**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

CITY OF DEARBORN,

Plaintiff/Counter-Defendant/Appellee,

v

BANK OF AMERICA, N.A., as successor-in-interest to STANDARD FEDERAL BANK, N.A.,

Defendant/Counter-Defendant/Appellee,

and

WEST DEARBORN PARTNERS, LLC,

Defendant/Counter-Plaintiff/Appellant.

Supreme Court
Docket No. 159691

Court of Appeals
Docket No. 339704

Lower Court
Wayne County Circuit Court
Case No. 15-012788-CH
Hon. Muriel D. Hughes

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## COUNTER-STATEMENT OF JURISDICTION

For the reasons stated more fully herein, Plaintiff/Counter-Defendant/Appellee City of Dearborn asserts that review by this Court is not warranted pursuant to MCR 7.305(B)(3) or (5) because there are no issues of particular significance to this state's jurisprudence and the Court of Appeals' Opinion is well supported by existing law and is therefore not clearly erroneous or in conflict with published precedent from the Court of Appeals or this Court.

## COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) The Bankruptcy Court's Order applicable to this case made the transfer of the subject property from the Trustee to the City of Dearborn subject only to interests "of record." Here, West Dearborn Partners could have recorded its interest at any time before the subject property was transferred to Dearborn, including when West Dearborn Partners first allegedly obtained its interest, after it filed an objection in the Bankruptcy Court, after the Bankruptcy Court held a hearing, or even after the Bankruptcy Court ruled but before the property was transferred. Yet, West Dearborn Partners made the apparently deliberate decision not to record its claimed interest, notwithstanding its contractual obligation to do so. Did the trial court and Court of Appeals correctly conclude that the Bankruptcy Court's Order extinguished any interest West Dearborn Partners may have held due to its failure to make its interest "of record?"

The trial court answered: Yes.

The Court of Appeals answered: Yes.

Appellant answers: No.

Appellee answers: Yes.

(2) An assignee's failure to record its interest leaves it at risk of being subject to claims, defenses, or conduct by the original of-record assignor. Even if West Dearborn Partners' alleged interest survived the Bankruptcy Court's Order, West Dearborn Partners' failure to record resulted in Bank of America—the last mortgagee of record—being sued in two quiet-title actions, defending against those proceedings as the mortgagee, and ultimately discharging the mortgage as a result of those actions. Is West Dearborn Partners subject to the discharge executed and recorded by the assignor mortgagee-of-record, Bank of America, that arose solely due to West Dearborn Partners' failure to record?

The trial court declined to answer, given its response to Question (1) above.

The Court of Appeals answered: Yes.

Appellant answers: No.

Appellee answers: Yes.

(3) West Dearborn Partners' sloppiness resulted in significant deficiencies with respect to the alleged assignment. For example, there is a discrepancy regarding the true assignee, the acknowledgment is missing the necessary language, and the assignment leaves unclear on behalf of whom it is signed. These deficiencies create a cloud on the title to the subject property, including raising questions about which entity would have the authority to foreclose under Michigan law. In such a circumstance, is the assignment invalid or, at a minimum, not properly recorded?

The trial court declined to answer, given its response to Question (1) above.

The Court of Appeals declined to answer, given the trial court's response to Question (1) above.

Appellant answers: No.

Appellee answers: Yes.

## COUNTER-STATEMENT OF ORDER APPEALED AND LACK OF GROUNDS FOR SUPREME COURT REVIEW

This Court should deny Defendant/Counter-Plaintiff/Appellant West Dearborn Partners, LLC's Application for Leave to Appeal from the Court of Appeals' decision in this quiet title action. WDP has had its opportunities to repeatedly make its arguments to multiple courts seeking to rescue it from its own mistakes, intentional inaction, and breaches. In each instance, the courts (the trial court, the Court of Appeals, and even the Bankruptcy Court) refused to save WDP from the consequences of its own actions and inactions. Never satisfied, WDP filed motions for reconsideration in both the trial court and the Court of Appeals. WDP's regurgitation of the same arguments over and over does not change the reality that WDP's interest in the property at issue was properly extinguished under the law due to its own conduct.

On February 12, 2019, Judges Stephens, K. F. Kelly and Tukel of the Court of Appeals issued their Opinion and Order ("COA Opinion") affirming the trial court's grant of summary disposition against Defendant/Counter-Plaintiff/Appellant West Dearborn Partners, LLC ("WDP") and in favor of Plaintiff/Counter-Defendant/Appellee City of Dearborn (the "City" or "Dearborn") in this quiet title action. **(Ex. QQ).** As it did in the trial court, WDP filed a Motion for Reconsideration of the COA Opinion on March 5, 2019, which the Court of Appeals denied on April 19, 2019. On May 31, 2019, WDP filed its Application for Leave to Appeal to this Court asserting that review is warranted under MCR 7.305(B)(3) and (5). However, there is no legitimate basis for this Court to further review this case.

### I. There are no issues of significance to Michigan's jurisprudence implicated in this matter.

First, there are no issues of particular significance to this state's jurisprudence under MCR 7.305(B)(3). The trial court and the Court of Appeals simply enforced the clear terms of a

Bankruptcy Court order ("Bankruptcy Order") abandoning real property of a bankruptcy estate and extinguishing interests in a parcel of real property not "of record." **(Ex. Q).** During the pendency of this litigation, WDP even moved the Bankruptcy Court to interpret its order to say that WDP's interest was not extinguished, but the Bankruptcy Court refused. **(Exs. Z, AA).** WDP did not appeal the Bankruptcy Court's order refusing to do so. If the Bankruptcy Court did not deem this issue significant enough—even within this action itself—to further interpret its own order in the manner requested by WDP, then this Court should similarly be unconvinced of the significance of this case to the entire State of Michigan's jurisprudence. Moreover, because the COA Opinion in this case is not a published decision, it will not even have precedential effect in Michigan, much less a significant impact on Michigan jurisprudence. See MCR 7.215(C)(1).

## II. The COA Opinion is not clearly erroneous or in conflict with published precedent.

Second, the COA Opinion is well supported by existing law and is therefore not clearly erroneous or in conflict with published precedent from the Court of Appeals or this Court. WDP relies primarily on *Prime Financial Services LLC v Vinton*, 279 Mich App 245; 761 NW2d 694 (2008) and *Coventry Parkhomes Condominium Association v Federal National Mortgage Association*, 298 Mich App 252; 827 NW2d 379 (2012) for its argument that the COA Opinion should be reviewed under MCR 7.305(B)(5). Both cases are distinguishable to the point of inapplicability.

*Prime Financial Services LLC*, *supra*; *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712; 2 NW2d 892 (1942); and similar cases cited by WDP stand for the proposition that the transfer of an underlying promissory note operates as an assignment of a related mortgage as a matter of law. WDP Br., at 12-13. However, as the Court of Appeals correctly noted, "while generally an assignment of the note includes a transfer of obligation under the mortgage, the situation before us

is particularly unique. . . . While the 2005 mortgage itself was still 'of record' at the time of the bankruptcy proceeding, the assignment giving West Dearborn any interest was not." **(Ex. QQ).** COA Op., p. 5. The fact that the sale of a note operates as an assignment of the mortgage does nothing but put WDP in the same post-Bankruptcy Order position it was in already: with an assignment not "of record." Nor does WDP argue that the note itself was recorded. Accordingly, this argument has no effect on the ruling by the trial court and the Court of Appeals that WDP's alleged, unrecorded assignment—however obtained—was extinguished by the Bankruptcy Court Order. **(Ex. QQ)**, COA Op., pp. 5-6.

*Coventry*, *supra* is a case involving questions of priority after an assignment. But the instant matter concerns the interpretation of the Bankruptcy Order that applies to this uniquely burdened piece of Property and its impact on WDP's particular unrecorded interest, which WDP brought to the Bankruptcy Court's attention to address. It does not concern issues of priority. The Bankruptcy Order extinguished any interests that were not "of record"—like WDP's—regardless of their alleged "priority." Unlike *Coventry*, this is not a case about which party has a superior interest, it is about whether WDP has any interest at all. The Court of Appeals agreed that WDP's reliance on *Coventry* was misplaced because "*Coventry* concerned the interpretation of the Condominium Act and the priority of mortgages, not the interpretation, relevancy, and effect of a bankruptcy court's order. . . . [and] [t]he bankruptcy court's order itself required the assignment be recorded in order to have continued validity." **(Ex. QQ)**, COA Op., pp. 5-6. There was no analogous interest-extinguishing order in *Coventry*. That is a unique fact of this case alone. Because WDP's alleged assignment was not timely recorded, it was extinguished. Priority is irrelevant.

WDP further argues that the Court of Appeals "disregarded well-settled principles of equity." WDP Br. at ix. WDP first argues that the Court of Appeals "misapplied the doctrine of judicial estoppel by comparing and finding similar two statements made by the City in the same bankruptcy proceeding, rather than statements made by the City in the bankruptcy proceeding and the separate quiet title proceeding." WDP Br. at ix. In analyzing WDP's estoppel argument, the Court of Appeals stated that "[equitable estoppel did not apply] because (1) when considered in context, the City's current position is not inconsistent with its prior position; and (2) the bankruptcy court did not rely on or accept any alleged statements as true before effectuating its order of abandonment." **(Ex. QQ)**, COA Op., p. 7. WDP characterizes the Court of Appeals' analysis as comparing "the City's position in bankruptcy (its August 16, 2011 objections to the Trustee's proposal to sell the property) to the City's position in bankruptcy (its comments at the October 4, 2011 hearing), [instead of] the City's position in this action." WDP Br. at 17.

WDP completely misconstrues the Court of Appeals' Opinion. It is true that both statements from the City quoted by the Court of Appeals were from the bankruptcy proceedings. **(Ex. QQ)**, COA Op., pp. 6-7. However, that was not because the Court of Appeals was comparing the statements from the bankruptcy proceedings with each other. Rather, it was because the Court of Appeals adopted the City's argument that the City's position in the bankruptcy court should be considered in the full context of all of the City's statements. **(Ex. OO)**, Dearborn COA Br., pp. 25-26. The Court of Appeals was merely citing to the same portions of the bankruptcy court record that the City had cited to provide context for the City's true position in bankruptcy, namely that the City "certainly questioned why the assignment had not been recorded" in bankruptcy, just as it has done throughout the current litigation. **(Ex. QQ)**, COA Op., p. 7. There was no need for the

Court of Appeals to then also quote the City's well-known position in this litigation to perform a comparison, especially because there was no conflict.

Moreover, contrary to WDP's argument (*See* WDP Br. at 18), and as the Court of Appeals noted, the Bankruptcy Court "did not rely on or accept any alleged statements as true before [entering the Bankruptcy Court Order]" because that order "had nothing to do with the validity of the assignment; instead, the focus was on whether the property was a burden to the estate." **(Ex. QQ)**, COA Op., p. 7. In other words, the Bankruptcy Court was not answering the question of whether WDP's alleged assignment was valid and would be considered an interest "of record" under its order. It was deciding whether, and on what terms, the bankruptcy estate would abandon Parcel C. Accordingly, WDP's argument mischaracterizes the Court of Appeals' Opinion, which correctly rejected WDP's estoppel argument. Accordingly, WDP's argument in support of this Court's review of the estoppel issue is contrived and should be rejected.

WDP next argues that the Court of Appeals failed to follow equitable principles because the City was not a good faith purchaser under MCL 565.29 owing to a $1.00 purchase price recited in its deed and therefore the City reaped a windfall at WDP's expense. *See* WDP Br. at 19-22. While the Court of Appeals may have been obligated to balance the equities in this case, WDP assumes—based only on an unfavorable result—that the Court of Appeals did not do so. In fact, it is clear from the COA Opinion that the Court of Appeals absolutely did weigh the equities and considered WDP's argument that "equity compels reversal because allowing the City to own the Property in fee and free from [WDP's] interest would result in a windfall to the City." **(Ex. QQ)**, COA Op., p. 8. However, after the Court of Appeals placed WDP's argument on one side of the equity scale, it then placed countervailing equity evidence on the opposite side of the scale by accounting for WDP's "inexplicable failure to record the assignment more than 4 ½ years, after

receiving it March 2011." **(Ex. QQ)**, COA Op., p. 8. WDP simply disagrees with the Court of Appeals' reading of the equity scale in this case.

