No. 23-1870

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff -Appellee,
and

KEVIN B. DUFF,
Appellee,

v.

EQUITYBUILD, INC.,
Defendant,

APPEAL OF: BC57, LLC.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern, Division
Case No. 1:18-cv-05587
The Honorable Manish S. Shah

CONSOLIDATED REPLY BRIEF OF APPELLANT, BC57, LLC

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ORAL ARGUMENT REQUESTED

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In Illinois, when debt secured by a mortgage is paid, the lien of the mortgage securing that debt ceases to exist as a matter of law. In this case, this long-standing common law rule dictates that BC57's payment of the debt underlying the Investor-Lender Mortgages extinguished the lien of those prior mortgages, such that BC57 is entitled to priority to the Group 1 sales proceeds. The District Court erred in concluding otherwise. As demonstrated in BC57's Opening Brief, Illinois' principles of statutory interpretation, legislative history, and case law make clear that the Illinois Mortgage Act did not "replace[]" this well-established rule. And, *North Shore* does not hold as much.

Appellees, the Investor-Lenders and the Receiver, do not meaningfully respond to most of BC57's arguments on this dispositive legal issue. Instead, Appellees conflate the act of extinguishing a mortgage lien with the separate and distinct act of releasing a mortgage of record. This misstep results in Appellees focusing most of their attention on factual issues that are not relevant to this dispositive legal issue.

Moreover, while this Court need not assess the Releases BC57 obtained because it paid the debt underlying the Investor-Lender Mortgages, those Releases were nevertheless valid. First, EBF had actual authority to issue and execute the Releases. Appellees ignore the logical operation of the Authorization Document to this effect, choosing instead to focus on irrelevant—and unpresented—factual issues. Second, Appellees misunderstand BC57's argument that a scrivener's error in the Releases does not change the parties' clear intent to release the Investor-Lender Mortgages upon payment of the mortgage indebtedness. And in any event, even if

the Releases were somehow deficient, BC57 is entitled to a valid release under its loan agreement, the common law, and the Illinois Mortgage Act.

I. BC57 has priority over the Investor-Lenders because the Investor-Lenders' mortgages are unenforceable as a matter of law.

Consistent with the longstanding common law rule that "when [a] debt is paid, discharged, [or] released . . . the mortgagee's title is extinguished by operation of law," (*Bradley v. Lightcap*, 201 Ill. 511, 517 (1903)), the Investor-Lenders' mortgages were extinguished once the debt securing their mortgage liens was satisfied. The District Court concluded, however, that "the Illinois legislature replaced that rule in 1961 when it passed the Illinois Mortgage Act, 765 ILCS 905/2," citing *North Shore Cmty. Bank & Tr. Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784. (A28-29.) Neither the Illinois Mortgage Act nor *North Shore* support the District Court's conclusion and Appellees' arguments to the contrary lack merit.

A. The appropriate standard of review for legal error is *de novo*.

The District Court's determination that the Illinois Mortgage Act "replaced" the longstanding common law rule was an error of law subject to *de novo* review. Nevertheless, the Investor-Lenders assert an abuse of discretion analysis applies,

even to questions of law, because this appeal arises from the District Court's order approving the Receiver's proposed distribution of assets.[1] (Dkt.[2] 34 at 15, n.7.)

While district courts enjoy broad equitable power in supervising equitable receiverships, a district court's application of law in the context of a receiver's recommendations remains subject to *de novo* review. As an initial matter, an error of law is, by definition, an abuse of discretion. *See Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007). This Court has confirmed that legal error by a lower court is reviewed *de novo* as part of an abuse of discretion analysis. *See Morris v. BNSF Ry. Co.*, 969 F.3d 753, 766 (7th Cir. 2020) (on appeal of order to exclude evidence, "[w]e review the allegation of legal error *de novo*, and again review the district court's discretionary ruling for abuse of discretion.").

Other circuits have explicitly recognized that a district court's conclusions of law are subject to *de novo* review in the context of an equitable receivership. *See, e.g.*, *Cox Enters. v. Pension Benefit Guar. Corp.*, 666 F.3d 697, 701 (11th Cir. 2012) ("The district court's distribution of assets in a receivership is an equitable decision that we review for abuse of discretion. . . . However, the court's underlying interpretation of Florida statutes 'is a "purely legal issue" that is reviewed *de novo*.'") (citations omitted); *see also Keybank N.A. v. Fleetway Leasing Co.*, 781 Fed. Appx.

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[1] The Receiver also argues BC57 does not challenge the Receiver's distribution plan (Dkt. 29 at 13-15), but this is fundamentally incorrect. Indeed, this appeal is from the District Court's distribution order, which ordered the disbursement of proceeds in accordance with the District Court's earlier priority determination. (*See* Dkt. 19.)

[2] References to "Dkt." refer to docket entries on this Court's docket. As in BC57's Opening Brief, "R." refers to docket entries in the record on appeal, "A__" refers to the short appendix bound with the brief, and "SA__" refers to the separate appendix.

