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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CITY OF DEARBORN'S RESPONSE TO WEST DEARBORN PARTNERS, LLC'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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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 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) In spite of having over 4.5 years to record its alleged assignment, West Dearborn Partners deliberately chose not to record which resulted in multiple lawsuits involving the City of Dearborn and Bank of America as the last mortgagee of record over title to the subject property and the discharge of the subject mortgage. In a final attempt to avoid the chaos that West Dearborn Partners created by its failure to record, it asked the Court of Appeals to invoke equity (a) to estop the City of Dearborn from quieting title to the subject property even though Dearborn always challenged the validity of West Dearborn Partners'

assignment and did not take any inconsistent positions in the prior Bankruptcy case and (b) to prevent an alleged windfall to the City of Dearborn, even though Dearborn never got the benefit of its original bargain to have the subject property developed despite fulfilling its obligations to the developer to expend over $16 million to develop parking garages that flank the subject property and was merely being placed in status quo by having that property returned. Dearborn never received the benefit of the funds borrowed by the developer and secured by the mortgage on the property. Did the Court of Appeals properly balance the equities in this case when it held that estoppel did not apply and that it is not the role of the Court to protect sophisticated parties such as West Dearborn Partners and their counsel from their own mistakes or deliberate actions and inactions taken to their detriment?

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.

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

I. Introduction and Summary of Argument.

West Dearborn Partners, LLC ("WDP") comes to this Court asking to be saved from the consequences of its own deliberate inaction that has wreaked havoc on title to multiple pieces of real property in the City of Dearborn ("Dearborn"), including property owned by Dearborn 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 Dearborn—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 as required by a Development Agreement between it and Dearborn and ultimately declared bankruptcy.

During the pendency of the Bankruptcy, it is alleged that WDP sought a huge, high risk windfall by buying from Bank of America ("BOA") its mortgage on Parcel C for about seven cents on the dollar in March 2011. The Note Sale and Assignment Agreement between BOA and WDP required that WDP promptly and diligently record its purported assignment and that doing so was necessary to effect the contemplated transaction. In spite of the contractual requirement for WDP to record the assignment to bring it into effect, WDP did not promptly or diligently record the assignment. 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 in the Bankruptcy proceedings 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 Dearborn subject only to interests "of record," but before the actual Quit Claim Deed to Dearborn 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 hidden from 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 BOA 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 vigorously defended its interest in that action claiming to still be the mortgagee, thus signaling to the world and Dearborn 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.

Dearborn, 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 and was actively and publically claiming in court filings to still be the owner of the mortgage—further confirming that the 2011 assignment was invalid or ineffective—Dearborn named BOA as a defendant. Indeed, BOA initially demanded to be dismissed from this litigation by pointing to the discharge, not the assignment, 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 only after BOA discharged the mortgage and 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. 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 in filings 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., BOA. 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.

There is no question in this case that WDP was the author of its own plight. Nevertheless, WDP asks this Court to throw it a lifeline when, for over 4.5 years, WDP could not be bothered to take the simple action to protect itself by recording its alleged assignment.[1]

When West Village Commons, LLC filed for bankruptcy, the Parcel C became property of the 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. *See* (Appellee's Appendix pp. 000043b-000050b; Appellant's Appendix pp. 000152a-000153a, 10/05/11 Bankruptcy Order). The Bankruptcy Order severed any alleged interest in Parcel C that was not "of record." (Appellant's Appendix pp. 000152a-000153a, 10/05/11 Bankruptcy Order). 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 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.

Make no mistake, this case is about a sophisticated party, represented by sophisticated counsel, taking a calculated risk to ignore (1) its contractual duty to "promptly and diligently record" to effect its desired assignment and (2) the Bankruptcy Order extinguishing its alleged

[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.

unrecorded interest, who is now asking this Court (the fourth Court) to undo the consequences of its own deliberate and unexplained refusal to record. 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.'" (Appellant's Appendix pp. 000668a, Court of Appeals Opinion). 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.

II. 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 BOA.

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* (Appellant's Appendix pp. 000010a-000023a, Covenant Deed at 1, 10-11).

Dearborn conveyed the properties using a Covenant Deed, pursuant to a Development Agreement dated April 23, 2003. *See* (Appellant's Appendix pp. 000010a-000023a, Covenant Deed at 1, 10-11); (Appellee's Appendix pp. 000001b-000017b, 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 twin tower mixed-use office, hotel, and residential project on Parcel C. *See,*

e.g., (Appellant's Appendix pp. 000010a-000023a, 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 pp. 12a-13a, ¶¶ 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 p. 11a, ¶ 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* (Appellant's Appendix pp. 000024a-000038a, Construction Mortgage). In exchange for the mortgage, West Village Commons, LLC executed a note and a corresponding loan agreement so it could borrow money to develop the properties. *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, n 1.[2] The Construction Mortgage will be referred to hereinafter as the "BOA Mortgage." It is also undisputed that Dearborn received no benefit for the funds loaned to West Village Commons, LLC since Parcel C was never developed and was ultimately conveyed back to Dearborn by the Bankruptcy Trustee in the same unimproved physical condition as when Dearborn conveyed it to West Village Commons before the Construction Mortgage.

[2] References to WDP Br. are to WDP's Application for Leave to Appeal to this Court. References to WDP Supp. Br. are to WDP's Supplemental Brief to this Court.