The COA Opinion was also not clearly erroneous or in conflict with any of the cases WDP cites for the proposition that equity abhors a windfall. *See* WDP Br. at 21. The City will concede that equity abhors a windfall. The City, however, rejects that there was any such windfall in this case. First, because the City did not borrow any money from Bank of America ("BOA"), from whom WDP alleges its interest derives, there is no inequity as between WDP and the City. WDP's inequity argument would be more properly directed to West Village Commons, LLC or BOA itself, not the City. The City was not a party to the BOA note, mortgage, or WDP's alleged assignment.

Furthermore, because the Covenant Deed and the Development Agreement made Parcel C subject to development obligations requiring construction of a mixed-use office, hotel, and residential project (*See, e.g.*, **(Ex. A)**, at ¶ I.A), and because the failure to complete such development requirements was to result in reversion of Parcel C back to the City (*See id.* at ¶¶ II.A, B), it was not a windfall for the City to get Parcel C back without the alleged mortgage when that development never occurred. The City never got any benefit from the BOA note or mortgage. Nor did the City get the benefit of its original bargain requiring development of Parcel C, despite the fact that the City fulfilled all of its obligations with West Village Commons, LLC including the City's taxpayers spending over $16 million on the construction of parking structures that flank each side of Parcel C on the promise that Parcel C would be developed in accordance with the covenants that ran with the Property and would result in a paid parking revenue stream to cover the construction cost. The paid parking program had to be abandoned after the failure to develop Parcel C.

The Bankruptcy Order did not render a windfall to the City at all. Instead, it merely put the City in pre-breach *statu quo* by abandoning the Property back to Dearborn consistent with the terms of the Covenant Deed and the Development Agreement. Accordingly, WDP's "windfall" argument rings hollow and provides no basis for reviewing or reversing the Court of Appeals' decision. The Court of Appeals did not ignore equity's directive to abhor a windfall. It just correctly did not find a windfall in the first place.

### III. WDP is no victim of injustice.

Finally, to the extent that WDP claims to be the victim of injustice—a claim that the City vehemently denies—WDP was the author of its own plight. WDP asks this Court to continue this years-long litigation, review a properly decided unpublished opinion of the Court of Appeals that has no precedential value or impact on Michigan's jurisprudence, and throw it a lifeline when, for over 4.5 years, WDP could not be bothered to take the simple action to protect itself by merely recording its alleged assignment.[1]

The subject real property known as "Parcel C" became property of a bankruptcy estate. The Bankruptcy Court determined pursuant to 11 U.S.C. §§ 105(a) and 554(b) that Parcel C was a burden to the bankruptcy estate because of the development obligation that burdened it and ordered that it be abandoned on specific terms and conditions beneficial to the bankruptcy estate set forth in the Bankruptcy Order dated October 5, 2011. **(Ex. Q).** The Bankruptcy Order severed any alleged interest in Parcel C that was not "of record." **(Ex. Q).** Because Parcel C belonged to the bankruptcy estate, it was subject to the Bankruptcy Court's authority to set the terms under which the property would be transferred. Furthermore, because WDP's alleged assignment was

[1] As will be discussed further herein below, WDP's refusal to record the alleged assignment was most likely a deliberate legal strategy because WDP claimed attorney client privilege when asked why it did not record the assignment for over 4.5 years.

not "of record" prior to the entry of the Bankruptcy Order or the conveyance of Parcel C from the bankruptcy estate to the City, despite WDP's participation in the Bankruptcy Court proceedings and an opportunity for WDP to record, the trial court and the Court of Appeals correctly held that WDP's alleged interest, if any, was extinguished by the clear terms of the Bankruptcy Order.

This case is not one of significance to Michigan jurisprudence. Nor is it one of clear error or refusal to follow established precedent by the Court of Appeals. Instead, this case is about a sophisticated party, represented by sophisticated counsel, taking a calculated risk to ignore the Bankruptcy Order extinguishing its alleged unrecorded interest who is now asking this Court (the fourth Court) to save it from what is at best its own dereliction or at worst its deliberate gamble gone awry. The Court of Appeals, quoting the trial court, summed it up best when it said "'It is not the role of the Court to protect sophisticated parties and their Counsel from their own mistakes or deliberate actions taken to their detriment.'" **(Ex. QQ)**, COA Opinion, p 8. For the reasons stated more fully herein, the City respectfully requests that this Honorable Court DENY WDP's Application for Leave to Appeal, or, in the alternative, peremptorily AFFIRM the Court of Appeals, and grant any other relief the Court deems proper, including awarding costs.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should not grant WDP's Application for Leave to Appeal. This is a case of delinquency, tardiness, and sloppiness by WDP that has wreaked havoc on title to multiple pieces of real property in the City, including property owned by the City known as "Parcel C" (the "Property"). Parcel C is located in the heart of West Dearborn and was supposed to be developed by West Village Commons, LLC. Bank of America's predecessor loaned money to West Village Commons, LLC—not to the City—and secured its loan by a mortgage on Parcel C and nearby Parcel A-3. West Village Commons, LLC did not perform any construction on Parcel C and

ultimately declared bankruptcy. During the pendency of the Bankruptcy, it is alleged that Bank of America sold its mortgage to WDP for about seven cents on the dollar in March 2011.

WDP then took no meaningful action on the assignment for the next 4.5 years. Despite a contractual requirement that WDP "promptly and diligently record" the assignment, WDP did not record the assignment at the time of the alleged closing in March 2011. WDP did not record the assignment while the Bankruptcy proceedings were ongoing, notwithstanding that WDP filed an objection in those proceedings requesting that any order transferring the Property be done "not only" subject to interests "of record," "but also" subject to its unrecorded assignment. WDP did not record the assignment in August 2011, after Dearborn publicly raised the question of the validity of the alleged unrecorded assignment. WDP did not record the assignment after the Bankruptcy Court ordered that Parcel C be transferred to the City subject only to interests "of record," but before the actual Quit Claim Deed to the City was executed. And, WDP also did not record the assignment in the 4 years following those Bankruptcy proceedings. Moreover, WDP did not initiate foreclosure proceedings or demand any payments over the 5+ years of its purported ownership of the mortgage. Instead, WDP sat quietly in wait, the continuation of its claim of interest unknown to the world.

Meanwhile, after a tax forfeiture sale on Parcel A-3, which consisted of partially finished condominiums across the railroad tracks from Parcel C, the new property owner sought to quiet title to that parcel. The owner sued Bank of America in 2014 as the mortgagee of record due to WDP's failure to record its alleged interest. Rather than claiming a lack of interest due to the assignment, however, BOA defended its interest in that action claiming to still be the mortgagee, thus suggesting to the world and the City that the March 2011 assignment to WDP was not consummated (thereby explaining why it was still not recorded). And, when the trial court in that

proceeding ordered BOA to discharge its mortgage as a result of those proceedings, BOA discharged the mortgage as to *both* Parcel A-3 *and* Parcel C.

The City, as the owner of Parcel C, sought to quiet title to Parcel C through this litigation. Because BOA still remained as the last mortgagee of record—further suggesting that the 2011 assignment was invalid or ineffective—Dearborn named BOA as a defendant. Indeed, BOA initially defended against this litigation by pointing to the discharge as evidence that it no longer had an interest in Parcel C. Dearborn subsequently learned of WDP's continued claim of interest, leading to WDP being named as a defendant on December 7, 2015. WDP *finally* recorded the assignment on December 17, 2015, i.e., nearly five years after the assignment purportedly occurred and after this litigation was initiated against it.

In short, and as set forth more fully below, this entire dispute stems from WDP's apparently deliberate failure to record its interest "promptly and diligently" as it was required to do. Any harm that has befallen WDP is thus of its own creation, resulting from a breach of its contractual obligations. As the trial court correctly concluded, WDP's assignment—upon which it must rely for its interest—was extinguished by the Bankruptcy Order because, as WDP acknowledged before that Court, its interest was not "of record," and the Bankruptcy Court's Order only protected interests "of record." WDP could have made its alleged interest "of record" at any time in the seven months between when WDP purportedly received the assignment and when the Bankruptcy Trustee transferred Parcel C to Dearborn, including after the Bankruptcy Court ruled but before the Trustee transferred Parcel C to Dearborn, but WDP failed to do so.

Further, to the extent the recording of the underlying 2005 mortgage somehow saved WDP's interest because the mortgage was "of record" (even though the assignment—and thus WDP's alleged interest—was not), then WDP should take its interest subject to the claims,

defenses and conduct of the last mortgagee of record, i.e., Bank of America. Consequently, BOA's subsequent discharge of the mortgage—as the last mortgagee of record that was sued due to WDP's failure to record—extinguished WDP's claim. If WDP wanted to protect against the risk of being subject to BOA's conduct, it could have taken the simple (and contractually required) step of recording its assignment; yet, it failed to do so.

In addition, the assignment and ultimate recordation thereof contain significant deficiencies that call into question the validity of WDP's interest or, at a minimum, create an unnecessary cloud on the City's title. And even if WDP could overcome these hurdles, WDP's failure to take any substantive action—and the unnecessary costs and prejudice that has resulted to the City, its taxpayers, the courts, BOA, and third parties like the purchaser of related Parcel A-3—demands that the mortgage be deemed equitably extinguished, rescinded, or abandoned. The Court of Appeal's Opinion affirming the trial court's grant of judgment in favor of the City was proper and WDP's Application for Leave to Appeal to this Court should be denied.

## BACKGROUND

### I. Pre-November 2011.

#### A. The Property is transferred to West Village Commons, LLC subject to a Covenant Deed and development requirements/restrictions. West Village Commons, LLC executes a Construction Mortgage for the Property, which ends up with Bank of America.

In May 2005, Dearborn sold a variety of parcels of land—including two parcels referred to as Parcel A-3 and Parcel C—to West Village Commons, LLC (an affiliate of Burton-Katzman Development Company). West Village Commons, LLC paid approximately $2.8 million dollars for all of the properties combined, including Parcels C and A-3, as well as Parcels A-1 and A-2 (which have frontage on Michigan Avenue). *See* **(Ex. A)**, Covenant Deed at 1, 10-11.

Dearborn conveyed the properties using a Covenant Deed, pursuant to a Development Agreement dated April 23, 2003. *See* **(Ex. A)**, Covenant Deed; **(Ex. B)**, Declaration of Covenants and Restrictions for West Village Commons. Both the Covenant Deed and the Development Agreement contemplated that West Village Commons, LLC would construct a residential project on Parcel A-3 and a mixed-use office, hotel, and residential project on Parcel C. *See, e.g.*, **(Ex. A)**, at ¶ I.A. Indeed, the Covenant Deed specifically directed that this development occur, or else West Village Commons, LLC risked forfeiting the property back to Dearborn. *See id.* at ¶¶ II.A, B. The Covenant Deed further provided that West Village Commons, LLC could not sell, transfer, or otherwise convey any portion of these properties for a period of five years from the completion of the construction project upon the property. *See id.* at ¶ I.B.3.

West Village Commons, LLC granted a Construction Mortgage encumbering Parcels A-3 and C in favor of Standard Federal Bank National Association. *See* **(Ex. C)**, Construction Mortgage. In exchange for the mortgage, West Village Commons, LLC executed a note and a corresponding loan agreement. *Id.* It is undisputed for purposes of this litigation that LaSalle Bank, N.A. became the mortgagee, as successor by merger to Standard Federal. And it is undisputed for purposes of this litigation that BOA subsequently became the mortgagee, as successor by merger to LaSalle Bank, N.A. *See* WDP Br. at 2, n1.