119, 121, 2019 U.S. App. LEXIS 22067, *4 (3d Cir. 2019) ("We review the District Court's application of law with regard to the equitable receivership *de novo*, and its decisions relating to procedures it will follow in connection with the receivership proceedings for abuse of discretion.") (citing *SEC v. Black*, 163 F.3d 188, 195 (3d Cir. 1998)).

Moreover, this Court effectively engaged in the analysis endorsed by the Third and Eleventh Circuits in *SEC v. Wealth Management, LLC*, 628 F.3d 323 (7th Cir. 2010). After concluding the "district court faithfully applied" the equitable principles of a receivership "in endorsing the receiver's pro rata distribution," the *Wealth Management* Court separately analyzed the objectors' argument that "they were legally *entitled* to preference." 628 F.3d 323, 334 (7th Cir. 2010) (emphasis in original). In so doing, the Court reviewed a federal statute, state law, and case law interpreting both, before concluding the objectors were not legally entitled to preference as creditors, consistent with the district court's decision. *Id.* at 334-335.

BC57's arguments on appeal present dispositive legal issues for the Court's consideration, all of which are entitled to *de novo* review.

B. The Illinois Mortgage Act did not "replace" the common law rule and Appellees' argument to the contrary conflicts with Illinois rules of statutory interpretation.

Appellees contend the District Court properly rejected the notion that "payment to Equitybuild Finance acted to automatically release the individual investor's mortgages." (Dkt. 34 at 28; *see also* Dkt. 29 at 27.) In their view, the common law rule cannot continue to be in effect where the Illinois Mortgage Act "exclusively controls the requirements for releasing a mortgage in Illinois." (Dkt. 34

at 32.) The Investor-Lenders[3] purport to point to the plain language of the Illinois Mortgage Act for support, but the Act does not abrogate the common law rule, either expressly or implicitly. Appellees' framing of the issue misunderstands BC57's argument, and conflates Illinois common law and the Illinois Mortgage Act.

1. The plain language of the Illinois Mortgage Act does not abrogate the common law rule by implication.

The Investor-Lenders defend the District Court's conclusion that the Illinois Mortgage Act "replaced" the common law rule by arguing that the plain language of the Act abrogates the common law rule. (Dkt. 34 at 31.) According to the Investor-Lenders, the Illinois Mortgage Act provides the exclusive mechanism for recording a release, which "necessarily means that any other method of effecting the release of a mortgage, such as payment under the common law, cannot also be effective." (*Id.*) Due to this "irreconcilable repugnancy" between the statute and the common law rule, the Investor-Lenders conclude that the Act must be "deemed to have abrogated the common law." (*Id.*)

The Investor-Lenders' interpretation finds no support in the Illinois Mortgage Act. The Act reveals no express intent to abrogate the common law. Similarly, as demonstrated in BC57's Opening Brief, and unaddressed by either Appellee, the Illinois Mortgage Act's legislative history does not include any suggestion that any member of the Illinois legislature sought to repeal the longstanding common law rule,

[3] The Receiver, like the Investor-Lenders, contends there is "[n]o automatic release by payment," stating "BC57's argument is contrary to the language of the statutes cited, and contrary to legal authority." (Dkt. 29 at 26-27.) The Receiver does not elaborate on its position, however.

expressly or otherwise. *See* 72nd General Assembly, 1st Special Session, at 42-46 (1961). In the absence of explicit textual or legislative history support, the Investor-Lenders argue that the Act repeals the common law rule by implication. However, this argument misinterprets the scope of the Illinois Mortgage Act and ignores the functional interplay between the Act and the common law rule.

BC57 is not arguing that payment of debt secured by a prior mortgage "automatically releases" that mortgage of record. Instead, the extinguishment of a mortgage lien and a mortgage release of record are separate and distinct. The common law rule provides that once debt underlying a mortgage is satisfied, the mortgage lien secured by that debt is extinguished as a matter of law. *Bradley*, 201 Ill. at 517. When that debt is satisfied, prior mortgagees must then separately comply with the Illinois Mortgage Act's strictures to draft and deliver a release evidencing that payment within thirty days, or face a $200 fine. 765 ILCS §§ 905/2, 4. Thus, along with the Mortgage Certificate of Release Act, the Illinois Mortgage Act does provide the exclusive method for parties to create and deliver a recordable release—but these administrative requirements are separate from a lien's legal existence and enforceability.

Far from evincing the legislature's "clear intent to abrogate the common law" (Dkt. 34 at 31), as is required, the plain language of the Illinois Mortgage Act underscores this distinction. The Act acknowledges that its requirements are conditioned on a mortgagee "having received full satisfaction and payment of all such sum or sums of money as are really due." 765 ILCS § 905/2. After receiving full

satisfaction and payment, which operates to extinguish the mortgage lien per the common law rule, the mortgagee "shall . . . make, execute, and deliver" a release. *Id.* The Act thus embraces the common law rule by requiring prior satisfaction of the debt underlying the mortgage lien to then trigger a mortgagee's release obligations.