B. West Village Commons, LLC files for bankruptcy. BOA 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* (Appellant's Appendix pp. 000042a-000076a, Note Sale and Assign. Agreement with First and Second Amendments). The Note Sale and Assignment Agreement also set forth that, according to BOA'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* (Appellant's Appendix p. 000045a, ¶ 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* (Appellant's Appendix p. 000523a, Excerpts of Dep. Tr. of M. Mokelke, at 16:22-17:3). At the time of the sale, WDP knew that this was a high risk transaction as it was purchasing the mortgage subject to any rulings from the Bankruptcy Court in West Village Commons, LLC's

bankruptcy. *See* (Appellant's Appendix p. 000260a, 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* (Appellant's Appendix pp. 000040a-000041a, 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." (Appellant's Appendix pp. 000040a-000041a, at 2 (emphasis added)); *see also* (Appellant's Appendix p. 000303a, 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* (Appellant's Appendix p. 000051a, Note Sale Assign. Agreement, ¶ 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* (Appellant's Appendix pp. 000503a-000505a, Recorded Assignment); *see also* (Appellant's Appendix pp. 000414a, 000429a, Excerpts of Dep. Tr. of S. Lites at 31:2-4, 46:2-6) (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* (Appellant's Appendix pp. 000417a-000418a, Excerpts of Dep. Tr. of S. Lites at 34:14-35:9).

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 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* (Appellee's Appendix p. 000019b, 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. (Appellant's Appendix pp. 000080a-000085a, WDP Obj.). 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." (Appellant's Appendix p. 000081a, ¶ 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); (Appellant's Appendix p. 000268a, 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.* (Appellee's Appendix pp. 000028b-000042b, 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—Dearborn argued that the Bankruptcy Court should instead abandon the Property to Dearborn. *See id.* at 000035b-000041b.

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 000034b, ¶ 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 000034b-000035b, ¶ 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 000035b, ¶ 21.

Dearborn also filed its own motion for abandonment. (Appellee's Appendix pp. 0000043b-000050b, 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*. at 000049b-000050b, ¶ 2 (emphasis added).

The Bankruptcy Court held a hearing on the various motions and objections on October 4, 2011. *See* (Appellant's Appendix pp. 000113a-000151a, 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 noted 'I do believe under both 554 and 105 that there are grounds for this Court to require abandonment directly to 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 Supp. Br. at 6-7. 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. (Appellant's Appendix pp. 000152a-000153a, 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 (Appellant's Appendix pp. 000152a-000153a, Bankruptcy 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* (Appellant's Appendix pp. 000154a-000155a, Quit Claim Deed).

III. 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 BOA) requesting that she have Mr. Mokelke's signature notarized. *See* (Appellee's Appendix p. 000051b, 2/24/14 E-mail). However, Mr. Lites testified that he did not hear back from Ms. Bach. (Appellant's Appendix pp. 000384a-000518a, 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 BOA—requesting that Mr. Mokelke's signature be notarized. *See* (Appellee's Appendix p. 000052b, 7/16/14 E-mail); *see also* (Appellant's Appendix p. 000426a, Excerpts of Dep. Tr. of S. Lites at 44:1-23). Mr. Lites was connected with Ms. Allen after calling BOA's generic 1-800 phone number. (Appellant's Appendix p. 000427a, 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* (Appellant's Appendix p. 000336a, Excerpts of Dep. Tr. of S. Allen, at 23:13-22); *see also* (Appellant's Appendix p. 000427a, 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

B. BOA defends a quiet-title action as mortgagee and discharges the Construction Mortgage in August 2015.

In 2014, a quiet-title action was brought against BOA 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 BOA, 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, BOA vigorously defended its alleged interest as the mortgagee. Indeed, in response to the plaintiffs' motion for summary disposition in that case,

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transferred by BOA to California and had totally different contact information." WDP Supp. Br. at 7. 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* (Appellant's Appendix 000414a, 000417a-000418a, 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. (Appellant's Appendix p. 000528a, Excerpts of Dep. Tr. of M. Mokelke, at 34:16 - 35:1; 36:9-14). But Mr. Mokelke testified that no one contacted him during this time about getting his signature notarized. *Id.* at 000528a, 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* (Appellant's Appendix p. 000337a, Excerpts of Dep. Tr. of S. Allen at 26:17-27:1); (Appellant's Appendix p. 000427a, 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 and has no basis in the record.

BOA 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* (Appellee's Appendix pp. 000058b-000060b, BOA Resp. to Mot. for Summ. Disp. at 6-8 (emphasis added)). In other words, BOA's actions in that litigation where Dearborn was a party 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 BOA no longer held any interest in Parcel A-3 as a result, and that BOA should execute a discharge of its mortgage on Parcel A-3. *See* (Appellant's Appendix pp. 000224a-000226a, 6/26/15 Order at 2).

As ordered by the Court, BOA 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, BOA's discharge discharged the Construction Mortgage as to both Parcel A-3 *and* Parcel C. *See* (Appellant's Appendix pp. 000227a-000228a, Discharge). Indeed, when originally made a party to this lawsuit, BOA requested dismissal by Dearborn 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* (Appellee's Appendix pp. 000068b-000071b, Excerpts of Dep. Tr. of L. Yangouyian, at 64:16-65:2; 77:4-79:12; 95:4-96:20). Therefore, BOA's vigorous defense of the lawsuit and 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 000072b, 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 of the two twin towers under the Covenant Deed. *See* (Appellant's

Appendix p. 000311a, Excerpts of Dep. Tr. of D. Elder, at 65:23-67:1-18); (Appellant's Appendix pp. 000255a, 000274a, Excerpts of Dep. Tr. of A. Sarafa, at 61:2-22; 62:20-63:3, 137:6-19).

IV. September 2015 – December 2016.

In October 2015, Dearborn filed the instant action for quiet title against BOA, as the mortgagee of record, regarding Parcel C.[4] BOA 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. (Appellee's Appendix pp. 000068b-000071b, Dep. Tr. of L. Yangouyian, at 64:16-65:2, 77:4-79:12, 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* (Appellant's Appendix pp. 000503a-000505a, Recorded Assignment); *see also* (Appellant's Appendix p. 000429a, Excerpts of Dep. Tr. of S. Lites at 46:2-6). 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 BOA concerning another parcel covered by the purportedly assigned mortgage (Parcel A-3) had been resolved. *See* (Appellant's Appendix p. 000263a, Excerpts of Dep. Tr. of

[4] WDP has asserted 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 Supp. Br. at 8. These statements and purported quotes are not supported by *any* citations, nor does the deposition testimony by Dearborn employees reflect any such thing. 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* (Appellee's Appendix p. 000138b, Resp. to MSD at 7, n4), yet WDP continues to make the same baseless allegations in this Court, once again without any record citation or support. WDP Supp. Br. at 8.

