Recorder (“Loan”). According to Landmarc’s records, participation
8 interests in the Loan were sold to various warehouse and participation lenders resulting in the
9 beneficial ownership of the Loan, at the time of the Receiver’s appointment, being held as
10 follows: 50% by The Eugene and Lenore Schupak Family Trust dated April 4, 1991
11 (“Schupak”); 30.6% by The Gubin Family Trust (“Gubin”); 8.8% by the Wesley A. &
12 Marlene White Trust (“White”); 4.8% by Desert Trails; 3.2% by Station Park South, LLC
13 (“Station”); and 2.6% by LazyE, LLC (“LazyE”). Pursuant to a settlement with the Receiver,
14 LazyE assigned its 2.6% interest in the Loan to the Receiver¹, which, together with the
15 interest of Desert Trails, resulted in the Receiver holding a 7.4% beneficial interest in the
16 Loan.

17 **The Property**

18 5. This Petition seeks relief with respect to approximately 664 acres of vacant land
19 located in Yavapai County and legally described in **Exhibit 1** attached hereto (“Property”),

20 ¹ On November 9, 2010, the Court entered its *Order Re: Petition No. 35*, approving the
21 settlement between the Receiver and LazyE, LLC and affiliated entities under which, among
other things, LazyE, LLC agreed to assign its interest in the Loan to the Receiver.

1 including a judgment to quiet title to the Property. Landmarc holds fee title to the Property
2 for the benefit of various claimants as previously confirmed by the orders of this Court. The
3 Receiver is of the opinion that the Property has a fair market value of at least \$1,300,000.
4 The Receiver has attempted to actively market the Property for sale and is currently in
5 negotiations with a prospective buyer. However, a preliminary title report obtained by the
6 Receiver indicates that there is a cloud on the title to the Property as further described herein.
7 Until that cloud on the title has been resolved by the entry of the relief requested herein, the
8 Receiver will be unable to sell the Property for its fair market value. The cloud on the title to
9 the Property sought to be resolved herein is the result of clerical errors in prior recorded deeds
10 to the Property.

11 6. Palm and Poirier acquired title to the Property pursuant to a *Trustee's Deed*
12 recorded with the Yavapai County Recorder on September 14, 1992, at Book 2531, Page 973.
13 The *Trustee's Deed* was issued following the foreclosure of a Deed of Trust beneficially
14 owned by Churchill and Janet Bell. The *Trustee's Deed* incorrectly described parcel 3 of the
15 Property by inserting the word "of" where it should have used a comma. A copy of the
16 *Trustee's Deed* is attached as **Exhibit 2**. Subsequently a *Quit Claim Deed* was executed by
17 the Bells and recorded with the Yavapai County Recorder on February 12, 1997, at Book
18 3357, Page 025, correcting the legal description ("Bell Corrective Deed"). The Bell
19 Corrective Deed stated as follows: "This Quit Claim Deed is to clear title due to a
20 typographical error on the Legal Description on previous deeds." A copy of the Bell
21 Corrective Deed is attached as **Exhibit 3**.

1 7. The correct description of parcel 3 of the Property, set forth in the attached
2 **Exhibit 1** and in the Bell Corrective Deed (**Exhibit 3**), reads in relevant part as follows:

3 Lots 1,2,3,4,5,7,8 and 9, the South half of the Northeast quarter, the Southeast
4 quarter of the Northwest quarter, and the Northeast quarter of the Southeast
5 quarter of Section 1, Township 12 North, Range 1 East of the Gila and Salt
6 River Base and Meridian, Yavapai County, Arizona [emphasis added]

7 8. The incorrect legal description of parcel 3 of the Property contained in the
8 *Trustee's Deed* (**Exhibit 2**), and repeated in certain deeds thereafter, read in relevant part as
9 follows:

10 Lots 1,2,3,4,5,7,8 and 9, the South half of the Northeast quarter of the Southeast
11 quarter of the Northwest quarter, and the Northeast quarter of the Southeast
12 quarter of Section 1, Township 12 North, Range 1 East of the Gila and Salt
13 River Base and Meridian, Yavapai County, Arizona [emphasis added]

14 9. If read literally, the mistaken use of the word “of” in place of a comma would
15 result in the exclusion of approximately 240 acres in the middle of Section 1 of Township 12
16 North, Range 1 East. Neither Palm nor Poirier, nor any taxing authorities or secured
17 lienholders have at any time treated the Property as excluding the 240 acres described above.