The plain language of the Illinois Mortgage Act further confirms its administrative purpose—to define the manner in which parties document a release of record. The Act states: "Mortgages of real property and deeds of trust in the nature of a mortgage shall be released **of record** only in the manner provided herein." 765 ILCS § 905/2 (emphasis added). Prior to the enactment of the Act, a release would be "recorded" by writing it into the margin of the record. *See id.* (acknowledging pre-Act recording method entered "on the margin of record"); *see also Williams v. Griffith*, 310 Ill. App. 574, 577 (4th Dist. 1941) (". . . the mortgage referred to was released on the margin of the record . . . such release reciting that it was made in consideration of the full payment of the amount secured by the mortgage."). Post-Act, rather than writing a release into the margins, a release must be a separate "instrument in writing," which itself must be recorded. 765 ILCS § 905/2. Accordingly, the Illinois Mortgage Act codifies the operational requirements of a release, rather than abrogating the longstanding common law to such sweeping effect.

2. Appellees' interpretation of the Illinois Mortgage Act would lead to absurd results.

The Investor-Lenders' conclusion that the plain language of the Illinois Mortgage Act abrogates the common law rule also runs counter to the Illinois maxim that "[s]tatutes must be construed to avoid absurd or unjust results." *Soucek v.*

Breath of Life Prof'l Servs., 2021 IL App (1st) 210413. Specifically, the Investor-Lenders' reading (and the District Court's conclusion) that the Act "replaced" the common law rule "would upend the businesses of mortgage lending and insuring titles in Illinois." (Dkt. 20 at 2.) As described in BC57's Opening Brief, if the Act "replaced" the common law rule, a mortgagee would be able to withhold a release, enjoy the windfall of its debt relief, but only face a $200 fine, plus attorneys' fees. *See* 765 ILCS § 905/4. The mortgagor or the refinancing mortgagor's lender, on the other hand, would have paid the mortgagee's debt, received nothing, and (after thirty days) would be left to pursue the Act's statutory penalties. During that thirty day period—or until "a finding for the party aggrieved" (*id.*)—title would remain uncertain. Similarly, the Investor-Lenders' reading would "call into question the validity and finality of titles where no release of a prior mortgage has ever been recorded—as not infrequently happens—even though the debt that the mortgage secured has been paid." (Dkt. 20 at 2.)

The Investor-Lenders' reading further ignores Illinois' requirement that "[w]here the common law rule in question provides greater protection than the statute at issue, but the rule is not inconsistent with the general purpose of the statute, it is better to say that the law was intended to supplement or add to the security furnished by the rule of the common law rather than to say that it is repugnant to that rule." *Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, ¶ 17.

Here, the longstanding common law rule protects a lender who has paid the debt underlying a mortgage, rendering the prior lien unenforceable (*see Rockford Life*

Ins. Co. v. Rios, 128 Ill. App. 2d 190, 193 (1970)); by contrast, the Illinois Mortgage Act provides only a $200 fine and the cost of the lender's attorney's fees as a penalty for failure to provide a valid release within 30 days (765 ILCS § 905/4). The "greater protection" provided by the common law rule extends not just to mortgagors and subsequent lenders, but also to the commercial real estate industry and the general public, all of whom have an interest in the "free alienability of land" and in finality of real estate closings. *See In re Gluth Bros. Constr. Inc.*, 451 B.R. at 451; *see also* Dkt. 20 at 8-9 (describing "limbo" effect "as parties await delivery of the release and its recordation" post-closing, if the common law rule did not continue to have effect).

Indeed, though Appellees dismiss BC57's (and the ILTA's) real-world considerations as not "grounded in logic" and "self-serving," (Dkt. 34 at 44, Dkt. 29 at 28), eliminating the common law rule would fundamentally undermine the purposes the Illinois Mortgage Act is intended to serve. The Act is intended for the benefit of the mortgagor and to ensure free alienability of land. *See In re Gluth Bros. Constr. Inc.*, 451 B.R. at 451. The Investor-Lenders acknowledge *In re Gluth*'s import in this regard, yet argue that the decision "recognized, implicitly if not explicitly, that a mortgage remained in effect until a written release is delivered." (Dkt. 34 at 43.)

In re Gluth contains no such holding. There, the prior mortgagee refused to issue a release, despite having been paid for the debt securing its mortgage because, it claimed, other, non-payment provisions of its prior mortgage had not been satisfied. *Id.* at 450. The court rejected this argument, confirming that the Illinois Mortgage Act "unambiguously requires a mortgagee to release his mortgage upon receiving full

payment under the mortgage." *Id.* at 451 (quoting *Franz v. Calaco Dev. Corp.*, 352 Ill. App. 3d 1129, 110 (2d Dist. 2004)). The court cautioned "[i]t would clearly be against the purpose of the Act to allow lenders to forever cloud title to mortgaged property by throwing in an empty provision [to a mortgage] and asserting speculative future obligations." *Id.*

The same warning rings true here. If the Act "replaced" the common law rule, when a lender relieves the debt underlying a prior mortgage lien, that lien would continue in force until a release is recorded. This change would transform routine closings into high-risk ventures for any lender or purchaser. (Dkt. 20 at 8-9 (". . . closings, if they could be scheduled, would lack finality and remain in limbo as the parties await delivery of the release and its recordation."). The ILTA details the magnitude and scope of disruption this change would cause in the real estate industry—both commercial and residential (*see id.*)—which even the Receiver concedes would be "significant on custom and practice" in Illinois. (R.29 at 26.)

