No. 23-1870

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff/Appellee,

and

KEVIN B. DUFF,
Appellee,

v.

EQUITYBUILD, INC.
Defendants

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

ILLINOIS LAND TITLE ASSOCIATION'S MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANT BC57, LLC

J. Michael Williams, Carrie A. Dolan and Amy E. Daleo, Cohon Raizes & Regal LLP, for proposed amicus curiae Illinois Land Title Association.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29 and Seventh Circuit Rule 29, proposed a*micus* Illinois Land Title Association ("ILTA") moves for leave to file the attached brief in support of appellant BC57 LLC's appeal of district judge Manish Shah's February 15, 2023, Memorandum Opinion and Order and his May 23, 2023, Order Approving Distribution of Group 1 Proceeds. In support of its motion, ILTA states as follows:

1. Proposed a*micus* ILTA is a not-for-profit professional association of title insurance companies, agents, and attorneys that has served the Illinois land title community for over 100 years. ILTA addresses legislative and judicial concerns related to land titles for its members and the citizens of this State. *See* www.illinoislandtitle.org.

2. In the case below, the district court determined that the appellant's mortgage liens on five Chicago properties are inferior to the interests of some 160 individual and entity investors who previously had mortgages on the properties. The investors claim that releases of those mortgages given by their servicer were not valid.

3. In the course of reaching its decision, the district court concluded that the Illinois Mortgage Act, 765 ILCS 905/2, supplanted the longstanding Illinois common law rule that payment of the debt *ipso facto* extinguishes the mortgage securing repayment of the debt, and that the Act replaced that rule with another one: that a mortgage is not extinguished until a release is recorded. The district court also concluded that the investors' loan servicer had no authority to execute releases of the investors' mortgages absent the investors' consent, and that the refinancing lender had an obligation to confirm each investor's express consent.

4. The foregoing rulings would have serious adverse and unintended implications for the operation of the title insurance industry and the lending industry with which it is associated.

5. ILTA's proposed *amicus curiae* brief is intended to apprise this court of adverse impacts to the title insurance and mortgage lending industries if the decision below is affirmed.

6. ILTA believes that the points and arguments in its *amicus curiae* brief provide a broader perspective regarding the issues raised by this appeal that would serve as a useful supplement to the submissions presented by the parties. *See Neonatology Assoc., P.A. v. Commissioner of Internal Revenue,* 293 F.3d 128, 129 (3d Cir. 2002) (Alito, J.) (granting leave

to file an amicus brief where "amici have a sufficient 'interest' in the case and . . . their brief is 'desirable' and discusses matters that are 'relevant to the disposition of the case' (quoting Fed.R.App.P. 29[b]); *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.) (explaining that granting leave to file an *amicus* brief is appropriate "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide").

7. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), ILTA states that no counsel for any party authored the proposed brief in whole or in part, and that no person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

For the foregoing reasons, ILTA respectfully requests that the court grant this motion and allow ILTA leave to file the accompanying *amicus curiae* brief in support of the appellant.

ILLINOIS LAND TITLE ASSOCIATION

By: J. Michael Williams .
One of Its Attorneys

J. Michael Williams (mwilliams@cohonraizes.com)
Carrie A. Dolan (cdolan@cohonraizes.com)
Amy E. Daleo (adaleo@cohonraizes.com)
Cohon Raizes & Regal LLP
208 South LaSalle Street, Suite 1440
Chicago, Illinois 60604
312-726-2252 (office)
Counsel for Proposed Amicus Curiae *Illinois Land Title Association*

June 21, 2023

No. 23-1870

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,
Appellant.

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

AMICUS BRIEF OF ILLINOIS LAND TITLE ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT BC57, LLC

Cohon Raizes & Regal LLP
J. Michael Williams
Carrie Dolan
Amy E. Daleo
208 S LaSalle Street, Suite 1440
Chicago, IL 60604
Office: (312) 726-2252
Fax: (312) 726-0609
mwilliams@cohonraizes.com
cdolan@cohonraizes.com
adaleo@cohonraizes.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1870

Short Caption: Securities and Exchange Commission v. Equitybuild, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Illinois Land Title Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cohon Raizes & Regal LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ J. Michael Williams Date: 06/21/23

Attorney's Printed Name: J. Michael Williams

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 208 S. LaSalle Street, Suite 1440