A. Sarafa, at 94:3-10); (Appellant's Appendix p. 000414a, 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* (Appellee's Appendix pp. 000073b-000087b, 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* (Appellant's Appendix p. 000584a, 12/21/16 Order).

V. December 2016 – July 2017.

On February 23, 2017, Dearborn and WDP filed cross-motions for summary disposition. *See* (Appellee's Appendix pp. 000088b-000109b, Dearborn MSD (without exhibits)); (Appellee's Appendix pp. 000110-000131, WDP MSD (without exhibits)). After full and extensive briefing, the trial court heard oral argument on May 26, 2017. *See* (Appellee's Appendix pp. 000132b-000151b, Dearborn Resp. to WDP MSD (without exhibits)); (Appellee's Appendix pp. 000152b-000171b, WDP Resp. to Dearborn MSD (without exhibits)); (Appellee's Appendix pp. 000172b-000182b, Dearborn Reply in Supp. Of MSD (without exhibits)); (Appellee's Appendix pp.

[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 Supp. Br. at 9 ("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 (Appellee's Appendix p. 000138b, Resp. to MSD at 7) and in the Court of Appeals *(see* Appellee's Appendix p. 000271b, City's Brief on Appeal at 13 n. 4), but WDP nevertheless continues to use the same misleading language here.

000183b-000196b, WDP Reply in Support of MSD (without exhibits)); (Appellant's Appendix pp. 000603a-000655a, 5/26/17 Hr'g. Tr.).

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." (Appellant's Appendix p. 000648a, 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[s] 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 000649a, 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[s] of record.

Id. at 000649a-000650a, 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 000650a, 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 000650a, 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 000651a, 49:4-8.

The trial court concluded by mentioning two additional arguments Dearborn had raised: (i) that BOA'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 000651a, 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 000651a, 49:14-23.

The trial court entered its Order on June 5, 2017. *See* (Appellant's Appendix pp. 000656a-000658a, 6/5/17 Order). WDP filed a motion for reconsideration on June 26, 2017. *See* (Appellee's Appendix pp. 000197b-000208b, 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* (Appellant's Appendix pp.

000659a-000660a, 7/27/17 Order).

VI. 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 arguing 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) Dearborn admitted that WDP was protected by the Bankruptcy Court Order; 4) Dearborn's position is contrary to action it took in the Bankruptcy Court; 5) Dearborn 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 Dearborn's interest. (Appellee's Appendix pp. 000209-000248b, WDP COA Br. (without exhibits)).

Dearborn filed its Response Brief on Appeal to the Court of Appeals on March 7, 2018. Dearborn 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) Dearborn 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. (Appellee's Appendix pp. 000249b-000296b; 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 Dearborn, but to no avail.

On February 12, 2019, the Court of Appeals issued its Opinion, affirming the ruling of the trial court. (Appellant's Appendix pp. 000661a-000669a; COA Op., p. 9). The Court of Appeals upheld the trial court's grant of summary disposition in favor of Dearborn 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.'

(Appellant's Appendix pp. 000666a-000668a, 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. (Appellant's Appendix pp. 000670a, COA Order Denying Motion for Reconsideration).

On May 31, 2019, WDP filed its application for leave to appeal to this Court. On November 22, 2019, this Court ordered oral argument on WDP's application and asked for supplemental briefs regarding: (1) whether the Bankruptcy Order extinguished WDP's interest in Parcel C; (2) whether BOA's discharge of the mortgage in 2015 impacted any interest that WDP had in Parcel

C at the time; and (3) whether the equitable arguments raised by WDP require reversal of the Court of Appeals opinion. Dearborn submits that (1) WDP's interest was extinguished because it was not "of record" at the time the Trustee conveyed Parcel C back to Dearborn; (2) assuming *arguendo* that WDP's interest survived the Bankruptcy Order, which Dearborn denies, BOA's discharge of the mortgage eliminated any interest that remained; and (3) the Court of Appeals properly rejected WDP's equitable arguments.

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 America, 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, 192-193; 377 NW2d 382 (1985); *Singer v Am States Ins*, 245 Mich App 370, 381 n8; 631 NW2d 34 (2002).

ARGUMENT

I. The Bankruptcy Court's October 5, 2011 order extinguished WDP's alleged interest in Parcel C.

On October 5, 2011, the Bankruptcy Court entered its order stating as follows:

> "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 (Appellant's Appendix pp. 000152a-000153a, 10/5/11 Order (emphasis added)). There is no question that WDP's alleged interest was not recorded prior to the conveyance to Dearborn and, as a result, WDP's unrecorded assignment was therefore extinguished.

A. The mortgage-follows-the-note rule is irrelevant.

WDP first argues that its alleged unrecorded interest in Parcel C is saved by the "mortgage-follows-the-note" rule. WDP Supp. Br. at 14-17. *Prime Fin Servs LLC v Vinton*, 279 Mich App 245; 761 NW2d 694 (2008); *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712; 2 NW2d 892 (1942) and similar cases are cited by WDP for the proposition that the transfer of an underlying promissory note operates as an assignment of a related mortgage as a matter of law. *Id*. WDP's argument here totally misses the mark. The "mortgage-follows-the-note" rule is a straw man that WDP has raised to give it something to knock down, but which has no relevance to this dispute. 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." (Appellant's Appendix p. 000665a, COA Op., p. 5). The Bankruptcy Court Order requires both "lien[s]" and "interest[s]" to be "of record" to survive. *See* (Appellant's Appendix pp. 000152a-000153a). 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 interpretation that renders language superfluous). Therefore, under the Bankruptcy 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). 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. (Appellant's Appendix pp. 000665a-000666a, COA Op., pp. 5-6).