3. Illinois case law confirms the common law rule remains in effect.

Consistent with the foregoing Illinois principles of statutory interpretation, Illinois courts have not held the Illinois Mortgage Act to impliedly repeal the common law rule. Instead, courts analyzing the Act necessarily accept the common law rule's continued effect. Presented with these cases, Appellees argue they are either too old to hold precedential value or are not "on point." (Dkt. 34 at 32.) Neither assertion is correct.

As described in BC57's Opening Brief, Illinois courts have followed the common law rule for over a century. (Dkt. 7 at 14-15; *see also Schaeppi v. Glade,* 195 Ill. 62,

66, (1902) ("A mortgage without any debt has no effect as a lien, and it can only take effect from the time when some debt or liability secured by it is created. A debt or mortgage obligation is essential to create a lien.").) Instead of challenging the substance of the long-established recitations of the common law rule, the Investor-Lenders insist "[t]hese decisions cannot possibly provide any guidance" to the Court due to their age. (Dkt. 34 at 32.) But the age of these cases has no bearing on their vitality—particularly in this context. When "interpreting Illinois real estate law, this Court is guided by Illinois holdings often over a century old." *In re Pak Builders*, 284 B.R. 650, 653 (Bankr. C.D. Ill. 2002). "[I]t is a legal axiom that real estate law changes little through the years, and even recent real estate decisions are apt to simply recite antiquated holdings, underlying their consistent and timeless nature." *Id.*

BC57's more recent cases[4] further confirm that the common law rule remains in effect. The Investor-Lenders attempt to avoid this conclusion by highlighting factual differences among the cases. But such differences are neither surprising nor consequential as the common law principle holds true in each instance, demonstrating its "consistent and timeless nature." *In re Pak Builders*, 284 B.R. at 653.

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[4] The ILTA's cases confirm as much, too, though the Investor-Lenders dismiss their import as "simply dicta," (Dkt. 34 at 36) (*Dunas v. Metropolitan Tr. Co.*, 41 Ill. App. 2d 167 (1st Dist. 1963)), or fail to cite them at all (*In re Jansma*, 2011 Bankr. LEXIS 312 (Bankr. N.D. Ill. Jan. 27, 2011) (in Illinois, "'[t]he two essential elements of a mortgage . . . are a debt . . . to be secured and a conveyance . . . to secure that debt. . . . It follows that if there is no longer an underlying debt, there is no valid lien.") (citations omitted).

For example, the Investor-Lenders argue that *AAMES Capital Corp. v. Interstate Bank*, 315 Ill. App. 3d 700 (2d Dist. 2000), "emphasized that even though a debt is paid in full, a mortgage continues to be in effect until a written release is recorded." (Dkt. 34 at 41.) This argument finds no support in the *AAMES* decision. The *AAMES* court noted only that a recorded release could prevent a refinancing lender from seeking relief under a theory of conventional subrogation. *Id.* at 710. Further, BC57 cited *AAMES* not for its conventional subrogation holding, but for the significance Illinois courts place on a release as it relates to the chain of title. (Dkt. 7 at 22.) In *AAMES*, once the liens were recorded, "third parties examining chain of title . . . were put on notice of the existence of the debts and of the liens on the real estate" and "[b]ecause no release of lien had been filed pursuant to . . . the Mortgage Act, there was no indication to third parties that the liens were ever extinguished." *AAMES*, 315 Ill. App. 3d 700, 705 (2nd Dist. 2000).

The Investor-Lenders also try to distinguish *City of Chicago v. Elm State Prop. LLC*, 2016 IL App (1st) 152552, arguing "no part of its opinion addressed the requirements for releasing a mortgage." (Dkt. 34 at 33.) However, BC57 cited *City of Chicago* for the limited proposition that in Illinois, a mortgage "only creates a lien on the property" and for its recitation of the common law rule: a mortgage "conveys a security interest that may be extinguished by the mortgagor paying in full any time prior to foreclosure." *Id.* at ¶ 21. That *City of Chicago* otherwise concerned whether the "assignment of a mortgage is taxable under the transfer tax" does not diminish

the import of the common law rule, particularly where the court cited the rule as support for the distinction between a beneficial interest and a lien. *Id.* at ¶¶ 20, 21.

The Investor-Lenders similarly contend that *Jurado v. Simos*, 166 Ill. App. 3d 380, 381 (1st Dist. 1988) in no "way shape or form, relates to the requirements for releasing a mortgage in Illinois." (Dkt. 34 at 35.) Though the *Jurado* opinion concerns the doctrine of merger, that focus does not undermine *Jurado*'s implicit reliance on the common law rule. The court specifically affirmed the trial court's decision "grant[ing] defendants' motions for summary judgment, finding that plaintiff could not foreclose the mortgage *because his purchase of the note extinguished the debt*." *Id.* at 381 (emphasis added).