18 10. On September 4, 2001, Palm recorded a *Special Warranty Deed* (attached as
19 **Exhibit 4**) conveying his undivided one-half interest in the Property to Westend, which was
20 recorded with the Yavapai County Recorder at Book 3860, Page 591. On September 4, 2001,
21 Poirier recorded a *Special Warranty Deed* (attached as **Exhibit 5**) conveying his undivided
one-half interest in the Property to Westend, which was recorded with the Yavapai County
Recorder at Book 3860, Page 592. Westend is an Arizona limited liability company formed
by Palm and Poirier to develop the Property. Unfortunately, these Special Warranty Deeds to

1 Westend contained the incorrect legal descriptions contained in the original *Trustee's Deed*,
2 rather than the corrected legal description used in the Bell Corrective Deed (**Exhibit 3**).

3 11. At the Receiver's request, Palm has executed a Quit Claim Deed conveying any
4 and all interest he has in the Property as legally described in the attached **Exhibit 1** to
5 Landmarc and that deed was recorded on January 20, 2017, with the Yavapai County
6 Recorder at document number 20-0003412. Poirier has refused repeated requests by the
7 Receiver to execute a Quit Claim Deed or other corrective deed.

8 **Petitioner's Estate in the Property**

9 12. At the time Westend applied for its Loan from Landmarc, it represented to
10 Landmarc that it owned all of the 664 acres described as Parcel Numbers 500-09-001, 500-
11 09-002, and 500-09-003 in Yavapai County. In addition, Westend represented to Landmarc
12 that this property had a present market value of \$6,400,000 with existing liens of
13 \$3,761,313.86. Parcel Numbers 500-09-001, 500-09-002, and 500-09-003 were identified at
14 the time by Yavapai County (*see* **Exhibit 6** attached hereto) as including all of Section 1 and
15 a portion of Section 2, all of which was consistent with the correct legal description attached
16 as **Exhibit 1**. Under the terms of the Loan, a portion of the loan proceeds were to be applied
17 to the existing debt on the Property and the remaining debt would be subordinated to
18 Landmarc. In making the Loan to Westend, Landmarc relied on a 2005 land survey which
19 was recorded on September 13, 2005, with the Yavapai County Recorder at Book 131 of
20 Land Surveys, Page 83 ("2005 Survey"). The 2005 Survey included all of the land within
21 Section 1 of Township 13 North, Range 1 and 2 East of the Gila and Salt River Base and

1 Meridian, described as lots 1 thru 16. A copy of the 2005 Survey is attached as **Exhibit 7**.
2 The appraisal obtained by Landmarc also included all of the land within Section 1 as well as a
3 portion of Section 2. It is clear that all of the parties to the loan believed that all of Section 1
4 was included in the Property that would secure the Deed of Trust.

5 13. To secure the Loan from Landmarc, Westend executed a *Deed of Trust and*
6 *Assignment of Rents* for the benefit of Landmarc, which was recorded with the Yavapai
7 County Recorder on April 27, 2006, at Book 4389, Page 331 (“Westend DOT”). The
8 Westend DOT identified the Property securing the debt as Parcel Numbers 500-09-001, 500-
9 09-002, and 500-09-003, but included as an exhibit the incorrect legal description of parcel 3
10 that had been contained in the original *Trustee’s Deed*. A copy of the Westend DOT is
11 attached as **Exhibit 8**.