B. The validity of the BOA Mortgage, prior to its discharge, is not in dispute.

WDP next argues that the Court of Appeals "confused the validity of the [BOA] Mortgage with the need to record an assignment of the mortgage." WDP Supp. Br. at 17-19. Again, WDP has missed the mark. The Court of Appeals specifically acknowledged that the "2005 mortgage itself was still 'of record' at the time of the bankruptcy proceeding." (Appellant's Appendix p. 000665a, COA Op. at 5). The validity of the BOA Mortgage, prior to its discharge, is not the subject of this dispute. This argument is yet another straw man. However, for the reasons stated herein in Argument Section II, assuming *arguendo* that WDP's unrecorded assignment survived the Bankruptcy Order, the discharge of the BOA Mortgage in 2015 eliminated any such remaining interest.

C. The Court of Appeals did not require the recording of WDP's alleged assignment for the BOA Mortgage to survive, but instead correctly held that WDP's unrecorded alleged interest itself was extinguished by the Bankruptcy Court Order.

WDP next erroneously contends that the Court of Appeals required the recording of WDP's alleged assignment for the BOA Mortgage to survive. WDP Supp. Br. at 19-20. This is simply not accurate. To the contrary, the Court of Appeals held that "the 2005 [BOA] mortgage itself was 'of record' at the time of the bankruptcy proceeding," meaning that it survived the Bankruptcy Order, at least until it was discharged. (Appellant's Appendix p. 000665a, COA Op. at 5). However, the Court of Appeals correctly held that notwithstanding any survival of the BOA Mortgage, "the assignment giving [WDP] any interest was not" recorded and therefore did not survive. *Id*. Accordingly, because the alleged assignment purporting to give WDP an interest in Parcel C was

not itself "of record," it was extinguished pursuant to the clear terms of the Bankruptcy Order. *See* (Appellant's Appendix pp. 000152a-000153a).

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

Dearborn was a good faith purchaser of Parcel C under MCL 565.29. In response, WDP argues that Dearborn had "actual knowledge of . . . [WDP's] duly executed assignment of mortgage" and that "acts as the significant equivalent of an interest 'of record' under the Bankruptcy Order." WDP Supp. Br. at 20-21.

1. WDP's "of record equivalent" argument is not preserved for review.

As an initial matter, WDP's "of record equivalent" argument was not raised in or decided by the lower Courts and is therefore not preserved for review. *See Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364, 366 (2018). Additionally, the case WDP cites for this argument, *Read v Horner*, 90 Mich 152; 51 NW 207 (1882), concerns interests in personal property, not real estate that is the subject of MCL 565.29.

2. WDP's alleged assignment was not "duly executed."

WDP's alleged assignment was not "duly executed" as it claims. In fact, there were many deficiencies with the alleged assignment.[6] Both the Assignment itself and the Acknowledgements WDP ultimately obtained are 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

[6] 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. (Appellant's Appendix pp. 000668a, COA Op., p. 8). Nevertheless, the defective assignment provides an alternate basis to deny WDP relief from its own deliberate inaction and is directly relevant to WDP's argument that Dearborn had actual knowledge of a "duly executed" assignment.

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. *See* (Appellant's Appendix pp. 000503a-00505a).

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* (Appellant's Appendix pp. 000503a-00505a (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* (Appellant's Appendix pp. 000503a-000505a).

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." (Appellant's Appendix pp. 000503a-00505a, 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. This discrepancy between the name on the Acknowledgement and the name on the Assignment is in violation of MCL 565.201(1)(b).

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. Accordingly, the alleged assignment was not "duly executed."

3. Dearborn is a good faith purchaser.

WDP argues that Dearborn was not a good-faith purchaser under MCL 565.29 because Dearborn purportedly had actual notice of the assignment. WDP Supp. Br. at 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 BOA sold the note and mortgage to WDP, Dearborn questioned whether that sale was 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.

(Appellee's Appendix pp. 000035b, at ¶ 21). Despite Dearborn's open challenge to the validity of WDP's alleged assignment in the bankruptcy proceeding, 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); (Appellant's Appendix pp. 000528a, 000533a, Excerpts of Dep. Tr. of M. Mokelke, at 35:4-36:12, 55:18-22).[7] Any requirement for Dearborn to inquire as to the legitimacy of WDP's alleged interest was fulfilled by Dearborn's challenge and inquiry in its Objection filed in the Bankruptcy proceeding. In response, WDP said nothing. When given the chance to make its alleged interest "of record" prior to the Quit Claim Deed to Dearborn, WDP did nothing.

Moreover, in 2014 and 2015—still months before WDP recorded its Assignment—BOA 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, BOA noted that the plaintiff was "assert[ing] entitlement to Parcels encumbered by a Construction Mortgage *held by Defendant Bank of America*." (Appellee's Appendix pp. 000058b-000060b, at 6-8 (emphasis added)). This was a reference to Parcel A-3 and Parcel C, and the mortgage at issue in this case. *Id.* Ultimately, BOA recorded a discharge of that mortgage in August 2015. (Appellant's Appendix pp. 000227a-000228a).

[7] Notably, until its filings 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.

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 alleged transaction between WDP and BOA must have fallen through. *See* (Appellant's Appendix pp. 000559a, 000563a-000565a, 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) BOA defended against the quiet-title action on Parcel A-3 in 2014 by claiming that *it* still held the subject mortgage, and (ii) BOA 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* (Appellee's Appendix pp. 000058b-000060b, at 6-7; Appellant's Appendix pp. 000559a, 000563a-000565a, Excerpts of Dep. Tr. of D. Walling, at 58:16-59:22; 76:25-78:9; 82:5-15; 84:10-20); (Appellee's Appendix pp. 000068b-000071b, 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 did not respond to Dearborn's Objection in Bankruptcy in writing or on the court record, (ii) WDP had still not recorded its purported assignment in 2015 and (iii) the alleged assignor was acting in 2015 as though there was no assignment. *See Lowry v Bennett*, 119 Mich 301, 302-303; 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, Dearborn 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."). Accordingly, WDP's argument that Dearborn had "actual knowledge" of its "duly executed" assignment is completely without merit or basis in the record.