The Investor-Lenders also misunderstand the significance of *Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190 (1970), arguing that the "court had to order the plaintiff bank to release the mortgage because it was still an encumbrance on the property," such that the payment of the debt must not have "operate[d] to release [the] mortgage as a matter of law." (Dkt. 34 at 34.) To be sure, the prior mortgage in *Rockford* remained of record in the chain of title, improperly clouding title. *Id.* at 192. Accordingly, the court ordered the issuance of a valid release to confirm—of record—what had already occurred, that the lien was extinguished. *Id.* at 193. Though the court did not explicitly cite the common law rule, it certainly relied on its effect, concluding that because "the note secured by the mortgage had been paid in full," "[c]onsequently, Rockford Life was not entitled to foreclose its mortgage," underscoring the lien's unenforceability as a matter of law. *Id.*

Finally, the Investor-Lenders take issue with BC57's citation to authority from other states. Those authorities are offered not as controlling, but persuasive, examples to show that the common law rule in Illinois is identical to rules in effect across the country—which makes sense given the underlying subject matter. Some of these out-of-state cases simply offer more explicit recitations of the interplay between the common law rule and releases than those available in Illinois. *See, e.g.*, *Klapmeier v. Peoples Nat'l Bank of Mora*, No. A07-1789, 2008 Minn. App. Unpub. LEXIS 909, at *9 (Aug. 5, 2008) ("[O]nce a mortgage debt has been paid in full . . . the mortgage is completely extinguished . . . . Moreover, even if a mortgage that was paid in full was not satisfied of record, the mortgage is still completely extinguished.").

All told, the common law rule continues in effect in Illinois and elsewhere. Indeed, no court—including *North Shore*—has held that the Illinois Mortgage Act repealed the common law rule that payment of the debt extinguishes the lien of the mortgage securing the debt.

4. *North Shore* did not hold the Illinois Mortgage Act repealed the common law rule.

The District Court relied on *North Shore* as support for the idea that the Illinois Mortgage Act "replaced" the common law rule. The Investor-Lenders[5] now similarly invoke *North Shore*, arguing that the court "ruled squarely that the Illinois Mortgage Act abrogated any common law doctrine for releasing mortgages." (Dkt. 34 at 37.) *North Shore* contains no such holding.

[5] The Receiver does not cite or discuss *North Shore* in its brief.

The question in *North Shore* was whether payment of the debt underlying the mortgage triggered the release itself, where the release was not delivered, but was instead held in escrow, leaving the mortgage intact and of record by agreement. The *North Shore* court concluded it did not, holding that "even if there was full payment, the plain language of the Mortgage Act indicates that delivery is necessary before a mortgage is released." 2014 IL App (1st) 123784, ¶ 76. This is accurate. Payment alone does not *release* a mortgage of record—a mortgagee must comply with the conditions set out in the Illinois Mortgage Act to release a mortgage of record. Payment alone does, however, extinguish the lien secured by the mortgage debt, per the common law rule.

Critically, *North Shore* does not mention or discuss the common law rule, let alone its relationship with the Illinois Mortgage Act—*and neither did the parties*. The Investor-Lenders contend that "it is unclear if the parties in *North Shore* discussed the common law rule" but claim that the opinion "strongly suggests" the parties "attempt[ed] to invoke the common law doctrine." (Dkt. 34 at 39.) This is simply not correct. BC57 included the parties' appellate briefing from *North Shore* in its Separate Appendix filed with this Court. The briefing confirms that the objectors in *North Shore* never raised the common law rule, much less cited any cases for the appellate court addressing the rule. (SA70.) The bank similarly did not raise the common law rule in its opposition. (SA130-132.) Instead, the parties cited Illinois case law focused on the legal effect of delivery of deeds. (*See* SA19-22; SA70-73; SA129-132; SA169-170.) Given the parties' focus on the legal effect of delivery—and

the absence of *any* discussion of the common law rule—the *North Shore* holding is best understood as limited to the effect the lack of delivery of a release has on the efficacy of that release.

Expanding *North Shore*'s holding, on the other hand, to mean that the Illinois Mortgage Act "replaced" the common law rule conflicts with *North Shore*'s facts, the parties' briefing, and, most importantly, Illinois principles of statutory interpretation. Indeed, neither the *North Shore* court nor the parties engaged in the statutory analysis required for the implicit repeal of the common law, which "is not and has never been favored." *Rush Univ. Med. Ctr.*, 2012 IL 112906 at ¶ 17 (citation omitted).

Appellees do not meaningfully respond to any of these points. Instead they dismiss BC57's analysis and baldly assert that *North Shore*'s "holding explicitly rejects the common law" rule. (Dkt. 34 at 40.) However, given that the court does not even mention, much less discuss, the common law rule, BC57 respectfully submits that it cannot reasonably be concluded that the court "explicitly reject[ed]" the common law rule. Nevertheless, to the extent the Court disagrees and reads *North Shore* to so hold, the Court has "compelling reason to doubt that [*North Shore*] . . . stated the law correctly" considering *North Shore*'s lack of analysis and the extensive transactional changes such a reading would bring to bear. *AAR Aircraft & Engine Grp., Inc. v. Edwards*, 272 F.3d 468, 470 (7th Cir. 2001).