**B. West Village Commons, LLC files for bankruptcy. Bank of America purportedly sells the loan and assigns the Construction Mortgage to WDP; the assignment is not recorded.**

West Village Commons, LLC failed to comply with any of its construction obligations with respect to Parcel C. Therefore, Dearborn filed a lawsuit in 2009 to enforce West Village Commons, LLC's obligations and for damages. *See* Case No. 09-001342-CK, Wayne County Cir. Ct. After Judge Sapala ordered West Village Commons, LLC to begin construction, West Village

Commons, LLC filed for bankruptcy in August 2010 in order to avoid its obligations to Dearborn. *See* Case No. 10-66748-MBM, E.D. Mich. Bankr. Ct.

In March 2011, Mark Mokelke, on behalf of BOA, and Anmar Sarafa allegedly entered into a Note Sale and Assignment Agreement, with two subsequent amendments. Under the terms of that alleged agreement, BOA agreed to sell the Construction Mortgage (for Parcel A-3 and Parcel C) and corresponding documents to Mr. Sarafa, on behalf of WDP, for $110,000, with WDP paying an additional $40,000 in outstanding taxes. *See* **(Ex. D)**, Note Sale and Assign. Agreement; **(Ex. E);** First Am. to Note Sale and Assign. Agreement; **(Ex. F)**, Second Am. to Note Sale and Assign. Agreement. The Note Sale and Assignment Agreement also set forth that, according to Bank of America's records, "as of March 3, 2011, the unpaid principal balance of the Loan is $1,400,000 and accrued but unpaid interest is $190,118.06." *See* **(Ex. D)**, ¶ 4.5. Therefore, WDP's payment of $150,000 represented a total payment of approximately 10% of the outstanding loan amount, or approximately ten cents on the dollar. And the $110,000 payment, exclusive of outstanding taxes, represented approximately 7% of the outstanding loan amount, or approximately seven cents on the dollar. *See* **(Ex. G)**, Excerpts of Dep. Tr. of M. Mokelke, at 16:22-17:3. At the time of the sale, WDP knew that it was purchasing the mortgage subject to any rulings from the Bankruptcy Court in West Village Commons, LLC's bankruptcy. *See* **(Ex. H)**, Excerpts of Dep. Tr. of A. Sarafa, at 83:9-19, 84:5-17.

As part of that Note Sale and Assignment Agreement, Mr. Mokelke and Mr. Sarafa appear to have executed an Assignment of Mortgage for Parcel A-3 and Parcel C on or around March 31, 2011. *See* **(Ex. I)**, Assignment of Mortgage ("Assignment"). Notably, neither the signature of Mr. Mokelke nor of Mr. Sarafa were notarized at the time—a known requirement for recording the Assignment. *See* MCL 565.201(1)(c). Further adding to the confusion, although the

Assignment initially defines the "Assignee" as "West Dearborn Partners, LLC," the "Assignee" described above Mr. Sarafa's signature block at the end of the Assignment is "West *Village* Partners, LLC." **(Ex. I)** at 2 (emphasis added); *see also* **(Ex. J)**, Excerpts of Dep. Tr. of D. Elder, at 33:15-34:19.

In any event, the Note Sale and Assignment Agreement required that "[t]he Assignee *shall promptly and diligently record*, at the Assignee's sole expense, all assignments and notices, including, without limitation, *the Assignment instrument . . . , necessary to effect the transaction described in this Agreement*." *See* **(Ex. D)**, ¶ 21 (emphasis added). But the Assignment was not recorded by WDP in March or April 2011. To the contrary, and as described in more detail below, WDP failed to record the Assignment until December 2015, i.e., 4.5 years later. *See* **(Ex. I)**; *see also* **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites at 31:2-4 (WDP's counsel acknowledging that the assignment was not recorded "promptly and diligently" by WDP as contractually required). When asked the reason for the filing delay, WDP's attorney asserted attorney-client privilege, suggesting that at least part of the 4.5-year delay was due to a deliberate decision not to record. *See* **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites at 34:14-35:9.[2]

**C. Bankruptcy Order extinguishes interests not "of record."**

On August 1, 2011, the Chapter 7 Trustee for West Village Commons, LLC's Bankruptcy Estate filed a motion with the Bankruptcy Court seeking to sell Parcel C to West Village Commons Holdings II, LLC—an entity unrelated to any of the Parties to this case—for $6,000.00. In

[2] Pursuant to MCR 2.306(D)(5), because WDP asserted attorney-client privilege in response to this question, WDP cannot offer a contrary explanation for not recording the Assignment in 2011. *See* WDP Br. at 4. But in any event, as explained in more detail below, WDP's current explanation—i.e., that it could not get in contact with Mark Mokelke to notarize the document—lacks merit. Mr. Mokelke had the same contact information until May 2012. *See* **(Ex. G)**, Excerpts of Dep. Tr. of M. Mokelke, at 35:1; 36:9-14.

Paragraph 9 of that motion, the Trustee stated that the "Property will be sold subject to all claims, liens, and interests *of record* without limitation." *See* **(Ex. L)**, Trustee Mot. at ¶ 9 (emphasis added); *see also id.* (non-exhaustively listing some interests and stating that the sale would be "together with *any other recorded* interests and restrictions" (emphasis added)). The Trustee also stated that "[a]s of the date of filing this Motion, the mortgage on the Property is held by Bank of America." *Id.* at ¶ 6.

Although WDP never filed a Proof of Claim in the Bankruptcy Court, it filed a limited objection to the Trustee's motion on August 10, 2011. **(Ex. M)**, WDP Obj. at 2. WDP claimed that it was "the assignee of Bank of America having been assigned Bank of America's interest in the mortgage on the subject property." *Id.* at ¶ 3. WDP requested that any order by the Bankruptcy Court "specifically provide that such sale of property is subject to *not only* the claims, liens and interest of record described in paragraph 9 of [the Trustee's] Motion, *but also* subject to the interest of Bank of America now held by West Dearborn Partners LLC as assignee of Bank of America." *Id.* at ¶ 5 (emphasis added); **(Ex. H),** Excerpts of Dep. Tr. of A. Sarafa, at 114:5-115:19. In other words, during the Bankruptcy Court proceedings WDP recognized a distinction between interests "of record" and its unrecorded purported interest.

Dearborn also filed an objection to the Trustee's motion in August 2011. *See, e.g.* **(Ex. N)**, Dearborn Obj. Noting that the Trustee could not sell Parcel C free and clear of the Development Agreement and restrictions in the Covenant Deed—including the inability to sell the Property until five years after the construction had been completed—the City argued that the Bankruptcy Court should instead abandon the Property to Dearborn. *See id.* at 8-14.

Dearborn also discussed WDP's limited objection. Dearborn noted that "upon information and belief, Bank of America sold the note and mortgage associated with Area C to West Dearborn

Partners, LLC . . . at the end of March 2011." *Id.* at ¶ 19. Dearborn also highlighted that WDP had requested that any "sale of property [be] subject to not only the claims, liens and interest of record described in paragraph 9 of the Sale Motion, but also subject to the interest of Bank of America now held by [WDP] as assignee of Bank of America . . . ." *Id.* at ¶ 20. However, Dearborn questioned the validity or impact of the purported assignment, particularly given its unrecorded status: "Notably, no explanation is provided by [WDP] as to why the documents effectuating the sale and transfer of the note and mortgage to [WDP] do not appear of record almost five months after the transaction." *Id.* at ¶ 21.

Dearborn also filed its own motion for abandonment. **(Ex. O)**, Dearborn Mot. Pursuant to that motion, Dearborn asked that the Bankruptcy Court require the Trustee to abandon Parcel C to Dearborn instead because it was a burden to the estate. Dearborn attached a proposed order to this motion that, like the Trustee's motion for sale, made the transfer of the property "subject to [] all claims, liens, interests, rights and obligations *of record*." *Id*. (emphasis added).

The Bankruptcy Court held a hearing on the various motions and objections on October 4, 2011. *See* **(Ex. P)**, 10/4/11 Bankr. Hr'g. Tr. Although counsel for WDP was present at the hearing, he did not participate. *Id.* And, despite Dearborn having raised concerns about the unrecorded status of the Assignment in its August 2011 Objection, WDP still had not recorded the Assignment by this time. WDP draws attention to the fact that the "bankruptcy judge herself noted 'I do believe under both 554 and 105 that there are grounds for this Court to require abandonment directly to the City of Dearborn. *The mortgagee in this case certainly can enforce its remedies. The order that was proposed and attached to the motion protects the rights of anybody else with an interest in the property*.' . . . (emphasis supplied)." WDP Br. at 4. However, this statement only begs the question of who the "*mortgagee*" is in this case. That is the entire question in this case. Namely,

whether WDP's alleged interest survived the written, entered Bankruptcy Order that required an interest be "of record" for continued validity. **(Ex. Q)**, Bankruptcy Order.

At the hearing, the Bankruptcy Court denied the Trustee's motion and granted Dearborn's motion. *Id.* The Bankruptcy Court, without any objection from WDP, entered Orders the next day reflecting its ruling. As relevant here, the Court ordered that the:

> "Trustee is directed to promptly abandon the Debtor's real property [i.e., Parcel C] via quitclaim deed to the City of Dearborn, in form reasonably satisfactory to the City of Dearborn and consistent with this Order, pursuant to sections 105(a) and 554(b) of the Bankruptcy Code. Such abandonment shall not impair, and the Property shall remain subject to, all claims, liens, interests, rights and obligations *of record*."

*See* **(Ex. Q)**, 10/5/11 Order (emphasis added).

WDP did not raise any objection or make any request for reconsideration with the Bankruptcy Court regarding the Order's limitation to interests "of record" and not WDP's unrecorded interest, which it requested to be included. Nor did WDP promptly record its Assignment in light of the Bankruptcy Court's Order. Indeed, the Assignment still was not recorded by October 17, 2011—when the Trustee executed the Quit Claim Deed transferring Parcel C to Dearborn—nor on October 20, 2011—when the Deed was recorded with the Register of Deeds. *See* **(Ex. R)**, Quit Claim Deed.

## II. November 2011 – August 2015.

### A. The assignment remains unrecorded, despite receiving notarization in July 2014.

The Assignment remained unrecorded more than two years later, i.e., at the beginning of 2014. In February 2014, Scott Lites (attorney for WDP) emailed Allison Bach (attorney for Bank of America) requesting that she have Mr. Mokelke's signature notarized. *See* **(Ex. S)**, 2/24/14 E-

mail. However, Mr. Lites testified that he did not hear back from Ms. Bach. **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites at 43:15-25.

Then, in July 2014 (i.e., five months later), Mr. Lites communicated with Ms. Allen—an employee at Bank of America—requesting that Mr. Mokelke's signature be notarized. *See* **(Ex. T)**, 7/16/14 E-mail; *see also* **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites at 44:1-23. Mr. Lites was connected with Ms. Allen after calling Bank of America's generic 1-800 phone number. **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites at 44:2-23. Within approximately one week of that contact, Mr. Lites obtained notarized Acknowledgements regarding Mr. Mokelke's signature and Mr. Sarafa's signature. *See* **(Ex. I)**, Recorded Assignment; *see also* **(Ex. U)**, Excerpts of Dep. Tr. of S. Allen, at 23:13-22; **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites at 44:21-23. Yet, WDP *still* failed to record at that time.[3]

[3] WDP alleges in its purported "Statement of Facts" that "Lites was unable to get the requisite acknowledgement page [for recording] until approximately July 2014, because Mokelke had been transferred by BOA to California and had totally different contact information." WDP Br. at 4. There are two issues with such a claim. First, as described above, in response to questions about why WDP did not record in 2011, Lites asserted attorney-client privilege. *See* **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites, at 31:2-4, 34:14-35:9. Accordingly, pursuant to MCR 2.306(D)(5), WDP cannot now give explanations regarding why this was not done. Second, WDP's explanation lacks merit. Mr. Mokelke testified that he did not move until May 2012, and his contact information remained the same until then. **(Ex. G)**, Excerpts of Dep. Tr. of M. Mokelke, at 35:1; 36:9-14. But Mr. Mokelke testified that no one contacted him during this time about getting his signature notarized. *Id.* at 36:23-37:2. Further, even after Mr. Mokelke moved offices, WDP's counsel was able to get the signature notarized within a week of asking Bank of America's representative in July 2014 (and shortly after calling Bank of America's 1-800 phone number), indicating that it really was not that difficult to obtain the necessary notarization had WDP truly been diligent in trying. *See* **(Ex. U)**, Excerpts of Dep. Tr. of S. Allen at 26:17-27:1; **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites, at 44:2-23. Moreover, the notarization should have been obtained as part of the original transaction in March 2011, given that it was a requirement that the Assignment be recorded. Therefore, WDP's assertion that it could not record until July 2014 because Mr. Mokelke had been transferred is false.