12 14. Landmarc sold a participation interest in the Loan and the Westend DOT to
13 Schupak and recorded an *Assignment of Deed of Trust* with the Yavapai County Recorder on
14 April 27, 2006, at Book 4389, Page 332.

15 15. In an effort to prepare the Property for development, Westend caused a new
16 survey to be made of the Property by Arizona Engineering Company for the purpose of,
17 among other things, dividing the Property into five parcels. This survey was recorded on
18 October 27, 2006, at Book 158 of Surveys, Page 52 of the records of the Yavapai County
19 Recorder (“2006 Survey”) and a copy is attached hereto as **Exhibit 9**. Westend then
20 recorded a Quit Claim Deed to itself in an attempt to revise the legal description to refer to
21 the five newly created parcels (“Westend QCD”). A copy of the Westend QCD is attached as

1 **Exhibit 10.** The legal descriptions contained in the Westend QCD encompasses the entirety
2 of the Property described in **Exhibit 1** and makes it clear that Westend clearly viewed the
3 entirety of the Property to have been conveyed to it by Poirier and Palm.

4 16. Westend subsequently defaulted under the Loan and Landmarc and Schupak
5 foreclosed under the Westend DOT. On December 7, 2007, a *Trustee's Deed Upon Sale* was
6 recorded with the Yavapai County Recorder at Book 4559, Page 688, vesting Landmarc and
7 Schupak with title ("TDUS"). The TDUS included the incorrect legal description of the
8 Property. A copy of the TDUS is attached as **Exhibit 11**. In order to facilitate the Receiver's
9 management and disposition of the Property but without relinquishing it's 50% beneficial
10 interest in the Property, Schupak subsequently quit claimed to the Receiver its 50% fee title
11 interest.

12 **Real Property Taxes**

13 17. Palm paid the real property taxes assessed on the entirety of the Property
14 (Parcels 500-09-001, -002 & -003) for the tax years 2003 through 2005. Landmarc paid the
15 taxes assessed on the entirety of the Property for the tax year 2006 and 2007 in its capacity as
16 the Lender, and for all subsequent tax years Landmarc or Schupak, as the owners of the
17 Property following the foreclosure of the Westend DOT, paid the real property taxes assessed
18 on the entirety of the Property.

19 18. Upon information and belief Palm or Poirier paid the real property taxes
20 assessed on the entirety of the Property (Parcels 500-09-001, -002 & -003) for the tax years
21 1993 through 2003.

1 **Respondents' Refusal to Clear Title**

2 19. Poirier has refused the Receiver's repeated requests to execute a corrective deed
3 to remove the cloud on Landmarc's title to the Property. On December 8, 2016, the
4 Receiver's counsel wrote a letter to Poirier requesting that he execute and return a Quit Claim
5 Deed to clear the title to the Property. This letter was sent by regular mail and certified mail
6 to an address of a business that Poirier owned. The certified letter was returned with a
7 forwarding address so on January 26, 2017, Receiver's counsel wrote another letter to Poirier
8 requesting that he execute and return a Quit Claim Deed to clear title to the Property, which
9 letter was sent to the forwarding address provided by the postal service. Again Poirier
10 ignored the request. Accordingly the Receiver is entitled to his costs in filing and serving this
11 action and to an award of reasonable attorney's fees. As a result of Respondent Poirier's
12 refusal to execute a quit claim deed to Landmarc, the Receiver is informed and believes that
13 Respondent Poirier makes a claim to the Property that is adverse to the Receiver.

14 20. The Receiver has also been unsuccessful in obtaining a corrective deed from
15 Westend. On March 29, 2017, the Receiver's counsel wrote a letter to Westend requesting
16 that it execute and return a Quit Claim Deed to clear the title to the Property. The letter to
17 Westend was mailed in care of the statutory agent for Westend at the address shown in the
18 records of the Arizona Corporation Commission. The letter to Westend was returned by the
19 U.S. Postal Service as "Undeliverable as Addressed" and "Unable to Forward." The
20 Receiver is informed and believes that Respondent Westend makes a claim to the Property
21 that is adverse to the Receiver.