For these reasons, and those described in BC57's Opening Brief, a finding that BC57 has the only enforceable lien is supported by both Illinois law and the record.

II. A valid release is not necessary to extinguish the lien of the Investor-Lenders' mortgages, but the Releases issued by the Investor-Lenders' authorized agent, EBF, are nevertheless valid.

While releases are not necessary to extinguish a lien—because, as explained above, in Illinois when the debt secured by a mortgage is paid, the lien of the mortgage is extinguished as a matter of law—the Releases issued by EBF nevertheless satisfied that requirement. Appellees' arguments suggesting otherwise focus largely on arguments BC57 did not raise, and are in direct conflict with the relevant agreements defining EBF's authority to release the Investor-Lender Mortgages.

A. EBF had actual authority to release the Investor-Lender Mortgages.

Though Appellees devote a significant portion of their briefing to apparent authority arguments, BC57's argument on appeal is focused on the District Court's decision concerning EBF's actual authority. Specifically, BC57 challenges the District Court's decision that EBF did not have express authority to issue and execute the Releases, a decision subject to *de novo* review given that resolution of the issue rises and falls on the District Court's interpretation of the Collateral Agency and Servicing Agreement ("CAS") and the Authorization Document. *See VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247, 251 (7th Cir. 2016) ("We review *de novo* a district court's interpretation of a contract."); *see also* A23 ("I must 'look to the contract [here, the investment package, including the CAS and Authorization Document]. . . . And I must 'attempt to give meaning to every provision of the contract . . . .'").) In response, Appellees primarily argue that BC57's reading of the Authorization Document "renders key provisions of the investment documents superfluous or meaningless." (Dkt. 34 at 19; *see also* R.1386 at 23-24; *see also* Dkt.

29 at 22-23.) But Appellees, like the District Court, overlook the fact that the CAS, which requires "written instruction" to amend or terminate the Investor-Lender Mortgages, and the Authorization Document, which provides written instruction to accept payoffs and issue releases, are not in tension.

Read together—as BC57 agrees they must be, notwithstanding the Investor-Lenders' suggestion to the contrary (*see* Dkt. 34 at 20-21, n.9)—the Authorization Document provides precisely the "written instruction" mandated by the CAS. Though part of the same investment package, the Authorization Document is a separate instrument from the CAS, bearing a separate signature. (*See* R.1147-7, R.1160 at 78.) The CAS's general admonition that there be "written instruction" to amend or terminate the Investor-Lender Mortgages does not conflict with this simultaneous grant of the specific authority, separately signed, to execute and issue releases.

Yet, the Investor-Lenders contend this simultaneous authorization "makes no sense," because it "would mean that the individual investors released their mortgages at the very same moment they were created." (Dkt. 34 at 20.) BC57 agrees it would "make[] no sense" to interpret the Authorization Document in this way. Instead, the Authorization Document grants EBF authority to act at a specific point in time[6]—specifically, "upon payment in full of any outstanding balance"—to "issue and execute a release of said mortgage." (R.1160 at 78.) For the same reason, BC57 respectfully

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[6] In the context of their argument concerning the Releases' validity, the Investor-Lenders actually concede this interpretation: "At best, though, these documents can only establish the understanding that the individual investors and the EquityBuild Defendants had when the investors made their investments as to how the mortgages ***might be released at some later point in time***." (Dkt. 34 at 27 (emphasis added).)

submits that the answer to the District Court's question—"Assuming. . . that the Authorization Documents simultaneously gave [EBF] permission to release those mortgages. . . what was the point of the CAS provisions [requiring written instruction] in the first place?" (A23)—is straightforward. The CAS generally required "written instructions" from the Investor-Lenders for EBF to foreclose, amend, or terminate the Investor-Lender Mortgages. (R.1147-7 at §§ 3, 4(a)(ii), 6(a).) The Authorization Document provided specific written instruction to receive payoffs and issue and execute releases upon payment of any outstanding balance. (R.1160 at 78.) Should EBF have wished to terminate or amend the Investor-Lender Mortgages in some other way—such as changing their maturity date or the applicable interest rate—a separate written instruction would have been necessary to comply with the CAS.

The Investor-Lenders also suggest the language of the Authorization Document is otherwise "unclear," such that it "does not unambiguously authorize EBF to issue mortgage releases." (Dkt. 34 at 23-24.) Each suggestion is without merit. The Investor-Lenders argue the Authorization Document's use of the past tense—stating EBF "has been authorized"—calls into question the source of that authority, "suggesting that the authorization had already been granted." (*Id.* at 23.) This ignores the simplest understanding of that language: the Authorization Document is itself the "source" of the authority to receive the payoff and issue and execute a release. The Investor-Lenders also argue the Authorization Document's reference to "said mortgage" is ambiguous given the Authorization Document does

not otherwise reference a mortgage. But this ignores that the Authorization Document is a part of an investment package, which also included the mortgage itself. (*See* R.1160 at 73-74.) And the Investor-Lenders' issue with the reference to lenders in the plural is unfounded—that term is inclusive of all types of Investor-Lenders; some investors invested as a couple (*see, e.g.*, R.1156, Ex. 7 pt.1), for example.