Chicago, Illinois 60604

Phone Number: 312-726-2252 Fax Number: 312-726-0609

E-Mail Address: mwilliams@cohonraizes.com

rev. 12/19 AK

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1870

Short Caption: Securities and Exchange Commission v. Equitybuild, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Illinois Land Title Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cohon Raizes & Regal LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Carrie A. Dolan Date: 06/21/23

Attorney's Printed Name: Carrie A. Dolan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 208 S. LaSalle Street, Suite 1440

Chicago, Illinois 60604

Phone Number: 312-726-2252 Fax Number: 312-726-0609

E-Mail Address: cdolan@cohonraizes.com

rev. 12/19 AK

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1870

Short Caption: Securities and Exchange Commission v. Equitybuild, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Illinois Land Title Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cohon Raizes & Regal LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Amy E. Daleo Date: 06/21/23

Attorney's Printed Name: Amy E. Daleo

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 208 S. LaSalle Street, Suite 1440

Chicago, Illinois 60604

Phone Number: 312-726-2252 Fax Number: 312-726-0609

E-Mail Address: adaleo@cohonraizes.com

rev. 12/19 AK

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

MISCELLANEOUS: **PAGE**

BRIEF OF AMICUS CURIAE ILLINOIS LAND TITLE ASSOCIATION

The Illinois Land Title Association ("the ILTA") is a not-for-profit association whose mission is to provide professional education and government advocacy to companies in the business of insuring titles to real estate. Its members include title insurance companies, title insurance agents, and interested attorneys. Having served the Illinois land title community for more than one hundred years, ILTA is the only industry organization in Illinois that addresses legislative and judicial concerns related to land titles for its members and for the citizens of Illinois. See www.illinoislandtitle.org.

By virtue of the composition of the membership and its mission, ILTA is in a position to offer further perspective to assist the Seventh Circuit in this case. The district court's Memorandum Opinion and Order entered on February 15, 2023 ("Order") and its Order entered on May 23, 2023 approving distribution of proceeds are the subject of appeal by BC57, LLC. The district court's holding in the Order will have implications beyond the scope of the instant case and will impact the everyday transactions of real estate purchasers, mortgage lenders, and title insurers. ILTA submits this brief as *amicus curiae* in support of BC57, LLC.

Summary of the Argument

The district court's decision hinges on two fundamental misconceptions.

First, the longstanding common law rule in Illinois is that payment of the debt—when paid and without the necessity of doing any other thing, such as recording a release of mortgage—extinguishes any underlying mortgage securing the debt. *935 v. Lightcap*, 201 Ill. 511, 517 (1903) *rev'd on other grounds*, 195 U.S. 1 (1904). The district court was persuaded, wrongly we believe, that the foregoing rule has been "replaced" (A29) by a different rule purportedly contained, but hidden until now, in the Illinois Mortgage Act ("the Mortgage Act"),

765 ILCS 905/2, which became law sixty-two years ago in 1961. The purported rule given effect by the district court's reading of the Mortgage Act is that a mortgage is not extinguished, unless and until a release of mortgage has been recorded. The district court is wrong.

Moreover, neither title insurance companies, nor lenders for that matter, have understood the Mortgage Act as abrogating the common law. Neither have they operated their businesses under such premise. In virtually every—if not every—transaction over the past sixty-two years, they have relied upon Illinois common law and treated the payment of an existing mortgage debt as *ipso facto* extinguishing the underlying mortgage. Transactions would not proceed seamlessly without that understanding. As discussed below, the district court's holding on this issue, if affirmed, would upend the businesses of mortgage lending and insuring titles in Illinois. It would also 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.[1]

Second, title insurance underwriters and lenders rely, every day, on mortgages and payoff letters of the kind that are the subject of this case. There was nothing unusual or extraordinary about them. Both instruments gave every indication that EquityBuild, Inc., was the mortgagor and that EquityBuild Finance, LLC was the servicer for a collection of more than 160 individuals and entities who comprised the investor lenders ("Investor Lenders") and had authority to accept payment and to release the mortgages that encumbered the properties.

[1] A myriad of reasons exist for the failure to record a release of mortgage. For example, the recorder may reject the release for noncompliance; the recorder may be understaffed and delay recordation; the release may get lost; the bank may make a clerical error in the release misidentifying the recorded mortgage; or the lender may no longer exist. See Freyermuth, R. Wilson, *Why Mortgagors Can't Get No Satisfaction*, 72 Missouri. L. Rev. 1159, 1159-60 (2007).