E. The Court of Appeals and trial court correctly construed the Bankruptcy Order.

Contrary to WDP's fifth argument on this issue, the Court of Appeals did not expand the scope or misunderstand the effect of the Bankruptcy Order. WDP Supp. Br. at 21. Dearborn agrees with WDP that "[c]onstruction of a court order is only permissible if the language of that order is ambiguous on its face. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 486 NW2d 884 (1992)." WDP Supp. Br. at 21. However, the Bankruptcy Order could not be more plain that the conveyance to Dearborn was subject only to "claims, liens, interests, rights and obligations *of record*." *See* (Appellant's Appendix pp. 000152a-000153a, (emphasis added)). There is no dispute that the Assignment from which WDP's purported interest arose was not "of record" at that time. Moreover, the Note Sale and Assignment Agreement required that WDP "**promptly and diligently record** . . . all assignments and notices, including without limitation, **the Assignment Instrument attached hereto**, **necessary to effect the transaction described in this Agreement**." (Appellant's Appendix p. 000051a, at ¶ 21). Therefore, WDP's breach of its contractual requirement to "promptly and diligently" record the Assignment, which was "necessary to effect the" sale of the Note led to the elimination of its interest.

WDP's post hoc conflation of its alleged assignment with the recorded BOA Mortgage is contrary to its position in the Bankruptcy case. WDP's objection to the Bankruptcy Trustee's motion to sell Parcel C to a different entity belies WDP's argument that it understood its alleged assignment to be "of record" by virtue of the recorded BOA Mortgage. WDP requested that the Bankruptcy Court make the Trustee's proposed transfer "subject to *not only* the claims, liens and interest *of record . . ., but also* subject to the interest of [BOA] now held by [WDP] as assignee of [BOA]." *See* (Appellant's Appendix p. 000081a, at ¶ 5 (emphasis added)). 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* (Appellant's Appendix p. 000649a, 5/26/17 Hr'g. Tr. 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)); *see also* (Appellant's Appendix p. 000666a, COA Op., p. 6).

WDP's reliance on various excerpts from the Bankruptcy Court hearing is also misplaced. In a last-ditch effort 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 to argue that WDP's interests survived the Bankruptcy Court's Order. *See* WDP Supp. Br. at 21 n 10. But WDP takes those statements completely out of context.

In its Objection to the Trustee's motion, Dearborn stated 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." (Appellee's Appendix p. 000035b, ¶ 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 as required by the terms of the alleged assignment itself), and that such an interest would be protected if recorded. *See generally* (Appellant's Appendix pp. 000116a, 000144a, 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. (Appellant's Appendix pp. 000417a-000418a, Excerpts of Dep. Tr. of S. Lites, at 34:14-35:9).[8] Therefore, any harm that befell WDP from the Bankruptcy Court's Order arose solely from its own conduct.

[8] Pursuant to MCR 2.306(D)(5), because WDP asserted attorney-client privilege in response to this question, WDP is precluded by court rule from offering a contrary explanation for not recording the Assignment in 2011. *See* WDP Supp. Br. at 7. But in any event, WDP's current explanation—i.e., that it could not get in contact with Mark Mokelke to notarize the document—lacks merit. Mr.

Furthermore, WDP erroneously concludes that the Bankruptcy Judge acknowledged that WDP's interest would survive when she said that '[t]he 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 Supp. Br. at 21 n 10. However, this statement only begs the question of who the "*mortgagee*" is in this case. Namely, whether WDP's alleged, unrecorded interest survived the Bankruptcy Order – and the Note Sale and Assignment Agreement – that both required WDP's alleged interest be "of record" to be valid. (Appellant's Appendix pp. 000152a-000153a, Bankruptcy Order; (Appellant's Appendix p. 000051a, at ¶ 21). The Bankruptcy Court refused to adopt WDP's interpretation of its order when WDP requested it to do so during the pendency of the trial court proceedings. Because of WDP's failure to "promptly and diligently" record, its alleged assignment did not survive.

F. BOA retained its interest in the BOA Mortgage until that mortgage was discharged of record.

WDP raises a final rhetorical question in arguing that the Bankruptcy Order did not extinguish its alleged assignment: "What happened to the mortgage interest?" WDP Supp. Br. at 22. Once again, WDP is asking the wrong question. The BOA mortgage survived the Bankruptcy Order until it was discharged, as will be discussed in further detail in Section II of the Argument. However, there is no question that the unrecorded assignment of the BOA Note and Mortgage through which WDP's alleged interest in Parcel C arose did not survive the Bankruptcy Order for the many reasons already stated herein.

Mokelke had the same contact information until May 2012. *See* (Appellant's Appendix p. 000528a, Excerpts of Dep. Tr. of M. Mokelke, at 35:1; 36:9-14).

II. Even if WDP stood in BOA's shoes with respect to the BOA Mortgage, WDP's interest was eliminated by BOA's discharge of the mortgage.

A. BOA's discharge of mortgage was valid and effective against WDP.

When BOA discharged the BOA Mortgage, it eliminated WDP's interest, if any remained. The Court of Appeals held that "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." *See* (Appellant's Appendix p. 000666a, COA Op., p. 6). This holding is well-supported by Michigan law. WDP argues that BOA had nothing to discharge and cites multiple cases for the proposition that one "cannot convey greater title than he possesses." WDP Supp. Br. at 23. But, these cases address the conveyance of title, not the discharge of a mortgage. The only cases WDP cites concerning discharge of a mortgage are from Indiana and are of no precedential or persuasive effect, especially in light of the specific Michigan statutory authority for BOA to discharge the BOA Mortgage as the mortgagee of record, notwithstanding the existence of potential assignees. MCL 565.42 states the following:

> Any mortgage shall also be discharged upon the record thereof by the register of deeds, in whose custody it shall be, whenever there shall be presented to him a certificate **executed by the mortgagee, his personal representative or assigns**, acknowledged, approved and certified as in this chapter provided, to entitle conveyances or instruments in writing in any wise affecting the title to lands to be recorded, specifying that such mortgage has been **paid, or otherwise satisfied or discharged** . . . .

