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6
7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8
9 IN AND FOR THE COUNTY FO MARICOPA

10 STATE OF ARIZONA ex rel. LAUREN)
KINGRY, Superintendent of the Arizona)
Department of Financial Institutions,)
11 Plaintiff,)
v.)
12 LANDMARC CAPITAL &)
INVESTMENT COMPANY,)
13 Defendant.)

Cause No. CV2009-020595

PETITION NO. 47

PETITION TO CONFIRM SALE OF
REAL PROPERTY LOCATED AT 2092
N. WHISPERING BELLS DRIVE,
TUCSON, ARIZONA 85745

14)
15)
16 _____
Lauren Kingry, as the court appointed Receiver, respectfully petitions the Court as
17 follows:

18 1. On June 24, 2009, this Court entered its *Order Appointing Receiver and Order*
19 *to Show Cause*, which appointed the Superintendent of the Arizona Department of Financial
20 Institutions as Receiver of Landmarc Capital & Investment Company (“Landmarc”). On July
21 10, 2009, this Court entered is *Order Appointing Permanent Receiver and Injunction*. On

1 February 27, 2010, the Court entered its *Order Placing Hayden Investments, LLC, Desert*
2 *Trails Holdings, LLC and Arizona Valuation Company, LLC in Receivership*. On May 12,
3 2010, the Court entered its *Amended Order Appointing Permanent Receiver and Injunction*
4 (collectively “Receivership Order”). The Receiver Order appointed Thomas Giallanza as
5 Deputy Receiver and authorized the Receiver to engage and employ Special Deputy
6 Receivers to carry on the day to day business of Landmarc.

7 **Confirmation of Sale of the Property Located at 2092 N. Whispering Bells Drive,**
8 **Tucson, Arizona**

9 2. On or about March 31, 2008, Landmarc funded Loan No. 08021885 for
10 \$1,500,000 (“Loan”) to Ray and Olga Diaz (“Borrower”) for the purpose of constructing a
11 single family residence on property located at 2092 North Whispering Bells Drive, Tucson,
12 Arizona 85745 (“Property”). The Property is legally described in Exhibit “1” attached hereto.
13 The Property secured the Loan under a Deed of Trust recorded on April 9, 2008, with the
14 Pima County Recorder at Docket 13281, Page 3998 (“DOT”). The Borrower subsequently
15 defaulted and the Receiver foreclosed on the Loan and DOT resulting in the issuance of a
16 Trustee’s Deed recorded with the Pima County Recorder on December 7, 2009 at Docket
17 13699, Page 158, vesting title to the Property in the name of Thomas J. Giallanza, as Deputy
18 Receiver of Landmarc.

19 3. According to Landmarc’s records, Landmarc Capital Partners (“Partners”)
20 acquired a 70.667% interest in the Loan. However, four separate assignments were recorded
21 with the Pima County Recorder by Landmarc prior to the Receivership purporting to convey

1 to Partners a total of 75.813% beneficial interest under the DOT as follows: 58.48% by
2 assignment recorded August 04, 2008, at Docket 13362, Page 1822; 4.00% by assignment
3 recorded October 09, 2008, at Docket 13409, Page 745; 10.00% by assignment recorded
4 October 09, 2008, at Docket 13409, Page 746; 3.33% by assignment recorded October 09,
5 2008, at Docket 13409, Page 747. The discrepancy between what interest Landmarc's
6 records show is held by Partners and the total of the recorded assignments will be resolved in
7 the Receiver's claims report on the Loan Participation Claims which has not yet been filed.

8 4. On or about September 23, 2010, the Receiver received a proof of claim filed
9 by the Borrower ("Claim No. 6811") asserting a claim in the amount of \$450,000, which was
10 identified as a direct claim against Landmarc for which no other entity is liable. When asked
11 for an explanation of the claim the Borrower responded by stating that they believed that
12 Landmarc had stopped funding the Loan in October 2008 and therefore Landmarc had
13 illegally foreclosed on the Loan. In his explanation received on March 31, 2011, the
14 Borrower attempted to modify his claim by seeking \$550,000 in losses or the return of the
15 Property. Since the increased amount and the request for a return of the Property is a material
16 change in Claim No. 6811 which was filed after the Claims Bar Date, it should not be
17 allowed and the sale of the Property described herein should be approved with no restriction
18 on the disposition of the net sale proceeds. The merits of Claim No. 6811 will be determined
19 at a later date; however, the Property should be sold free and clear of any claimed interest of
20 the Borrower.

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1 5. On or about September 15, 2010, the Receiver received a proof of claim filed
2 by Los Arroyos del Oeste Homeowners Association (“Claim No. 8432”) in the amount of
3 \$1,678.20, together with subsequent assessment, which the claimant asserts is secured by the
4 Property. The Receiver intends to instruct the escrow agent to satisfy the secured portion of
5 this claim from the proceeds resulting from the sale of the Property. The Los Arroyos del
6 Oeste Homeowners Association asserts a secured interest in the Property for assessments and
7 certain other charges pursuant to the Declaration of Covenants, Conditions and Restrictions
8 for Los Arroyos Del Oeste, recorded with the Pima County Recorder on March 22, 1996 at
9 Docket 10257, Page 1615, as thereafter amended.¹

10 6. The Property consists of the real estate and an uncompleted single family
11 residence. According to the appraisals which have been done on this Property, the pool and
12 spa require completion, the interior and exterior walls are not complete, the interior has
13 exposed steel stud walls separating various living areas, the concrete pad is only partially
14 poured, and none of the flooring, lighting or plumbing fixtures or appliances have been
15 installed. The Property necessitates the expenditures of time and funds by the Receiver to
16 provide security and insurance for the Property and therefore the continued holding of the
17 Property is not necessary or appropriate to protect the interests of any of the persons
18 interested in this receivership. Accordingly, the Receiver commenced efforts to market and
19 sell the Property.