The Investor-Lenders also assert "it is undisputed that the individual investors themselves never received the 'payment in full,' which the Authorization Documents require." (Dkt. 34 at 24.) But BC57 had no duty to ensure the $4.9 million it wired to EBF was in fact remitted to the individual investors. This is because EBF, already cloaked with actual authority to act on the Investor-Lenders' behalf by virtue of the "care-of" language in the mortgages themselves (R.1147-1-1147-5; *see also* R.1147-7 at §§ 2(a), 9(a)), was indisputably authorized to receive payoffs (*see* A16). Appellees ignore well-settled Illinois law to this effect, which confirms that payment to an authorized agent has the same legal effect as payment to the principal. (*See* Dkt. 7 at 36-41.) For example, *Rockford* demonstrates that once payment was made to EBF, the Investor-Lenders' agent authorized to accept loan payments (R.1147-7 at § 9(a), R.1160 at 78), BC57 had no obligation to ensure that payment was remitted to the Investor-Lenders. 128 Ill. App. 2d 190, 193 (3d Dist. 1970) ("If payment is made to an authorized agent as in the case at bar, the payor is not bound to inquire into the application of such payment.").

Consistent with Illinois case law, the Illinois Mortgage Act supports this principle, too. Though the Investor-Lenders dismiss the argument as "irrelevant,"

they admit that the Illinois Mortgage Act expressly accepts that payment may be made to the mortgagee's "legal representative," such as EBF. (*See* Dkt. 34 at 24; *see also* 765 ILCS § 905/2.) The District Court concluded it was "reasonable" to expect that the Investor-Lenders needed to be paid directly "[g]iven the requirements of the Illinois Mortgage Act." (A20.) However, given that, as described, neither the Act nor Illinois case law require mortgagees be paid directly, BC57 respectfully submits that it is not a "reasonable interpretation" to conclude that payment in full must be to the mortgagees directly. (*Id.*)

Further, the Illinois Fiduciary Obligations Act—intended "to facilitate the fiduciary's performance of his responsibilities by limiting the liability of those who deal with him" (*Praither v. Northbrook Bank. & Tr. Co.*, 2021 IL App (1st) 201192, ¶ 27)—also protects BC57's payment to EBF, notwithstanding the CAS' advance waiver of fiduciary duties, which Illinois courts disfavor. (*See* Dkt. 7 at 40.) Specifically, despite the attempted disclaimer of EBF's role as a fiduciary, EBF is unquestionably an "agent," and is therefore within IFOA's definition of a "Fiduciary." (*See* 760 ILCS § 65/1.)

Finally, Appellees further argue that BC57's actual authority argument "fails factually" because the record contains Authorization Documents for most (89% (*see* R.1152 at 7-8)), but not all, individual investors. (*See* Dkt. 34 at 21-22.) But the District Court did not make any ruling to this effect, nor did it speak to a factual deficiency with respect to the Authorization Documents. Regardless, unanimous authorization was not required for EBF to release the Investor-Lender Mortgages

upon payment of the debt underlying those mortgages. The CAS required "written instructions from all Lenders with respect to the amendment or termination of the Mortgage, or, ***except as provided in the Mortgage***, any Lien on property of [EBF] granted under the Mortgage." (*See* R.1147-7, § 6(a) (emphasis added).) The Investor-Lender Mortgages, in turn, provided that "Lender shall release this [mortgage]" "[u]pon payment of all sums secured" by the mortgage. (R.1147-1-5 at ¶ 10.) Complete payment indisputably occurred here (R.1160 at 238-257)—and the CAS authorized EBF to issue payoff demands and collect all loan payments with instruction from a *majority* of investors, rather than all investors (*see* R.1147-7, § 9(a); *see also id.* § 1, Defined Term, "Required Lenders"). Therefore, EBF was required to, and did, release the Investor-Lender Mortgages consistent with its authority from the CAS and a majority of completed Authorization Documents.

B. A scrivener's error does not negate the parties' intent that EBF was authorized to issue releases, and thus does not negate the validity of the Releases.

As it did before the District Court, BC57 contends that a scrivener's error does not negate the parties' intent to release. Appellees suggest BC57 waived this argument, confusing it for a "mutual mistake" argument. (Dkt. 34 at 26; Dkt. 29 at 21.) Under Illinois law, however, a scrivener's error in an instrument *is* a mutual mistake. *See Roots v. Uppole*, 81 Ill. App. 3d 68, 72-73 (3d Dist. 1980) ("The mutuality of the mistake is apparent, as it is a scrivener's error. While this alone might justify reformation, it also indicates the parties failed to realize the deed did not express their true agreement, their mutual mistake being believing the instrument reflected this agreement.") Thus, Illinois law relating to mutual mistake—particularly as it

informs Illinois' view on the parties' intent to enter a contract—is relevant to the scrivener's error argument.