(emphasis added). This statute says that a mortgagee **OR** his assigns may discharge the mortgage.[9] Under WDP's logic, there would be no reason for the legislature to authorize either a mortgagee

[9] It is further noteworthy that a mortgagor may continue paying the original mortgagee, notwithstanding the fact that an assignment of the mortgage may have actually been recorded. See MCL 565.33. In which case, if the original mortgagee received full payment or some alternative

OR his assigns to discharge a mortgage because the two would always be one in the same. However, the statute meets the practical reality of a system where some alleged interests are in the public record and other alleged interests are not. There may be many reasons why an alleged, unrecorded interest holder does not appear in the public record. For instance, the transaction giving rise to the alleged interest may never have been completed or may be contingent on some other event. Additionally, many mortgages have nominal mortgagees charged with the administrative duties of servicing the mortgage, while another party, not of record, claims an interest in the mortgage. In which case, it makes perfect sense that a mortgagee of record, as opposed to an assignee who does not appear of record, would perform the administrative function of discharging the mortgage.

There may also be many reasons why an alleged interest holder would not want its interest to appear of record. There may be strategic real estate development reasons for keeping one's identity out of the chain of title. Additionally, there may be an attempt to avoid some liability connected with being identified in the chain of title.

In this case, WDP is protecting the reason it chose not to record its alleged assignment for over 4.5 years by asserting attorney-client privilege. *See* (Appellant's Appendix pp. 000417a-000418a, Excerpts of Dep. Tr. of S. Lites at 34:14-35:9). Nevertheless, it is beyond dispute that WDP deliberately chose not to record its alleged assignment prior to entry of the Bankruptcy Order, the quit-claim deed to Dearborn, or BOA's discharge of mortgage, contrary to its contractual duty to record, which was "necessary to effect the transaction described" in the Note Sale and Assignment Agreement. (Appellant's Appendix p. 000051a, at ¶ 21). Assuming, for the

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consideration in satisfaction of the mortgage, the original mortgagee would be required to discharge the mortgage.

sake of argument, that WDP ever held a valid assignment of the BOA Mortgage, BOA was still authorized by statute to discharge that mortgage. If WDP asserts that BOA wrongfully discharged the BOA Mortgage, then WDP's remedy would be against BOA, not Dearborn.[10]

Additionally, even if WDP retained any interest post-bankruptcy because of BOA's recording of the mortgage—as opposed to WDP's Assignment—then WDP takes its interest subject to any claims, actions, or defenses of BOA, as the mortgagee upon whose recorded rights WDP relies. *See Arnold v DMR Fin Servs, Inc*, 448 Mich 671, 677; 532 NW2d 852, 855-856 (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 BOA's later discharge of the mortgage, and the Court of Appeals appropriately affirmed the trial court's grant of summary disposition in favor of Dearborn. *Mich Ed Employees Mut Ins Co v Karr*, 228 Mich App 111, 115 n 1; 576 NW2d 728 (1998) ("We will not reverse when the trial court reaches the correct result regardless of the reasoning employed.").

Furthermore, 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

[10] MCL 565.42 further disposes of WDP's very brief argument, unsupported by any authority, that "[t]here is no financial reality to the discharge of a mortgage when the note remains unsatisfied." WDP Supp. Br. at 24. MCL 565.42 acknowledges that a mortgagee may record a discharge for various reasons including "that such mortgage has been paid, **or otherwise satisfied or discharged**." (emphasis added). Again, this statutory provision recognizes that mortgages are discharged for reasons other than satisfaction by payment and does not require any specific reason. Additionally, it is significant that BOA chose to resolve the 2014 West Village Square Condominiums case by complying with the trial court's order in that case instead of expending additional time and resources challenging that order. The resolution of a lawsuit without a protracted appeals process was additional consideration that supported BOA's discharge of the BOA Mortgage.

notices . . . necessary to effect the transaction described in [the] Agreement." *See* (Appellant's Appendix p. 000051a, at ¶ 21); (Appellant's Appendix p. 000414a, Excerpts of Dep. Tr. of S. Lites at 31:2-4). As a result of that breach—i.e., the failure to record—BOA 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 BOA defended against both of those lawsuits as the mortgagee, resulting in a court ordering BOA to discharge the Construction Mortgage, with which BOA complied. Indeed, in the 2014 action, BOA 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* (Appellee's Appendix pp. 000058b-000060b, BOA Resp. to Mot. for Summ. Disp. at 6-8 (emphasis added)). Therefore, if WDP's interest continued after the bankruptcy solely due to BOA's recordation, then WDP's interest also should be subject to BOA's conduct resulting from WDP's failure to record its own Assignment—including the August 2015 discharge by BOA. *See Goodale v Patterson*, 51 Mich 532, 536; 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).[11]

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 BOA: record the Assignment as contractually required. However, as discussed extensively above, WDP

[11] 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 Supp. Br. at 23. The court in *Goodale* found the assignor's discharge to be valid with respect to the purchaser, notwithstanding the assignor's earlier 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.

inexplicably failed to do so for almost five years, ultimately leading to BOA 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., BOA'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* (Appellant's Appendix pp. 000024a-000038a). Therefore, the purported March 2011 Assignment applied to both parcels as well.

In 2014, BOA was sued as the mortgagee of record due to WDP's failure to record and, as a result of that lawsuit, BOA discharged the mortgage as to both Parcel A-3 and Parcel C in 2015. (Appellant's Appendix pp. 000227a-000228a). But neither WDP nor BOA challenged the validity 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* (Appellant's Appendix pp. 000237a-000238a). However, there is no logical reason why the discharge should be effective as to Parcel A-3, and not Parcel C. If BOA 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 BOA 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 has asserted 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, n 5. 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 BOA'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-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., BOA—extinguished WDP's interest as well.