### B. Bank of America defends a quiet-title action as mortgagee and discharges the Construction Mortgage in August 2015.

In 2014, a quiet-title action was brought against Bank of America and the City of Dearborn by West Village Square Condominiums VII, LLC and West Village Square Condominiums VIII, LLC regarding Parcel A-3, the other Parcel (aside from Parcel C) covered by the Construction Mortgage. *See* Case No. 14-016512-CH, Wayne Cnty. Cir. Ct. The plaintiffs in that case are unrelated to any of the Parties in this case. They had bought Parcel A-3 at a tax forfeiture sale, and were trying to quiet title to the property. Therefore, the plaintiffs sued the City of Dearborn and Bank of America, as the apparent mortgagee of record given WDP's continued failure to record the Assignment.

Rather than claiming that the mortgage for Parcel A-3 had been transferred to WDP as part of the March 2011 Assignment, however, Bank of America vigorously defended its alleged interest as the mortgagee. Indeed, in response to the plaintiffs' motion for summary disposition in that case, Bank of America stated that the plaintiffs were "assert[ing] entitlement to Parcels encumbered by a Construction Mortgage *held by Defendant Bank of America* [i.e., Parcels A-3 and C]." *See* **(Ex. V)**, BOA Resp. to Mot. for Summ. Disp. at 6-7 (emphasis added). In other words, Bank of America's actions in that litigation were in direct contrast to a claim that the mortgage had been assigned to WDP over four years earlier. Ultimately, the Court ruled that the plaintiffs' interest in Parcel A-3 obtained through the tax sale was superior, that Bank of America no longer held any interest in Parcel A-3 as a result, and that Bank of America should execute a discharge of its mortgage on Parcel A-3. *See* **(Ex. W)**, 6/26/15 Order at 2.

As ordered by the Court, Bank of America executed and recorded a discharge of the Construction Mortgage as to Parcel A-3 in August 2015. But since the mortgage at issue covered both Parcel C and Parcel A-3, Bank of America's discharge discharged the Construction Mortgage

as to both Parcel A-3 *and* Parcel C. *See* **(Ex. X)**, Discharge. Indeed, when originally made a party to this lawsuit, Bank of America defended in part by asserting the validity of the discharge as evidence that it no longer had an interest in Parcel C, given that it had discharged the mortgage in the prior proceeding. *See* **(Ex. Y)**, Excerpts of Dep. Tr. of L. Yangouyian, at 64:16-65:2; 77:4-79:12; 95:4-96:20. Therefore, Bank of America's discharge of the Construction Mortgage as to both parcels further called into question whether the March 2011 Assignment to WDP had really been valid or finalized. *See id.* at 139:1-18.

Notably, throughout all of this time and litigation, WDP *still* had not recorded its Assignment. Nor had WDP tried to foreclose on the Property—likely because it would then be required to begin development under the Covenant Deed. *See* **(Ex. J)**, Excerpts of Dep. Tr. of D. Elder, at 65:23-66:9; 67:1-18; **(Ex. H)**, Excerpts of Dep. Tr. of A. Sarafa, at 61:2-22; 62:20-63:3, 137:6-19.

**III. September 2015 – December 2016.**

In October 2015, Dearborn filed the instant action for quiet title against Bank of America, as the mortgagee of record, regarding Parcel C.[4] Bank of America initially defended against this action by claiming that it no longer held an interest in Parcel C *because of the 2015 discharge*, not the March 2011 assignment to WDP. **(Ex. Y)**, Dep. Tr. of L. Yangouyian, at 64:16-65:2, 77:4-

[4] WDP asserts that "[d]eposition testimony reflects that . . . certain City officials were seemingly becoming pressured because nothing was happening with the development," that the "parking decks were costing the City money through bonds that had been sold," and that there was "pressure to 'get something going.'" WDP Br. at 5; *see also id.* (repeating the "get something going" language in quotation marks). These statements and purported quotes are not supported by *any* citations, nor does the deposition testimony by Dearborn employees reflect any such thing. *Id.* Such inflammatory comments—unsupported by the record—are inappropriate and exemplify the misleading nature of WDP's claimed facts. Indeed, Dearborn highlighted this same issue before the trial court, *see* **(Ex. DD)**, Resp. to MSD at 7, n4, yet WDP continues to make the same baseless allegations here, once again without any record citation or support.

79:12, 95:4-96:20. However, after Dearborn subsequently learned that the unrecorded March 2011 Assignment to WDP was still being claimed as a valid interest, notwithstanding the issues and positions-taken discussed above, Dearborn amended its Complaint in December 2015 to name WDP as a defendant. Two weeks later, on December 17, 2015, WDP *finally* recorded the purported Assignment. *See* **(Ex. I)**, Assignment. Of course, this recordation occurred more than 4.5 years after the Assignment, nearly 1.5 years after both signatures on the Assignment had been notarized, and months after litigation against Bank of America concerning another parcel covered by the purportedly assigned mortgage (Parcel A-3) had been resolved. *See* **(Ex. H)**, Excerpts of Dep. Tr. of A. Sarafa, at 94:3-10; **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites, at 31:2-4.

In November 2016, nearly one year after being named as a Defendant in this action and after the close of discovery, WDP attempted an eleventh-hour "Hail Mary" by filing a motion in the Bankruptcy Court. *See* **(Ex. Z)**, WDP Bankr. Ct. Mot. WDP sought to divest the trial court of jurisdiction in an effort to have the Bankruptcy Court reinterpret its October 5, 2011 Order to include the *unrecorded* interest of WDP. *Id.*[5] On December 21, 2016, WDP's desperate attempt to avoid the trial court's adjudication of its purported interest in Parcel C failed when the Bankruptcy Court denied WDP's motion and refused to reinterpret its October 5, 2011 Order in the manner as requested by WDP. *See* **(Ex. AA)**, 12/21/16 Order.

## IV. December 2016 – July 2017.

On February 23, 2017, Dearborn and WDP filed cross-motions for summary disposition.

[5] Notably, WDP uses the passive voice in its brief to try to avoid stating that *it* was the one who attempted this last-minute tactic to avoid the implications of its failure to record. *See* WDP Br. at 6 ("While this action was pending, the Bankruptcy Court was asked to confirm the scope of its Bankruptcy Order."). Dearborn highlighted this same questionable use of passive voice in the trial court (**(Ex. DD)**, Resp. to MSD at 7) and in the Court of Appeals (*see* **(Ex. NN)**, City's Brief on Appeal at 13 n. 4), but WDP nevertheless continues to use the same misleading language here.

*See* **(Ex. BB)**, Dearborn MSD (without exhibits); **(Ex. CC)**, WDP MSD (without exhibits). After full and extensive briefing, the trial court heard oral argument on May 26, 2017. *See* **(Ex. DD)**, Dearborn Resp. to WDP MSD (without exhibits); **(Ex. EE)**, WDP Resp. to Dearborn MSD (without exhibits); **(Ex. FF)**, Dearborn Reply in Supp. Of MSD (without exhibits); **(Ex. GG)**, WDP Reply in Support of MSD (without exhibits).

At the conclusion of that hearing, the trial court granted summary disposition in favor of Dearborn, and against WDP. The trial court found that "[a]ny interest [WDP] had in Parcel C was extinguished by the bankruptcy court order and due to [WDP's] failure to record the assignment." **(Ex. HH)**, 5/26/17 Hr'g. Tr., at 46:13-17. The trial court further explained why WDP's decision not to record the assignment prior to the transfer to Dearborn extinguished any interest WDP may have had:

> It is the bankruptcy court's order for abandonment of real property to the City of Dearborn that determined and directed the trustee to quit claim the deed to the property to the City of Dearborn and stated "such abandonment shall not impair and the property shall remain subject to all claims, lien, interest rights and obligation of record." WDP left any interest it may have held in the property from the March, 2011 assignment due to its failure to record and thus perfect and protect its interests before the Chapter Seven trustee transferred the property to Dearborn.

*Id.* at 47:2-15. The trial court also noted that WDP itself had acknowledged the distinction between a recorded interest and its unrecorded assignment:

> The order entered by the bankruptcy [court] could have included language protect[ing] WDP's unrecorded interest. Indeed, WDP expressly requested the Court to do so[,] recognizing the distinction between an interest of record an[d] [its] unrecorded assignment. WDP expressly understood that an order reflecting interest of record would not protect its unrecorded interest. But the bankruptcy court order retained only those claims, liens, interest rights and obligation of record.

*Id.* at 47:16-48:2. Therefore, the trial court concluded that any interest WDP may have had in the

Property was extinguished by October 20, 2011—the date the deed to Dearborn was recorded. *Id.* at 48:6-12.

The trial court then rejected WDP's argument that this result was unjust. The trial court noted that "WDP acquired the assignment while the bankruptcy was pending," and that the "assignment itself places the burden of recording the assignment on WDP, yet WDP failed to comply and did not record the 2011 assignment until 2015 after the bankruptcy order in this case was filed." *Id*. at 48:13-20. The trial court highlighted that "WDP had numerous opportunities to correct the deficiencies and/or inconsistencies in the assignment and then record the assignment to protect its interests, yet it failed to do so." *Id.* at 48:21-25. In short, the trial court concluded that "[i]t is not the role of the Court to protect sophisticated parties and their Counsel from their own mistakes or deliberate actions taken to their detriment." *Id.* at 49:4-8.

The trial court concluded by mentioning two additional arguments Dearborn had raised: (i) that Bank of America's discharge removed any remaining interest WDP may have had, and (ii) that there were significant issues with the Assignment. With respect to the former, the trial court stated that it "need not reach" this issue. *Id.* at 49:9-13. With respect to the latter, the trial court found that the "deficiencies in the assignment . . . are concerning," but it declined to actually "make a ruling on the validity of the assignment because any interest held by [WDP] was extinguished by the bankruptcy court due to WDP's continued failure to correct any deficiencies and promptly record . . . their assignment." *Id.* at 49:14-23.

The trial court entered its Order on June 5, 2017. *See* **(Ex. II)**, 6/5/17 Order. WDP filed a motion for reconsideration on June 26, 2017. *See* **(Ex. JJ)**, WDP Mot. for Reconsideration. The trial court denied that motion on July 27, 2017, finding that WDP had "merely present[ed] the same issues ruled on by the Court. [WDP] has failed to demonstrate a palpable error by which the

Court and the parties have been misled and show that a different disposition of the motions must result from correction of the error to warrant reconsideration of hearing." *See* **(Ex. KK)**, 7/27/17 Order.

**V. August 2017 - present.**

On August 16, 2017, WDP filed its Claim of Appeal in the Michigan Court of Appeals. On December 6, 2017, WDP filed its Brief on Appeal to the Court of Appeals. WDP made the exact same arguments—albeit in a different order—to the Court of Appeals that it now makes to this Court. WDP argued that 1) the Bankruptcy Court did not abandon the earlier recorded mortgage; 2) the trial court's interpretation of the Bankruptcy Court Order is contrary to Michigan law; 3) the City admitted that WDP was protected by the Bankruptcy Court Order; 4) the City's position is contrary to action it took in the Bankruptcy Court; 5) the City received a massive windfall; 6) an assignment need not be recorded; 7) the August 2015 discharge by BOA did not eliminate the mortgage allegedly assigned to WDP; 8) the alleged assignment was not fatally defective; and 9) WDP's alleged interest had priority over the City's interest. **(Ex. NN)**; WDP COA Br. (without exhibits).