More importantly, the record establishes that the parties intended to authorize EBF to execute and issue releases on the individual Investor-Lenders' behalf. The CAS authorized EBF to act on the Investor-Lenders' behalf, including pursuant to any written instruction authorizing EBF to amend or terminate the Investor-Lender Mortgages. (*See* R.1147-07, §§ 2(a), 3, 4(a)(ii), 6(a).) The Authorization Document, in turn, gave EBF authority to "issue and execute" releases of the Investor-Lender Mortgages. (*See* R.1160 at 78.) For its part, BC57 conditioned its loan on receiving a first security interest on the Group 1 properties. (*See* R.1160 at 114.)

Moreover, a scrivener's error denoting "EquityBuild, Inc." as the releasing party, even though the signature correctly reflected "Equitybuild Finance, LLC" as the releasing party, does not negate the validity of the Releases. Though the Receiver views these facts as "conclusively" demonstrating that Equitybuild and EBF "were one and the same," (Dkt. 29 at 19), these same facts highlight the parties' efforts to correct similar inadvertent errors prior to closing. In particular, "BC57's lawyers specifically noticed" that the releases initially sent to BC57 were prepared for signature by Jerry Cohen, the principal of the borrowing entity (Equitybuild, Inc.) rather than for signature by the lenders' agent, Equitybuild Finance, LLC. (*See* R.1227, Ex. 12.) This error, at least, was corrected (Equitybuild Finance, LLC was the proper signatory on the Releases, *see, e.g.*, 1147-17).

Regardless, even if the Releases were deficient in any way, BC57 is entitled to a valid release under its loan agreement, the common law, and the Illinois Mortgage Act. The Investor-Lenders suggest BC57 is not entitled to a release, because the Act would only "allow a *mortgagor* who had been paid in full, to seek a release." (*See* Dkt. 34 at 28 (emphasis added).) But courts have not interpreted the Illinois Mortgage Act so narrowly.

For example, in *Rockford*, the court affirmed the trial court's order finding that the defendants—not just the original mortgagors *but also* the subsequent purchasers who, like BC57, paid the outstanding balance of the principal due on the original mortgage—"were entitled to a release of the mortgage," a fact the Investor-Lenders acknowledge. (128 Ill. Ap. 2d 190, 193; *see also* Dkt. 34 at 34.) Similarly, the court in *In re Gluth* explicitly concluded that the Illinois Mortgage Act "does not limit its application to mortgagors," noting instead that "the statute creates an affirmative duty of a mortgagee to file or deliver a release upon payment and satisfaction." *Id.* at 452. In *In re Gluth*, a bank had a recorded mortgage on a parcel of land even though the underlying debt had been paid in full, and refused to issue a release. 451 B.R. at 449. The court ordered the bank "to prepare, execute and file or deliver a release of the Mortgage in accordance" with the Illinois Mortgage Act to a third party, even though the third party was not a mortgagor. *Id.* at 454. In support of its order, the court reasoned that the third party's "rights in the land [were] impaired by the Mortgage" and thus it was entitled to a release. *Id.*

As in *Rockford* and *In re Gluth*, BC57 is entitled to a release. The Investor-Lenders empowered EBF to accept payoffs in their name (an aspect of EBF's authority that is undisputed (*see* A16)), and must bear the burden of their agent's actions. *See M&T*, 2015 IL App (2d) 141233. Correspondingly, BC57 had no duty to ensure its payment to EBF, based on payoff statements EBF was unequivocally authorized to issue (R.1147-7 at § 9(a); *see also* A16 (EBF's "express responsibilities" included "issu[ing] payoff statements")), was in fact remitted to the individual Investor-Lenders. BC57's reliance on the payoff statements issued by the authorized servicing agent, to which the Investor-Lenders were bound, was reasonable and there is no evidence of record to the contrary. (R.1160 at 225-228.) EBF received the payoff funds from BC57 satisfying the prior-mortgage debt, as evidenced by completed wire transfers. (*Id.* at 238-257.) The record also confirms EBF had the authority to collect payments on behalf of the Investor-Lenders. (R.1147-7 at § 9(a), R.1160 at 78.) Accordingly, the record supports BC57's entitlement to valid Releases in the same way it supports BC57's lien priority.

CONCLUSION

Accordingly, Appellant BC57 respectfully requests this Court enter an order reversing the District Court's priority determination and remanding with instruction to enter an order finding BC57's mortgage lien has priority to the sales proceeds of the Group 1 properties over the Investor-Lenders' unsecured claims.

Dated: September 15, 2023

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that this brief contains 6,998 excluding Fed. R. App. P. 32(f)'s exclusions. I also certify, pursuant to Fed. R. App. P. 32(a)(5), that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Century.

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CERTIFICATE OF SERVICE

I certify that, on September 15, 2023, I filed this brief via the Court's ECF system, which will send notice to all users registered with that system.

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