B. The discharge of the BOA Mortgage binds WDP regardless of the "taxpayer lawsuit."

The discharge of the BOA Mortgage binds WDP regardless of whether it was made a party to the 2014 West Village Square Condominiums quiet title action (the "taxpayer lawsuit"). WDP again misconstrues the issue here by arguing that it cannot be bound by the order in the taxpayer lawsuit because it was not a party to that suit. WDP Supp. Br. at 25. Dearborn is not arguing that WDP is bound by the order in the "taxpayer lawsuit." Dearborn is arguing that WDP is bound by the discharge of the BOA Mortgage, which very clearly states that the mortgage "is discharged in its entirety" and includes Parcel C. (Appellant's Appendix pp. 000227a-000228a). This plain language in the discharge stands in stark contrast to WDP's additional argument that the "Discharge did not involve Parcel C." WDP Supp. Br. at 24. Furthermore, even assuming that the order from the taxpayer lawsuit did not involve Parcel C, that has nothing to do with the validity

of the discharge as to Parcel C as WDP further contends. WDP Supp. Br. at 25. The trial court in the taxpayer lawsuit certainly did not prohibit BOA from discharging its mortgage as to Parcel C. There is no legitimate challenge to the validity of the BOA discharge.

As discussed herein above, the taxpayer lawsuit is relevant because it shows BOA claiming that the "Construction Mortgage [was] *held by Defendant Bank of America*." (Appellee's Appendix pp. 000058b-000059b, BOA Resp. to Mot. for Summ. Disp. at 6-7 (emphasis added)). BOA's actions confirm that WDP's alleged assignment was either never validly completed or was extinguished by the Bankruptcy Order. However, what binds WDP is the discharge of mortgage itself, not the order from the taxpayer lawsuit. If the taxpayer lawsuit did not relate to Parcel C, as WDP argues, then the full and complete discharge of the BOA Mortgage, including Parcel C, was a voluntary action by BOA made out of its continued belief that it was the holder of the entire mortgage as evidenced by its unequivocal statements and actions in the taxpayer lawsuit. Regardless of the underlying reason, the BOA Mortgage was discharged in its entirety.

WDP's reliance on the "Affidavit of Scrivener's Error" to avoid only its selected portion of BOA's discharge of mortgage is misplaced because 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, it is undisputed that the Affidavit would alter Dearborn's and/or WDP's rights, but it is not signed by either of them. Moreover, WDP's additional implication that Dearborn somehow admitted there was a mistaken legal description in the discharge and should be sanctioned for pursuing this litigation is without any basis in fact. See WDP Supp. Br. at 25. Dearborn has never admitted to nor agreed with the invalid Affidavit of Scrivener's error. BOA's discharge of the mortgage was valid and effective against WDP (and the rest of the world) and could not be unilaterally revoked contrary to MCL 565.451d(2)(b).

Again, WDP may have a remedy against BOA for monetary damages for discharging a mortgage WDP alleged was assigned to it. 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 BOA), and BOA's actions (i.e., defending against the quiet title action on Parcel A-3 and Parcel C and discharging the BOA Mortgage in its entirety). There is no evidence of similar questionable conduct by Dearborn.

III. The Court of Appeals correctly rejected WDP's equitable arguments.

A. Contrary to WDP's mischaracterizations, Dearborn has always challenged WDP's alleged interest and the Court of Appeals correctly rejected WDP's estoppel arguments.

From the beginning of its involvement in the bankruptcy case, Dearborn questioned the validity 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." (Appellee's Appendix p. 000035b, Dearborn Obj. at ¶ 21). Accordingly, WDP's assertion that Dearborn's arguments are barred by estoppel because it "admitted that [WDP] was protected by the Bankruptcy Order" is simply not true. WDP Supp. Br. at 27.

The law of judicial estoppel in Michigan is clear that "the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent." *Paschke v Retool Indus*, 445 Mich 502, 510; 519 NW2d 441, 444 (1994). The Court of Appeals correctly analyzed WDP's estoppel argument within the parameters of *Paschke* and held that estoppel was inapplicable "because (1) when considered in context, Dearborn'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." (Appellant's Appendix p. 000667a, COA Op., p. 7). In response, WDP characterizes the Court of Appeals' analysis as comparing and finding "consistent two positions taken by Dearborn in the bankruptcy proceedings" instead of "comparing the positions taken by Dearborn in the two different forums – the bankruptcy court and the instant litigation." WDP Supp. Br. at 27.

WDP completely misconstrues the Court of Appeals' Opinion. It is true that both statements from Dearborn quoted by the Court of Appeals were from the bankruptcy proceedings. (Appellant's Appendix pp. 000666a-000667a, 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 Dearborn's argument that Dearborn's position in the bankruptcy court should be considered in the full context of all of Dearborn's statements. (Appellant's Appendix p. 000667a, COA Op., p. 7). The Court of Appeals was merely citing to the same portions of the bankruptcy court record that Dearborn had cited to provide context for Dearborn's true position in bankruptcy, namely that Dearborn "certainly questioned why the assignment had not been recorded" in bankruptcy, just as it has done throughout the current litigation. *Id*. There was no need for the Court of Appeals to then also quote Dearborn'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 Supp. Br. at 28-29), 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]." (Appellant's Appendix p. 000667a, COA Op., p. 7). Therefore, Dearborn did not "prevail" on any challenge to the validity of WDP's alleged

interest 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." *Id*. The Bankruptcy Court was not concerned with 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. Any statements concerning the "mortgagee" or "holder of the mortgage" made during the bankruptcy hearing beg the question of who the proper mortgagee was after entry of the Bankruptcy Order. The validity of WDP's alleged, unrecorded assignment was not passed on by the Bankruptcy Court, in spite of WDP's request during the pendency of this action for it to do so.