The City filed its Response Brief on Appeal to the Court of Appeals on March 7, 2018. The City argued that 1) the trial court correctly found that the Bankruptcy Court Order extinguished WDP's alleged interest because it was not "of record"; 2) BOA's subsequent discharge of mortgage extinguished any interest that may have remained; 3) the Assignment was deficient because of invalid acknowledgments and mismatched party names; 4) the City qualified as a good-faith purchaser because it reasonably believed that the alleged March 2011 assignment must not have closed or had been rescinded; and 5) WDP's alleged interest should have been equitably rescinded or extinguished in any event. **(Ex. OO)**; Dearborn COA Br. (without exhibits).

On April 11, 2018, WDP filed a Reply Brief in the Court of Appeals attempting to negate the arguments and established law cited by the City, but to no avail.

On February 12, 2019, the Court of Appeals issued its Opinion, affirming the ruling of the trial court. **(Ex. QQ)**; COA Op., p. 9. The Court of Appeals upheld the trial court's grant of summary disposition in favor of the City and affirmed the extinguishment of WDP's alleged interest in Parcel C. The Court of Appeals Opinion essentially ruled as follows:

> 1. The bankruptcy court's order effectively extinguished any unrecorded interest when it later ordered that the Trustee abandon the property: . . subject to, all claims, liens, interests, rights and obligations *of record*. [Emphasis added.] . . . The bankruptcy court's order itself required the assignment be recorded in order to have continued validity. . . .;
>
> 2. [Equitable estoppel did not apply] because (1) when considered in context, the City's current position is not inconsistent with its prior position; and (2) the bankruptcy court did not rely on or accept any alleged statements as true before effectuating its order of abandonment;
>
> 3. [This case] is not a matter of priority as between the City and [WDP]. Instead, the case is whether the bankruptcy court's order extinguished [WDP's] unrecorded interest in the property[, which it did]; and
>
> 4. 'It is not the role of the Court to protect sophisticated parties and their Counsel from their own mistakes or deliberate actions taken to their detriment.'

**(Ex. QQ)**, COA Op., pp. 6-8. On March 5, 2019, WDP filed a Motion for Reconsideration asking the Court of Appeals to give it a "second chance" to unravel the consequences of its own deliberate inaction. The Court of Appeals denied WDP's Motion for Reconsideration on April 19, 2019. **(Ex. TT)**, COA Order Denying Motion for Reconsideration.

Contrary to WDP's assertion, the COA Opinion does not run afoul of *Prime Financial Services, LLC*; *Coventry*; or their related cases. Both lines of cases are distinguishable in light of the unique fact in this case that the Bankruptcy Order extinguished WDP's unrecorded assignment. Therefore, it makes no difference that WDP may have obtained an unrecorded assignment by

transfer of the BOA note. It is still an assignment not "of record." Priority of interest is irrelevant where, as in this case, WDP has no interest at all.

Nor did the Court of Appeals commit clear error or ignore published precedent concerning the equities in this case. Again, WDP assumes—based only on an unfavorable result—that the Court of Appeals did not balance the equities. The Court of Appeals absolutely did weigh the equities and considered WDP's argument that "equity compels reversal because allowing the City to own the Property in fee and free from [WDP's] interest would result in a windfall to the City." **(Ex. QQ)**, COA Op., p. 8. However, the Court of Appeals found WDP's argument lacking when it accounted for WDP's "inexplicable failure to record the assignment more than 4 ½ years, after receiving it March 2011." **(Ex. QQ)**, COA Op., p. 8.

The City did not receive a windfall in this case. The City did not borrow any money from BOA that it is not paying back. The City was not a party to the BOA note, mortgage, or WDP's alleged assignment. There is no inequity as between WDP and the City. Furthermore, the City did not get a windfall because it never got the benefit of its original bargain requiring development of Parcel C, despite the fact that the City's taxpayers spent over $16 million on parking structures that flank each side of Parcel C on the promise that Parcel C would be developed in accordance with the covenants that ran with the Property. *See* **(Ex. OO)**, Dearborn COA Br. at 21. The Bankruptcy Order merely conveyed the Property back to Dearborn consistent with the terms of the Covenant Deed and the Development Agreement. The Court of Appeals did not ignore equity's directive to abhor a windfall. There was just no windfall in this case.

WDP has now filed its current Application for Leave to Appeal to this Court. For the reasons stated previously and below, it is clear that there are no grounds for Supreme Court review in this case because the COA Opinion was 1) unpublished and therefore of no precedential value

or significance to Michigan's jurisprudence and 2) not clearly erroneous or contrary to published precedent of the Court of Appeals or this Court.

## STANDARD OF REVIEW

This case involves the interpretations of a court order, contract, and statutes. Each of these items would be reviewed *de novo* if this Court were to grant leave. *See Silberstein v Pro-Golf of Am, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008); *Klapp v United Ins Grp Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003); *Trentadue v Gorton*, 479 Mich 378, 386; 738 NW2d 664 (2007). In interpreting each of these, the plain language governs. *See In re Dembek*, 145 Mich App 185, 192; 377 NW2d 382 (1985); *Singer v Am States Ins*, 245 Mich App 370, 381 n8; 631 NW2d 34 (2002).

## ARGUMENT

### I. The Court of Appeals correctly found that the Bankruptcy Court's Order extinguished WDP's purported interest, because that interest was not of record due to WDP's failure to promptly and diligently record.

#### A. WDP's interest was extinguished because it was not "of record."

The Court of Appeals correctly affirmed the trial court's ruling that WDP lost any interest it may have held in the Property due to its failure to record, and thus perfect and protect, its interest before the Chapter 7 Trustee transferred the Property to Dearborn. *See* **(Ex. HH)**, Trial MSD Hr'g. Tr., at 47:2-15; **(Ex. QQ)** COA Op., p. 9. The Bankruptcy Court's Order made the transfer subject to "claims, liens, interests, rights and obligations *of record*." *See* **(Ex. Q)**, 10/5/11 Order (emphasis added). There is no dispute that the Assignment from which WDP's purported interest arose was not "of record" at that time. Therefore, WDP's breach of its contractual requirement to "promptly and diligently" record the Assignment led to the elimination of its interest.

Nevertheless, WDP tries to bootstrap the mortgage's once recorded status to its unrecorded assignment by arguing that the transfer of an underlying promissory note operates as an assignment

of a related mortgage as a matter of law and relies on *Prime Financial Services LLC v Vinton*, 279 Mich App 245; 761 NW2d 694 (2008) and *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712; 2 NW2d 892 (1942). WDP Br., at 12-13. However, the Court of Appeals correctly noted that "the situation before us is particularly unique. . . . [and that w]hile the 2005 mortgage itself was still 'of record' at the time of the bankruptcy proceeding, the assignment giving West Dearborn any interest was not." **(Ex. QQ),** COA Op., p. 5. As mentioned previously, the fact that the sale of a note operates as an assignment of the mortgage merely puts WDP in the same post-Bankruptcy Order position it was in already: holding an unrecorded assignment. The note itself was not recorded. WDP's argument has no effect on the ruling by the trial court and the Court of Appeals that WDP's alleged, unrecorded assignment—however obtained—was extinguished by the Bankruptcy Court Order. **(Ex. QQ)**, COA Op., pp. 5-6.

Likewise, WDP's reliance on *Coventry* is misplaced because this is not a case about priority of interest between the City and WDP. It is a case about whether WDP's unrecorded interest survived the Bankruptcy Order's extinguishment of interests not "of record." **(Ex. Q)**.

Indeed, as the trial court correctly highlighted, the proceedings before the Bankruptcy Court reveal that WDP knew its unrecorded interest was potentially at risk. *See* **(Ex. HH)**, Trial MSD Hr'g. Tr., at 47:16-48:2. In Paragraph 9 of the Trustee's motion seeking to sell Parcel C for $6,000.00, the Trustee stated that the "Property will be sold subject to all claims, liens, and interests of record without limitation. **(Ex. L)**, ¶ 9; *see also id.* (non-exhaustively listing some interests and stating that the sale would be "together with any other *recorded* interests and restrictions" (emphasis added)). WDP, in turn, filed an objection to the Trustee's motion. **(Ex. M)**. WDP did not object to the price of the sale. Nor did WDP inherently object to the idea of selling Parcel C at all. Rather, WDP requested that any order "provide that such sale of property is subject to *not*

*only* the claims, liens and interest of record described in Paragraph 9 of [the Trustee's] Motion, *but also* subject to the interest of Bank of America now held by West Dearborn Partners LLC as assignee of Bank of America." *Id.*, at ¶ 5 (emphasis added). In other words, WDP recognized a distinction between interests "of record"—i.e., covered by Paragraph 9 of the Trustee's Motion—and its unrecorded purported interest in the mortgage. But the Bankruptcy Court's Order made the transfer of the Property subject only those "claims, liens, interests, rights and obligations *of record*." **(Ex. Q)** (emphasis added).

This distinction is further confirmed by statements made by counsel for the Trustee at the hearing on the motions before the Bankruptcy Court. At the hearing, counsel stated: "[WDP] filed a limited objection. They requested that the sale motion also be subject to their assignment of the mortgage from Bank of America . . . .*We had pretty much worked out a proposed stipulation to resolve those issues prior to they even file that* [sic]." **(Ex. P)**, Bankr. Hr'g. Tr., at 4:12-19 (emphasis added). But no such stipulation would have been necessary if the Trustee's proposed order, which made the transfer subject to "all claims, liens, interests, rights and obligations of record" (like the ultimate Order entered by the Bankruptcy Court), also preserved the unrecorded assignment to WDP. Therefore, WDP was aware that its unrecorded interest could be eliminated by the Bankruptcy Court; however, WDP still failed to record.

The Bankruptcy Court could have added requested language to its Order protecting WDP's *unrecorded* interest. It did not do so. And WDP failed to make its interest "of record" in March 2011, in August 2011 after Objections were filed in the Bankruptcy Court, in October 2011 after the Bankruptcy Court's October 4, 2011 ruling, and even after the Bankruptcy Court issued its October 5, 2011 Order. In fact, as shown by WDP's counsel's assertion of attorney-client privilege, the flawed decision not to make WDP's interest "of record" in 2011 was a deliberate

one, as WDP could have obtained the necessary acknowledgement and had the Assignment recorded during that time—particularly given that Mr. Mokelke had the same contact information until 2012. *See* **(Ex. G)**, Excerpts of Dep. Tr. of M. Mokelke, at 35:1; 36:9-14; **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites at 34:14-35:9. As the trial court found—and the Court of Appeals agreed—"[i]t is not the role of the Court to protect sophisticated parties and their Counsel from their own mistakes or deliberate actions taken to their detriment." **(Ex. HH)**, Trial MSD Hr'g. Tr., at 49:4-8; **(Ex. QQ),** COA Op., pp. 8-9.[6] Nor is such a result unjust. Anmar Sarafa, the former manager of WDP, acknowledged at deposition that WDP purchased the mortgage knowing it would be subject to whatever the Bankruptcy Court ruled regarding enforceability. *See* **(Ex. H)**, Excerpts of Dep. Tr. of A. Sarafa, at 84:5-17. Further, WDP could have easily prevented the extinguishment. As the trial court found, "WDP had numerous opportunities to correct the deficiencies and/or inconsistencies in the assignment and then record the assignment to protect its interests, yet it failed to do so." *See* **(Ex. HH)**, at 48:21-25.