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21 ¹ A second Declaration was recorded on April 12, 1996 with the Pinal County Recorder in Docket
10272, Page 2642 and thereafter a First Amendment recorded in Docket 10553, Page 419 re-recorded
at Docket 10539, Page 798 and a Second Amendment recorded in Docket 10780, Page 1123.

1 7. On February 10, 2010 C.S. Smith of Sweetwater Appraisal Group, PLLC
2 submitted an appraisal of the Property which indicated a fair market value for the Property of
3 \$700,000. C.S. Smith has been issued Certificate No. 10506 by the State of Arizona as a
4 Certified Residential Estate Appraiser. The Receiver has agreed to pay this appraiser a fee of
5 \$850 for this appraisal and the appraiser has no known interest in any of the parties or in the
6 sale of the Property.

7 8. On June 6, 2011, Jeffrey C. Patch of Tucson Real Estate Appraisal submitted an
8 appraisal of the Property which indicates a current fair market value for the Property of
9 \$400,000. Jeffrey C. Patch has been issued Certificate No. 30263 by the State of Arizona as a
10 Certified Residential Estate Appraiser. The Receiver has agreed to pay this appraiser a fee of
11 \$600 for this appraisal and the appraiser has no known interest in any of the parties or in the
12 sale of the Property.

13 9. In addition, the Receiver engaged the services of Henry K. Zipf of Henry Zipf
14 Realty Co, to market the Property, under which the Receiver agreed to pay a 6% sales
15 commission, subject to the approval of this Court.

16 10. The Property was originally listed for sale on March 10th, 2010, for
17 \$749,000.00. The list price was reduced to \$725,000 in July of 2010. The list price was
18 further reduced in October of 2010 to \$695,000, again in December of 2010 to \$670,000 and
19 finally to \$599,900.00 on March 3, 2011. During the past year and a half or so the property
20 has attracted a tremendous amount of activity. It has been shown by Tucson Realtors
21 throughout the community hundreds of times. The property has also been seen by many

1 unrepresented principals. Although the listing is well known in the Tucson community it has
2 resulted in only two offers. Both offers were from investors and were received early in the
3 properties marketing history. On July 2, 2010, the Receiver received an offer to purchase the
4 Property for \$150,000 and on July 9, 2010, the Receiver received another offer to purchase
5 the Property for \$265,000. The Receiver determined that these offers were not even
6 sufficient to warrant efforts to negotiate a higher price and therefore the Receiver let the
7 offers expire.

8 11. Recently the Receiver's agent, Mr. Zipf, was in discussions with the investor
9 who had purchased the Shannon property from the Receiver under which the investor
10 intended to offer \$300,000 for the Property with Landmarc carrying nearly the entire
11 purchase price for five years. In light of the offer described below this investor never
12 followed through with his offer.

13 12. On April 21, 2011, the Receiver received an offer from Anthony and Linda
14 Hollars to purchase the Property for \$450,000 under terms that were not acceptable to the
15 Receiver. The Receiver thereafter submitted to Buyer a counter offer which has been
16 accepted. These documents constitute the Purchase Agreement and are attached hereto as
17 Exhibit "2". The Purchase Agreement provides for the sale of the Property for \$450,000 in
18 cash. The sale contemplated under Exhibit "2" is conditioned upon, and will not take place in
19 the absence of, an order of this Court approving such sale after notice and a hearing.

20 13. In accordance with this Court's Order Re: Petition Number 2, the Receiver:
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1 a. Has mailed a copy of this Petition, the proposed order, and the Notice of
2 Hearing, to all persons on the Master Service List as indicated in the Proof of Mailing
3 filed herewith;

4 b. Has mailed a copy of the Petition, the proposed order, and the Notice of
5 Hearing, to the Borrower, as indicated in the Proof of Mailing filed herewith;

6 c. Has mailed a copy of the Petition, the proposed order, and the Notice of
7 Hearing, to Arroyos del Oeste Homeowners Association, in care of its legal counsel, as
8 indicated in the Proof of Mailing filed herewith; and

9 d. Intends to publish notice of this sale in a newspaper of general
10 circulation within the county in which this action is pending and within the county in
11 which the Property is located.

12 14. The Receiver recommends that the Property be sold for the price and under the
13 terms set forth in the Purchase Agreement attached as Exhibit “2”, which the Receiver
14 believes are in the best interests of the receivership estate.

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

16 1. Approving the sale as set forth in the Purchase Agreement attached as Exhibit
17 “2” to this Petition of the Property legally described in Exhibit “1”.

18 2. Declaring that Claim No. 6811 filed by Ray & Olga Diaz does not assert an
19 interest in the Property and does not prevent disposition of the net sale proceeds to the
20 beneficial owners under the orders of this Court.

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3. Authorizing the Receiver to satisfy the secured claim of Arroyos del Oeste Homeowners Association under Claim No. 8432 from the proceeds of the sale of the Property.

4. Authorizing Thomas Giallanza, as Deputy Receiver, to execute all necessary documents in connection with the sale of the Property confirmed by the Court.

Respectfully submitted this 14th day of June, 2011.

GUTTILLA MURPHY ANDERSON

/s/Patrick M. Murphy
Patrick M. Murphy
Attorneys for the Receiver

1157-001(107747)