Additionally, assuming for the sake of argument that there was some misrepresentation, which Dearborn denies because it expressly challenged WDP's unrecorded assignment, equitable estoppel requires justifiable reliance that results in prejudice to the relying party. *Hoye v Westfield Ins Co*, 194 Mich App 696, 705; 487 NW2d 838, 842 (1992). WDP has not provided any record evidence that it, or its counsel at the bankruptcy hearing, Mr. David Lerner, relied on any "representation . . . to believe that its [alleged] mortgage interest would be protected by way of the Bankruptcy Order . . . . [and therefore] did not press to object to the abandonment or alter the terms of the order." WDP Supp. Br. at 30. To the contrary, the evidence in this case indicates that WDP believed that its unrecorded interest stood on separate ground than other interests "of record" and would not be protected. As previously stated, WDP requested in the Bankruptcy case that any Order by the Bankruptcy Court maintain "not only" interests of record, "but also" WDP's alleged interest not of record. (Appellant's Appendix p. 000081a, at ¶ 5). Therefore, WDP acknowledged that its interest would not be protected as one "of record." Furthermore, at the bankruptcy court hearing, counsel for the Trustee 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]." (Appellant's Appendix p. 000116a, 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 specifically aware that its unrecorded interest could be eliminated by the Bankruptcy Court. Accordingly, WDP's equitable estoppel argument fails for the additional reason that there is no evidence of justifiable reliance resulting in prejudice.

B. This case is not about priority because WDP has no interest at all.

WDP continues to misconstrue the issue in this case by arguing that the "Assignee interest of [WDP] has priority over the fee interest of the City of Dearborn." WDP Supp. Br. at 32-35. As the Court of Appeals correctly noted, 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." (Appellant's Appendix p. 000668a, COA Op., p 8). WDP's discussion about questions of priority under Michigan law is also misplaced. *See* WDP Supp. Br. at 32-35. 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. Unlike *Coventry*, this is not a case about which party has a superior interest, it is about whether WDP has any interest at all. 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." (Appellant's Appendix pp. 000665a-000666a, 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 still irrelevant.

C. Dearborn did not receive a windfall.

Dearborn did not receive a "windfall" when it regained ownership of Parcel C. WDP suggests that transfer of Parcel C to Dearborn 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 Supp. Br. at 35; *see also Id*. at 3-4.[12] WDP's view of the equities in this case is myopic.

First, Dearborn did not borrow any money, yet its interest was arguably subject to a large mortgage. The money was borrowed to construct and improve the property, which was never done. Dearborn received back Parcel C in the same physical condition as it was sold, but now WDP argues it is encumbered by a mortgage for which Dearborn got no benefit. Furthermore, recall that both the Covenant Deed and the Development Agreement made Parcel C subject to significant and expensive development obligations requiring construction of a two tower mid-rise,

[12] 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 Supp. Br. at 35 (Dearborn "re-attained [the Property] from the Trustee through the bankruptcy proceedings 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* (Appellee's Appendix p. 000019b, ¶ 7). Therefore, Dearborn acquiring the Property for a nominal amount is not inequitable.

mixed-use office, hotel, and residential project on Parcel C. *See, e.g.*, (Appellant's Appendix pp. 000010a-000011a, 000023a, at ¶ I.A and Ex. D). The Covenant Deed required that this development occur, or else West Village Commons, LLC would forfeit the property back to Dearborn. *See id.* at 000012a-000013a, ¶¶ II.A, B. It was not a windfall for Dearborn to get Parcel C back without the mortgage because 1) Dearborn never got the benefit of the proceeds of the BOA note or mortgage and the money from that loan never was spent on improving the Property; and 2) Dearborn never got the benefit of its original bargain requiring development of Parcel C, which is a huge, glaringly vacant hole in the center of the West Dearborn business district after more than 16 years. Accordingly, by abandoning Parcel C back to Dearborn, the bankruptcy court did not render a windfall in favor of Dearborn at all. Instead, it merely put Dearborn in status 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* (Appellant's Appendix p. 000081a, at ¶ 5 (emphasis added)); (Appellant's Appendix p. 000260a, 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 Dearborn. Rather, a finding that WDP no longer holds an interest in the Property protects Dearborn's taxpayers by preventing WDP from continuing to sit quietly while leaving Parcel C vacant and unmarketable—an important piece of real estate in Dearborn that is supported by taxpayer expenditures of over $16 million on parking structures that flank each side of Parcel C and were sized and constructed for a two tower development that never happened. WDP never demanded payment or sought to foreclose.[13] 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, WDP's "windfall" argument provides no basis for reviewing or reversing the Court of Appeals' decision.

D. Dearborn's Development Agreement is completely different from WDP's alleged unrecorded assignment.

Finally, WDP argues that Dearborn is taking a different position in this case regarding WDP's unrecorded assignment than Dearborn took in Bankruptcy regarding its Development Agreement. WDP Supp. Br. at 36-37. This is not true. The Development Agreement is distinguishable from WDP's unrecorded assignment 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 BOA 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

[13] One can only assume WDP did not foreclose in order to avoid the obligation to develop the two twin towers under the Covenant Deed. *See* (Appellant's Appendix p. 000311a, Excerpts of Dep. Tr. of D. Elder, at 65:23-67:1-18); (Appellant's Appendix pp. 000255a, 000274a, Excerpts of Dep. Tr. of A. Sarafa, at 61:2-22; 62:20-63:3, 137:6-19).

documents work. *See, e.g.* (Appellant's Appendix p. 000011a, at ¶ I.B.1 ("No portion of the Property shall be used other than for purposes as contemplated in the Development Agreement") and I.B.3 (prohibiting sales, transfers, or conveyances "except in accordance with the Development Agreement")); (Appellee's Appendix p. 000003b, 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.

Moreover, 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. 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.

CONCLUSION

In summary, WDP could have made its interest "of record" between March 2011 and the motion briefing in August 2011. 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* (Appellee's Appendix pp. 000035b, 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. Any of these actions could have protected WDP's interest in the Property. But WDP did none of these.

Instead, WDP sat quietly by and failed to record the Assignment until December 2015, more than 4.5 years after the March 2011 transaction and after extensive litigation by BOA, 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. As the Court of Appeals aptly noted, "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." (Appellant's Appendix p. 000668a, COA Op. at 8).

For all of 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/ Gary K. August

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