WDP could have made its interest "of record" between March 2011 and the motion briefing in August 2011. Notably, when asked why WDP did not record its interest during this time, counsel for WDP asserted the attorney-client privilege, suggesting the decision not to record was

[6] WDP's brief demonstrates WDP's continued misunderstanding of the impact of the Bankruptcy Court's Order. WDP argues that "the City had actual knowledge of the Assignment to [WDP]" prior to its acquiring its fee interest, and therefore "*it matters not when the Assignment was recorded*." WDP Br. at 20 (emphasis added). Putting aside for now whether Dearborn had actual knowledge, *see supra* Section IV, it *does* still matter when the Assignment was recorded. The impact of the Bankruptcy Court's Order does not depend on knowledge; rather it depends on timing. If WDP had recorded the Assignment before October 20, 2011, the Bankruptcy Court's Order may not have extinguished WDP's interest. Therefore, the timing of the recordation (and, correspondingly, WDP's failure to meet its contractual obligation to record "promptly and diligently") is determinative of whether WDP retained an interest in the Property.

deliberate, notwithstanding WDP's contractual obligation to "promptly and diligently" do so. *See* **(Ex. D)**, ¶ 21; *see also* **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites, at 31:2-4, 34:14-35:9.

WDP also could have made its interest "of record" in August 2011 after reviewing the Trustee's motion to approve sale, Dearborn's motion for abandonment, and/or Dearborn's objection (which expressly highlighted that the Assignment had not been recorded). *See* **(Ex. N)**, at ¶ 21. It could have made its interest "of record" before or after filing its own Objection to the Trustee's motion. It could have made its interest "of record" between the filing of those motions/objections and the Court's hearing on October 4, 2011. It could have made its interest "of record" after the Court entered the Order on October 5, 2011, but before the Quit Claim Deed was executed on October 17, 2011 or recorded on October 20, 2011. Or it could have filed a motion shortly after the Bankruptcy Court's decision, requesting that the Bankruptcy Court amend its Order to specifically include WDP's unrecorded purported interest. Any of those actions could have protected WDP's interest in the Property.

But WDP did none of these. Instead, it sat quietly and failed to record the Assignment until December 2015, more than 4.5 years after the March 2011 transaction and after extensive litigation by Bank of America, Dearborn, and unrelated third parties that may not have been necessary had WDP simply recorded its interest. Therefore, any harm that befell WDP from the Bankruptcy Court's Order was due solely to WDP's (or its agents') negligence or deliberate decision not to record the Assignment.

WDP tries to avoid this result by claiming that there is "no requirement that an assignment be recorded to be valid." WDP Br. at 23. This misses the point. It is the Bankruptcy Court's Order itself that required the assignment to be recorded to have continued validity, not some other legal requirement. And, the language of that Order left WDP's decision not to record a mistaken

strategy with consequences. Moreover, it is indisputable that WDP had an obligation to record the Assignment (i.e., under the Note Sale and Assignment Agreement), and to do so "promptly and diligently." *See* **(Exhbit D)**, ¶ 21; *see also* **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites, at 31:2-4, 34:14-35:9. However, WDP breached its contractual obligation and failed to meet this requirement.

Finally, the City did not receive a "windfall" when it regained ownership of Parcel C. WDP suggests that transfer of Parcel C to the City free of its alleged interest in BOA's mortgage is "inequitable because it creates a massive windfall to the City, to the detriment of" WDP. WDP Br. at 21; *see also id*. at 9.[7] WDP's view of the equities in this case is myopic.

First, the City did not borrow any money, yet its interest was arguably subject to a large mortgage. Furthermore, recall that both the Covenant Deed and the Development Agreement made Parcel C subject to development obligations requiring construction of a mid-rise, mixed-use office, hotel, and residential project on Parcel C. *See, e.g.*, **(Ex. A)**, at ¶ I.A. The Covenant Deed required that this development occur, or else West Village Commons, LLC would forfeit the property back to Dearborn. *See id.* at ¶¶ II.A, B. It was not a windfall for the City to get Parcel C back without the mortgage because 1) the City never got the benefit of the BOA note or mortgage and the money from that loan never was spent on improving the Property; and 2) the City never got the benefit of its original bargain requiring development of Parcel C, which is still vacant after 16 years. Accordingly, by abandoning Parcel C back to Dearborn, the bankruptcy court did not

[7] It appears that at least part of WDP's argument regarding a "massive windfall" is that Dearborn acquired the property "for the nominal $1.00, when the property was valued at $800,000 under the bankruptcy schedule." WDP Br. at 11, 21; *see also id.* at 1 (Dearborn "then acquired its interest in the Subject Property from the Bankruptcy Court in 2011 – for $1.00."). Putting aside the other consideration by Dearborn discussed below, it is notable that the Bankruptcy Trustee sought to sell Parcel C to another entity for only $6,000.00. *See* **(Ex. L**, ¶ 7**)**. Therefore, Dearborn acquiring the Property for a nominal amount is not inequitable.

render a windfall in favor of the City at all. Instead, it merely put the City *in statu quo* consistent with the terms of the Covenant Deed and the Development Agreement.

Additionally, Mr. Sarafa testified that WDP knew its interest would be subject to the Bankruptcy Court's decisions, a point made even clearer when WDP requested that any Order by the Bankruptcy Court maintain "not only" interests of record, "but also" WDP's alleged interest not of record. *See* **(Ex. M)**, at ¶ 5 (emphasis added); **(Ex. H)**, Excerpts of Dep. Tr. of A. Sarafa, at 83:9-19, 84:5-17. Indeed, WDP only paid approximately seven cents on the dollar for the purchase of the note and mortgage, suggesting that both it and BOA recognized the speculative nature and significant risk of WDP's investment. Further, any alleged harm to WDP is of its own doing; if it had "promptly and diligently" recorded the Assignment (as it was contractually required to do) in March, April, or May 2011—or even through October 2011—then the Bankruptcy Court's Order would not have extinguished its interest.

In any event, there is no "windfall" to the City. Rather, a finding that WDP no longer holds an interest in the Property protects the City's taxpayers by preventing WDP from continuing to sit quietly while leaving Parcel C vacant and unmarketable—an important piece of real estate in the City that is supported by taxpayer expenditures of over $16 million on parking structures that flank each side of Parcel C. WDP never demanded payment or sought to foreclose. Indeed, WDP made no mention of its purported interest in the mortgage between the filing of its Objection in the Bankruptcy Court in August 2011 and being sued as a defendant in this case in December 2015. Accordingly, this is not a basis for reviewing or reversing the Court of Appeals' decision.[8]

[8] WDP also argues that the trial court's ruling and Court of Appeals' opinion is inconsistent with "Michigan law." WDP Br. at 1, 14-15. It is unclear if this vague reference to "Michigan law" is solely to the arguments raised in WDP's briefing, which the City has repeatedly refuted, or to some other purported issue that WDP has not set forth with the requisite specificity for the City to respond. *See* **(Ex. FF)**, Dearborn Reply ISO MSD at 4, n2.

### B. Recordation of the underlying mortgage is of no consequence; WDP only had a purported interest in the Property due to WDP's *unrecorded* Assignment.

WDP next attempts to rebut the impact of the Bankruptcy Court's Order by arguing that the *mortgage* was of record, even though WDP's Assignment of that mortgage was not. WDP claims that the trial court "interpreted the Bankruptcy Order's express terms . . . as inapplicable to the recorded mortgage." WDP Br. at 1.

In raising such an argument, however, WDP confuses the underlying *mortgage* with WDP's *interest in the mortgage*. *See id*. at 1, 6, 8, 9-10. WDP's interest in Parcel C arose solely from the Assignment; without that Assignment, WDP had no interest whatsoever. And it is undisputed that the purported Assignment was unrecorded—due to WDP's own deliberate or negligent conduct—at the time of the Quit Claim Deed from the Trustee. In other words, while the mortgage itself may have still been "of record," the document that gave WDP any interest in Parcel C—i.e., the Assignment—was not. And it was WDP's *interest* that was extinguished.[9]

Indeed, WDP itself recognizes that the Assignment (the purported instrument giving WDP its interest in Parcel C) is a "different and distinct instrument" from the mortgage. *See* WDP Br. at 14. And WDP acknowledged in its Objection to the Trustee's motion that it could lose its unrecorded interest, requesting that the Bankruptcy Court make the transfer "subject to *not* only the claims, liens and interest of record . . ., *but also* subject to the interest of Bank of America now held by [WDP] as assignee of Bank of America." *See* **(Ex. M)**, at ¶ 5 (emphasis added). To that

[9] Notably, the Bankruptcy Court Order requires both "lien[s]" and "interest[s]" to be "of record" to survive. *See* **(Ex. Q)**. The fact that the Order uses both words suggests they are not duplicative, otherwise, the term "lien" would be superfluous if it was encompassed in the word "interest." *See Port Huron Ed Ass'n v Port Huron Sch Dist*, 452 Mich 309, 324; 550 NW2d 228 (1996) (avoid contract interpretation that renders language superfluous). Therefore, under the Order, not only did the lien (i.e., the "mortgage") have to be "of record," so too did WDP's "interest" in the Property (i.e., the Assignment).

end, if WDP truly believed the recorded underlying mortgage saved WDP's unrecorded interest as well, there would have been no need for WDP to file its Objection—the Trustee's motion would have already covered WDP. Therefore, the trial court and Court of Appeals appropriately found that *WDP's interest* in Parcel C was extinguished by the Bankruptcy Court's Order. *See* **(Ex. Q)**, at 47:2-15 ("WDP left any interest *it may have held in the property* from the March, 2011 assignment due to its failure to record and thus perfect and protect *its interests* before the Chapter Seven trustee transferred the property to Dearborn." (Emphasis added)); **(Ex. QQ),** COA Op., p. 6.

In an effort to create further confusion, WDP also highlights that the Construction Mortgage provided that it inured to "successors and assigns." WDP Br. at 11, 13, 19. But this is of no consequence. The Assignment from Bank of America to WDP—which is what gave WDP any interest in Parcel C—was not "of record." And it is this lack of recording that caused the extinguishment by the Bankruptcy Court's Order. The fact that the mortgage inured to the benefit of "successors or assigns" does not override the Bankruptcy Order's "of record" requirement.

For this same reason, WDP's discussion about questions of priority under Michigan law is misplaced. *See* WDP Br. at 19-21. WDP relies extensively on *Coventry Park Homes Condominium Association v Federal National Mortgage Association*, 298 Mich App 252; 827 NW2d 379 (2012), a case dealing with questions about priority after an assignment. But this matter concerns the interpretation of the relevant Bankruptcy Court Order that applies to this particular piece of Property and its impact on unrecorded interests; it does not concern issues of priority. And that Order extinguished any interests that were not "of record"—like WDP's—regardless of their alleged "priority." The Court of Appeals agreed that WDP's reliance on *Coventry* was misplaced because "*Coventry* concerned the interpretation of the Condominium Act and the

priority of mortgages, not the interpretation, relevancy, and effect of a bankruptcy court's order. . . . [and] [t]he bankruptcy court's order itself required the assignment be recorded in order to have continued validity." **(Ex. QQ)**, COA Op., pp. 5-6. Because WDP's alleged assignment was not timely recorded, it was extinguished.

WDP also appears to use the "successor and assigns" language in the Construction Mortgage to suggest that the recording of that mortgage somehow rendered the assignment also "of record" under the Bankruptcy Court's Order. WDP Br. at 11-14. For support, WDP highlights that the City argued in the Bankruptcy Court that the Development Agreement related to Parcel C should survive the Bankruptcy, even though it was not recorded, because the Development Agreement was referenced in two recorded documents: the 2005 Covenant Deed and the 2005 Declarations of Covenants and Restrictions. WDP Br. at 16, 18-19.