1 **Respondents' Failure to File Claims as Required by this Court**

2 21. On August 6, 2010, this Court entered its *Order Establishing Procedures for*
3 *the Adjudication of Claims, Re: Petition No. 27* ("Order 27"), which established procedures
4 for the Receiver to solicit and adjudicate claims by anyone asserting an interest in the assets
5 of Landmarc, Hayden Investments, LLC ("Hayden"), Desert Trails Holdings, LLC ("Desert
6 Trails") or Arizona Valuation Company, LLC ("Arizona Valuation").

7 22. Order 27 set deadlines for filing claims with the Receiver ("Claims Bar Date").
8 Order 27 set September 24, 2010, as the Claims Bar Date for all claims other than non-loan
9 participation claims by Landmarc Capital Partners, LLC ("Partners"). Although Poirier and
10 Westend had actual or constructive notice of Order 27 and the Claims Bar Date, neither filed
11 a claim by the Claims Bar Date asserting an interest in the Property.

12 **Beneficial Ownership of the Property**

13 23. By its previous orders, the Court has confirmed the beneficial ownership of the
14 Property in the following persons (collectively referred to hereafter as the "Beneficial
15 Owners") as follows:

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| <u>Beneficial Owner</u> | <u>Percentage Ownership</u> | <u>Order²</u> |
|--|-----------------------------|--------------------------|
| The Eugene and Lenore Schupak Family Trust | 50.0% | 43 |
| The Gubin Family Trust | 30.6% | 43 |
| Wesley A. & Marlene White Trust | 8.8% | 43 |
| Receiver | 7.4% | 43 & 54 |
| Station Park South, LLC | <u>3.2%</u> | 54 |
| | 100.0% | |

WHEREFORE the Petitioner respectfully requests that the Court:

1. Enter Judgment against Poirier and Westend as follows:
 - a. Declaring that the Receiver is the owner of record and holds legal title to the approximately 664 acres of vacant land located in Yavapai County, which is legally described in the attached Exhibit 1;
 - b. Declaring that title to the Property is held by the Receiver for the benefit of the Beneficial Owners in the percentages determined under the prior orders of the Court as described herein;
 - c. Declaring that Poirier and Westend have no interest in the Property, legal or otherwise and are barred and forever estopped from having or claiming any right or title to the Property adverse to the Receiver or to Landmarc or its successors; and

² On July 11, 2011, the Court entered its *Order Approving Receiver's Recommendations Regarding Warehouse Credit Facility Claims, Re: Petition No. 43*, which among other things, confirmed the beneficial interests in the Property held by The Eugene and Lenore Schupak Family Trust, The Gubin Family Trust, the Wesley A. & Marlene White Trust, and the Receiver as the successor in interest to LazyE, LLC. On May 21, 2012, the Court entered its *Order Deferring Resolution of the Claimed First Out Rights and Claimed Interests in the Presidio 197 Loan and Approving Remaining Recommendations of the Receiver, Re: Petition No. 54*, which among other things, confirmed the remaining beneficial interests in the Property held by Station Park South, LLC and Desert Trails Insurance, in receivership.

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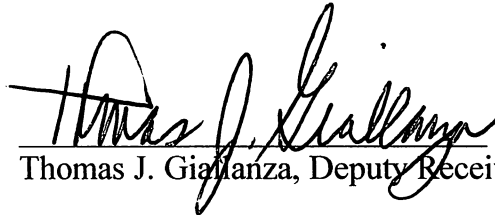
Verification

I, Thomas J. Giallanza, do hereby declare as follows:

I am the court appointed Deputy Receiver of Landmarc Capital & Investment Company; that I have read the foregoing *Petition No. 100, Petition for Quiet Title and Other Relief* and know the contents thereof; that the matters and things contained therein are true in substance and in fact, to the best of my information, knowledge and belief, except as to those matter and things alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of April, 2017, in Phoenix, Arizona.


Thomas J. Giallanza, Deputy Receiver