Although the City does not dispute that the BOA mortgage contains language to the effect that the mortgagee includes successors and assigns, that is not the point. The question at issue in this case is whether WDP's alleged assignment continued to exist after the Bankruptcy Order. WDP is also incorrect when it argues that the Court of Appeals disregarded precedent holding that assignment of the note includes a transfer of the obligation under the mortgage." WDP Br. at 11. The Court of Appeals correctly identified that WDP's interest failed, not because of the method that was utilized, but because WDP did not record its interest. **(Ex. QQ)**, COA Op., pp. 5-6. Moreover, the Court of Appeals noted that even if it accepted that WDP stood in BOA's shoes "and had no obligation to record the assignment . . . then [WDP] stood in BOA's shoes when BOA later discharged the mortgage in 2015 as a result of the separate quiet title proceeding regarding Parcel A-3," which BOA defended as the mortgagee, despite the alleged, unrecorded assignment from 2011. **(Ex. QQ)**, COA Op., pp. 6.

However, the Development Agreement is distinguishable from WDP's unrecorded interest for a number of reasons. First, the Development Agreement existed at the time of the recorded documents. The March 2011 assignment did not exist when the Construction Mortgage was recorded in 2005.

Second, the recorded Covenant Deed and Declarations of Covenants and Restrictions expressly referenced the Development Agreement, including incorporating certain provisions that would require a person to review the Development Agreement to understand how the recorded documents work. *See, e.g.* **(Ex. A)**, at ¶ I.B.1 ("No portion of the Property shall be used other than for purposes as contemplated in the Development Agreement"); I.B.3 (prohibiting sales, transfers, or conveyances "except in accordance with the Development Agreement"); **(Ex. B)**, at II.B (referencing a site plan "pursuant to Section 2.04(k) of the Development Agreement"). In other words, if the Development Agreement were deemed to have been extinguished by the Bankruptcy Court's Order, provisions of the recorded Covenant Deed and Declarations of Covenants and Restrictions would make no sense.

The "successors and assigns" language in the mortgage, however, is entirely different. The mortgage does not expressly reference or incorporate the 2011 Assignment to WDP, nor could it have given that the Assignment was executed years after the mortgage was recorded. Further, the mortgage (obviously) does not require a person to review the subsequent Assignment to understand how the mortgage works.

Finally, Dearborn's argument before the Bankruptcy Court did not concern whether the unrecorded Development Agreement would survive the Order requiring the Property to be transferred to Dearborn. To the contrary, Dearborn was arguing against the Trustee's position that the Trustee obtained Parcel C free and clear of the Development Agreement when the Property

was transferred to the Bankruptcy Estate and, therefore, the Trustee was not bound by the Development Agreement's restrictions on sales and conveyances. Moreover, Dearborn's argument concerned whether the reference to the Development Agreement constituted constructive notice to the Trustee—something that is not at issue here given that WDP's loss of its interest was due to the plain language of the Bankruptcy Court's Order extinguishing any interests that were not "of record." Accordingly, WDP's unrecorded interest—which was extinguished by the Bankruptcy Court's Order and WDP's own failure to record—is significantly different than Dearborn's argument regarding the Development Agreement that was specifically referenced and incorporated into the recorded documents.

### C. WDP takes the statements by Dearborn's counsel, the Bankruptcy Court, and the Court of Appeals out of context.

In a last-ditch attempt to save itself from its own failings, WDP points to statements by Robert Gordon—counsel for Dearborn in the Bankruptcy Proceedings—and the Bankruptcy Court as evidence that WDP's interests survived the Bankruptcy Court's Order. *See* WDP Br. at 3-4, 21. But WDP takes those statements out of context. For example, in its Objection to the Trustee's motion, Dearborn noted that "upon information and belief, Bank of America sold the note and mortgage associated with [Parcel] C to [WDP] . . . at the end of March 2011." **(Ex. N)**, ¶ 19. But WDP ignores that Dearborn continued with the following: "Notably, no explanation is provided by West Dearborn Partners as to why the documents effectuating the sale and transfer of the note and mortgage to West Dearborn Partners do not appear of record almost five months after the transaction." *Id.*, ¶ 21. Therefore, even as early as its August 2011 filings with the Bankruptcy Court, Dearborn raised questions about the validity of the purported assignment.

Read in this context, Mr. Gordon's statements reveal only that Dearborn viewed WDP as an "alleged" secured party (whose interest had not been confirmed through recording), and that

such an interest would be protected if recorded. *See generally* **(Ex. P)**, at 4:12-14, 32:1-5 (Trustee stating that WDP appears to be the secured party, which Mr. Gordon then repeats based on this assertion). In other words, any statements by Mr. Gordon (and, correspondingly, the Bankruptcy Court) about WDP's interest that were made in October 2011—nearly two months after Dearborn filed its Objection—were made under the impression that if WDP truly held an assigned interest in the mortgage, it must have recorded its assignment by then, particularly in light of Dearborn's expressly stated concern that WDP had not done so almost five months after the transaction. Yet, despite these expressed concerns, the proposed orders that made the transfer subject only to interests "of record," and the more than six-month period between the purported closing of the transaction and the Quit Claim Deed to Dearborn, WDP still inexplicably made the strategic decision not to record—a decision which WDP has now protected by asserting the attorney-client privilege. **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites, at 34:14-35:9. Therefore, any harm that befell WDP from the Bankruptcy Court's Order arose solely from its own conduct.

## II. Even if WDP's interest survived the Bankruptcy Court Order, Bank of America's subsequent discharge extinguished any interest that may have remained.

WDP claims that its interest survived the Bankruptcy Court's Order because the *mortgage* was recorded, even if WDP's interest was not. WDP Br. at 11-14. As set forth above, Dearborn disagrees with this position and so did the Court of Appeals. *See* **(Ex. QQ)**, COA Op., p. 6 ("Even if we accepted West Dearborn's position that it stood in BOA's shoes and had no obligation to record the assignment to protect its interest, then West Dearborn stood in BOA's shoes when BOA later discharged the mortgage in 2015."). This conclusion is well-supported by Michigan law.

Even if WDP retained any interest post-bankruptcy because of Bank of America's recording of the mortgage—as opposed to WDP's Assignment—then WDP takes its interest subject to any claims, actions, or defenses of Bank of America, as the mortgagee upon whose

recorded rights WDP relies. *See Arnold v DMR Fin Servs, Inc*, 448 Mich 671; 532 NW2d 852 (1995) (unrecorded security assignment of a mortgage does not prevent the mortgagee of record from foreclosing by advertisement). Therefore, even if WDP's interest somehow survived the Bankruptcy Court's Order, its interest was eliminated by Bank of America's later discharge of the mortgage, and the Court of Appeals appropriately affirmed the trial court's grant of summary disposition in favor of the City. *See Mich Ed Employees Mut Ins Co v Karr*, 228 Mich App 111, n1; 576 NW2d 725 (1998) ("We will not reverse when the trial court reaches the correct result regardless of the reasoning employed.").

WDP's counsel acknowledged that WDP breached the terms of the Note Sale and Assignment Agreement by failing to "promptly and diligently record . . . all assignments and notices . . . necessary to effect the transaction described in [the] Agreement." *See* **(Ex. D)**, at ¶ 21; **(Ex. K)**, Excerpts of Dep. Tr. of S. Lites at 31:2-4. As a result of that breach—i.e., the failure to record—Bank of America has now been sued in two different quiet-title actions concerning property covered by the mortgage: by West Village Square Condominiums in 2014 and this case. And Bank of America defended against both of those lawsuits as the mortgagee, resulting in a court ordering Bank of America to discharge the Construction Mortgage, with which Bank of America complied. Indeed, in the 2014 action, Bank of America specifically defended against the plaintiffs' motion for summary disposition by stating that the plaintiffs were "assert[ing] entitlement to Parcels encumbered by a Construction Mortgage *held by Defendant Bank of America* [on Parcels A-3 and C]." *See* **(Ex. V)**, BOA Resp. to Mot. for Summ. Disp. at 6-7 (emphasis added). Therefore, if WDP's interest continued after the bankruptcy solely due to Bank of America's recordation, then WDP's interest also should be subject to Bank of America's conduct resulting from WDP's failure to record its own Assignment—including the August 2015

discharge by Bank of America. *See Goodale v Patterson*, 51 Mich 532; 16 NW 890 (1883) (holding that an assignee was subject to the same equities as the assignor, and if the assignor gave a discharge of the mortgage to the purchaser, the purchaser was entitled to regard it as a regular and valid release thereof).[10]

Just like with the impact of the Bankruptcy Court's Order, this result also is not unjust. WDP had a very simple remedy to protect itself from any later conduct by Bank of America: record the Assignment, as contractually required. However, as discussed extensively above, WDP inexplicably failed to do so for almost five years, ultimately leading to Bank of America being sued in two separate lawsuits and ultimately discharging the Construction Mortgage. Therefore, it is wholly equitable for WDP to be subject to the consequences of its deliberate or negligent failure to record, i.e., Bank of America's discharge as the last mortgagee of record.

The logic and necessity of this result is further demonstrated by examining what the impact of a contrary decision could be on other innocent third parties. As discussed earlier, both Parcel A-3 and Parcel C were subject to the Construction Mortgage at issue in this case. *See* **(Ex. C)**. Therefore, the purported March 2011 Assignment applied to both parcels as well.

In 2014, Bank of America was sued as the mortgagee of record due to WDP's failure to record and, as a result of that lawsuit, Bank of America discharged the mortgage as to both Parcel A-3 and Parcel C in 2015. **(Ex. X)**. But neither WDP nor Bank of America challenged the validity

[10] The *Goodale* and *Arnold* cases also undermine WDP's argument that the Discharge was invalid because Bank of America had nothing to discharge as a result of the assignment. WDP Br. at 24-25. The court in *Goodale* found the assignor's discharge to be valid with respect to the purchaser, notwithstanding the assignor's earlier (and unrecorded) assignment of the document. *Goodale*, 51 Mich at 532. In other words, the assignee (here, WDP) was subject to the conduct (i.e., discharge) of the assignor original mortgagee (here, Bank of America). *Id.* Similarly, *Arnold* permitted the assignor mortgagee of record to foreclose on the property. *Arnold*, 448 Mich at 671.

of that discharge as to Parcel A-3. Indeed, the "Affidavit of Scrivener's Error"—which was executed months after WDP became a defendant in this action—expressly retains the discharge as to Parcel A-3. *See* **(Ex. LL)**.[11] However, there is no logical reason why the discharge should be effective as to Parcel A-3, and not Parcel C. If Bank of America truly had no ability to discharge the mortgage as to one parcel due to the March 2011 Assignment, it should not have had the ability to discharge the mortgage as to the other either. But neither Bank of America nor WDP sought reconsideration of the court's decision in the 2014 litigation, nor have they corrected any issues regarding the discharge for Parcel A-3.

In an attempt to avoid this result, WDP asserts that it "had no interest in moving to set aside the Discharge as to Parcel (A-3) and, therefore, had no reason to do so." WDP Br. at 25, n5. But even if true, this is just *another* example of a strategic decision by WDP taken at the expense of other innocent third parties. If Bank of America's discharge as to Parcel C was invalid due to the March 2011 unrecorded Assignment, it could raise serious questions (or threaten inconsistent results) about title to Parcel A-3 as well into the future—regardless of WDP's now-claimed lack of "interest in moving to set aside the Discharge as to Parcel (A-3)." And these issues could prejudice third parties, including West Village Square Condominiums VII, LLC and West Village Square Condominiums VIII, LLC—the plaintiffs in the 2014 quiet title action regarding Parcel A-

[11] WDP also should not be permitted to rely on the "Affidavit of Scrivener's Error," as that document is invalid. MCL 565.451d(2)(b) prohibits an Affidavit of Scrivener's Error that "alter[s] the substantive rights of any party unless it is executed by that party." Here, the Affidavit would alter Dearborn's and/or WDP's rights, but it is not signed by either of them.

Of course, notwithstanding the uselessness of the Affidavit of Scrivener's Error, WDP may have a remedy if it was a proper assignee—it may be able to sue Bank of America for monetary damages for the discharge. But that should have no impact on Dearborn's title to Parcel C, particularly given that all of these issues arise out of WDP's conduct (i.e., failing to record, as required by the contractual agreement with Bank of America), and Bank of America's actions (i.e., defending against the quiet title action on Parcel A-3 and Parcel C). There is no evidence of similar questionable conduct by Dearborn.

3. In other words, West Village Square Condominium's clear title to Parcel A-3 would once again, be open to dispute.

Accordingly, the Court of Appeals Opinion was well-grounded in existing Michigan law and equity and consistency demanded a finding that if WDP's interest somehow survived the bankruptcy based on the recording of the underlying mortgage, the discharge of that recorded interest by the mortgagee of record—i.e., Bank of America—extinguished WDP's interest as well.

**III. The Assignment is also deficient, containing invalid acknowledgments and mismatched names, thereby undermining its enforceability.**

The Court of Appeals did not decide this issue because the trial court did not rely on this argument as the basis for its ruling. **(Ex. QQ),** COA Op., p. 8. Nevertheless, the defective assignment provides an alternate basis to deny WDP relief from its own deliberate inaction.

Moreover, and notwithstanding the above deficiencies, both the Assignment itself and the Acknowledgements WDP ultimately obtained are also deficient, thus further undermining their effectiveness. MCL 565.201(1) begins by declaring that "[a]n instrument . . . by which . . . any interest in real estate is conveyed, assigned, encumbered, or otherwise disposed of shall not be received for record by the register of deeds of any county unless that instrument complies with each of the following requirements." One such requirement is that an instrument assigning any interest in real estate that is to be recorded must have the "name of each person purporting to execute the instrument . . . legibly printed, typewritten, or stamped beneath the original signature or mark of the person." MCL 565.201(1)(a). Here, although Mr. Mokelke's typewritten name appears beneath his signature, Mr. Sarafa'a does not.

Further, although the Assignment begins by defining "West Dearborn Partners, LLC" as the "Assignee," it closes the document by naming "West *Village* Partners, LLC" as the "Assignee. *See* **(Ex. I** at 2**)** (emphasis added). And it is this latter entity on behalf of which Mr. Sarafa

purportedly signs as "Managing Member." *Id*. Nor is such a defect minor, as this could cause confusion in a foreclosure regarding the true recipient of the mortgage and thus who would have the ability to foreclose. *See* MCL 600.3204(3). The differing assignee entities within the same document is just another example of a cloud on the title created by WDP's sloppiness with respect to Parcel C.

This particular deficiency also raises issues with the Acknowledgement (and subsequent recordation) that WDP ultimately obtained as well. One requirement for recordation is that the instrument must contain an acknowledgement. MCL 565.201(1)(c). The Acknowledgement for Mr. Sarafa's signature states: "The foregoing instrument was acknowledged before me this 7/18/2014 (date) by Anmar K. Sarafa (name of person acknowledged)." The Acknowledgement does not say "Anmar K. Sarafa, on behalf of West Dearborn Partners, LLC, a Michigan limited liability company." Indeed, the Acknowledgement entirely neglects to mention the company on behalf of which Mr. Sarafa was purportedly acting. *See* **(Ex. I)**.

Given the inconsistent entities discussed above, the Acknowledgment could also not contain a consistent "on behalf of" statement. Mr. Sarafa signed the Assignment as "Managing Member" for "West Village Partners, LLC." **(Ex. I** at 2**)**. But Mr. Sarafa would have had to sign the Acknowledgement on behalf of "West Dearborn Partners, LLC" if that was truly the entity on behalf of which he was acting. Under MCL 565.201(1)(b), this discrepancy between the name on the Acknowledgement and the name on the Assignment would have prevented proper recordation.

Each of these issues rendered the Assignment signatures and Acknowledgements deficient, which should have either left the Assignment invalid or, at a minimum, prevented its recordation in December 2015. *See* MCL 565.201.

## IV. Dearborn qualifies as a good-faith purchaser because it reasonably believed the March 2011 deal must not have closed or had been rescinded.

WDP further argues that Dearborn did not acquire Parcel C as a good-faith purchaser under MCL 565.29, and should thus be subject to WDP's previously unrecorded property interest in the mortgage. This argument should fail for a number of reasons.

First, as described above, any interest WDP may have held in the Property was extinguished by the Bankruptcy Court's Order requiring the Trustee to transfer the property to Dearborn subject only to "claims, liens, interests, rights and obligations of record." *See* **(Ex. Q)**. The purported assignment giving WDP an interest in the mortgage was not "of record" until December 2015—after this litigation was filed. **(Ex. I)**. Moreover, even if the mortgage's recorded status somehow saved WDP's interest—regardless of WDP's failure to promptly and diligently record its assignment before the transfer to Dearborn—Bank of America's subsequent discharge of the mortgage in August 2015—i.e., still before the assignment was recorded by WDP—extinguished any interest WDP may have had. **(Ex. X)**. Therefore, WDP's argument about knowledge and good-faith-purchaser status is irrelevant.

Second, WDP claims that Dearborn cannot qualify for protection under MCL 565.29 because it is not a "purchaser." WDP Br. at 20. MCL 565.29 provides in relevant part that "[e]very conveyance of real estate within the state hereinafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." WDP argues that because the Quit Claim Deed to the City recites a consideration of only $1.00, this is not "valuable consideration." *See* WDP Br. at 20; *see also* **(Ex. R)**, Quit Claim Deed. But, courts "do not generally inquire into the sufficiency of consideration," and "[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *GMC v Dep't of*

*Treasury*, 466 Mich 231, 239; 644 NW2d 734 (2002). Therefore, WDP's claim that the $1.00 stated in the Quit Claim Deed is insufficient to render Dearborn a "purchaser" given the value of the Property is without legal merit.

Moreover, the transfer of Parcel C to Dearborn was supported by more than the above-challenged consideration. As WDP recognizes, at the time West Village Commons, LLC filed for bankruptcy, Dearborn was in extensive litigation with West Village Commons, LLC over the failure to comply with its construction obligations under the Covenant Deed and related documents. Indeed, it is undisputed that Dearborn had obtained a court order requiring construction to begin. WDP Br. at 2, n2. Dearborn ultimately released all its claims against West Village Commons, LLC in exchange for, among other things, an acknowledgement that West Village Commons, LLC had conveyed all its interest in the Property to Dearborn. Dearborn's forgoing further rights against West Village Commons, LLC in exchange for clear title to Parcel C constituted valuable consideration.

Finally, WDP argues that Dearborn was not a good-faith purchaser under MCL 565.29 because Dearborn purportedly had actual notice of the assignment. WDP Br. at 9, 20-21. It is WDP's burden to rebut the presumption that Dearborn was a bona fide purchaser without notice. *Ooley v Collins*, 344 Mich 148, 159; 73 NW2d 464 (1955). But contrary to WDP's assertion, Dearborn did not have actual notice that the assignment had been completed. Although counsel for Dearborn may have been told that Bank of America sold the note and mortgage to WDP, Dearborn questioned whether that sale was still effective in its August 26, 2011 Objection in the Bankruptcy Court:

> Notably, no explanation is provided by West Dearborn Partners as to why the documents effectuating the sale and transfer of the note and mortgage to West Dearborn Partners do not appear of record almost five months after the transaction.

**(Ex. N)**, at ¶ 21. WDP did not provide any explanation or defense in response to this Objection—indeed, it did not respond to Dearborn's Objection at all. Nor did WDP record its Assignment in response to this questioning by Dearborn, notwithstanding that WDP could have easily obtained the necessary acknowledgements given that Mark Mokelke had the same contact information at that time. *See Federman v Van Antwerp*, 276 Mich 344; 267 NW 856 (1936) (a person put on inquiry as to another's claimed interest must exercise good faith and reasonable care, but no more, in pursuing the existence of the interest); **(Ex. G)**, Excerpts of Dep. Tr. of M. Mokelke, at 35:4-8, 55:18-22.[12]

Moreover, in 2014 and 2015—still months before WDP recorded its Assignment—Bank of America expended its resources defending against a quiet-title action regarding the related Parcel A-3, to which Dearborn also was a party. As part of that litigation, Bank of America noted that the plaintiff was "assert[ing] entitlement to Parcels encumbered by a Construction Mortgage *held by Defendant Bank of America*." **(Ex. V)**, at 6-7 (emphasis added). This was a reference to Parcel A-3 and Parcel C, and the mortgage at issue in this case. *Id.* Ultimately, Bank of America recorded a discharge of that mortgage in August 2015. **(Ex. X)**.

Therefore, based on WDP's failure to record its purported assignment between March 2011 and August 2011, or between Dearborn raising questions about that assignment in August 2011 and the Quit Claim Deed in October 2011, Dearborn reasonably believed the transaction between

[12] Notably, until its most recent filing in this Court, WDP stated in its briefs that the deal with Bank of America closed "on *or about* March 31, 2011." WDP COA Br. at 1, 2 (emphasis added). But the deal either closed on March 31, 2011 or it did not. WDP provides no evidence that the deal closed on any date other than March 31, 2011, yet it also would not affirmatively state that the deal closed on that date, until the City drew attention to this fact in the Court of Appeals. This sort of vagueness, and the corresponding conduct of other parties described above, is precisely why Dearborn reasonably believed the deal must have fallen through.

WDP and Bank of America must have fallen through. *See* **(Ex. MM)**, Excerpts of Dep. Tr. of D. Walling, at 58:16-59:22, 76:25-78:9, 82:5-15, 84:10-20. Such a belief was further confirmed when (i) Bank of America defended against the quiet-title action on Parcel A-3 in 2014 by claiming that *it* still held the subject mortgage, and (ii) Bank of America initially defended against the instant case by pointing to the August 2015 discharge as evidence that it no longer held an interest in Parcel C. *See* **(Ex. V)**, at 6-7; **(Ex. MM)**, Excerpts of Dep. Tr. of D. Walling, at 58:16-59:22; 76:25-78:9; 82:5-15; 84:10-20; **(Ex. Y)**, Excerpts of Dep. Tr. of L. Yangouyian, at 64:16-65:2, 77:4-79:12, 95:4-96:20. It is utterly ridiculous for WDP to suggest that Dearborn should have independently questioned whether WDP still claimed an interest from 2011 notwithstanding that (i) WDP had still not recorded its purported assignment in 2015 and (ii) the alleged assignor was acting in 2015 as though the assignment was not effective. *See Lowry v Bennett*, 119 Mich 301; 77 NW 935 (1899) (a person relying on the record of a discharged mortgage is protected against foreclosure even though it was mistakenly discharged).

Finally, throughout this entire 4.5-year period, WDP never demanded payment, nor did it try to foreclose. Therefore, based on WDP's continuing failure to record, complete silence and inaction, and the purported assignor's resulting actions in litigation, the City reasonably concluded that the assignment must not have been effective. And, all of this confusion resulted from WDP's inexplicable failure to record—the precise reason why recordation is so important. *See Harr v Coolbaugh*, 337 Mich 158, 167; 59 NW2d 123 (1953) ("The purpose of the recording law is that the true state of the title be represented, i.e., in the public records."); *see also Crouse v Mitchell*, 130 Mich 347, 358; 90 NW 32 (1902) (purpose of recording is to "secure a prompt record of

conveyances, and to afford a means for the ready determination of certain questions or priority which would otherwise arise.").[13]

## CONCLUSION

In short, the entire dispute in this case stems from WDP's apparently deliberate failure to record its alleged assignment "promptly and diligently," as it was required to do. Any harm that has befallen WDP is thus of its own creation. For the foregoing reasons, the City of Dearborn respectfully requests that this Honorable Court DENY WDP's Application for Leave to Appeal, or, in the alternative, peremptorily AFFIRM the Court of Appeals, and grant any other relief the Court deems proper, including awarding costs.

Respectfully submitted,

ZAUSMER, P.C.

*/s/ Richard A. Patton*

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Dated: June 28, 2019

[13] It should be noted that, contrary to WDP's assertion, "protect[ion] of subsequent purchaser" is not the "sole purpose of recording" in Michigan. *See* WDP Br. at 24.