The district court concluded that EquityBuild Finance, LLC lacked authority—actual and apparent—to release the mortgages. The district court based its holding as to actual authority on its reading of the Collateral Agency and Servicing Agreement ("CAS") and the Authorization Document. Neither document was obtained or reviewed by BC57, LLC prior to or at the closing. This brief does not address the issue of actual authority, which is discussed in BC57, LLC's main brief. Instead, in this brief ILTA focuses on the question whether EquityBuild Finance, LLC had apparent authority on which BC57, LLC could justifiably rely. As discussed below, the district court misconceived and underappreciated the indicia of such apparent authority. Day-in and day-out, in making lending and underwriting decisions, lenders and title insurance underwriters rely on recorded mortgages and on payoff statements the same in substance as the mortgages and payoff statements at issue here. BC57, LLC was warranted in concluding that EquityBuild Finance, LLC had such apparent authority.

The district court viewed the payoff statements and the mortgage releases with the benefit of hindsight, perceiving them as components of Jerome Cohen's and Shaun Cohen's alleged securities fraud scheme. With that perspective, the district court's opinion and order finds in favor of the Investor Lenders. The court's reasoning, however, is contrary to existing law and to industry practice. Allowing the district court's decision to stand will serve to distort, prolong, and increase the cost of any future real estate transaction that involves the payoff of an existing mortgage and will call into question past real estate transactions in which liens were paid but remain unreleased of record. On behalf of the title industry, ILTA fears the unintended consequences of the district court's reasoning and decision. Respectfully, ILTA asks that this court reverse the district court's decision.

Argument

A. The Rule that Payment of the Debt, Without More, Extinguishes an Underlying Mortgage is Grounded on Public Policy and on Custom and Practice

In Illinois, residential real estate closings have customarily ended with a handshake of congratulations and delivery of the house keys. The buyer is often planning to move into the new home immediately after closing, their belongings sitting in a truck with movers awaiting the "all clear" to start unpacking them. In many cases, the home buyer will be involved in two successive closings, often occurring on the same day: one to sell their old home and the second to purchase their new one, with the proceeds from the sale funding the purchase.

The smoothness of these transactions and the ability of these domino-like sales to fall in line are made possible by the common law rule in Illinois that liens are extinguished upon payment. Commercial transactions involving real property, while perhaps lacking the personal excitement of home purchases, nonetheless benefit from the same regime. Sellers and refinancing owners obtain payoff letters, present those letters at closing, and, upon payment of the amounts sought, the underlying liens on the property that have now been paid off are no longer enforceable. Armed with that protection, the system works. The buyer is assured that he is receiving clear title. The buyer's financing (or refinancing) lender (and their title insurer) is assured that the property, and the new lien, will not be subject to the liens that have been satisfied at closing.

The system works because it has long been the rule in Illinois that a mortgage is merely an incident of the debt. *Bradley v. Lightcap, supra*, 201 Ill. at 517. Payment of the debt, automatically and without more, extinguishes a mortgage that secures the debt. *Id.* This basic tenet is likewise recognized in other jurisdictions. See also *Skott v. Bank of America Illinois,* 266 Ga. 532, 534, 468 S.E.2d 359 (Ga. 1966) ("the Williams' obligation to Skott was discharged by

the payment in full to Modern Mortgage"); *Moore v. Benjamin*, 228 Wis. 591, 280 N.W. 340, 341 (Wis. 1938) ("payment of an indebtedness on a note secured by a mortgage on real estate extinguishes the mortgage lien without satisfaction thereof of record or in writing").

The district court appeared to accept that such was the rule until 1961, when the Mortgage Act was enacted (A29). With no meaningful analysis, however, the district court held that the Mortgage Act "replaced" the common law rule and that, as a result, liens are not extinguished until they are paid *and* released by a written release from the mortgagee. *Id.*

No other court in Illinois in the past sixty-three years has so held.[2] On the contrary, the decisions of the Illinois courts, and of the bankruptcy courts in Illinois since 1961, have consistently treated the common law rule as the operative rule in Illinois and have so held. See *In re Gluth Brothers Construction, Inc.*, 451 B.R. 447, 451 (Bankr. N.D.Ill. 2011) (unreleased mortgage was not enforceable because it was extinguished by borrower's repayment) (applying Illinois law); *Dunas v. Metropolitan Trust Company*, 41 Ill.App.2d 167, 170 (1st Dist. 1963) ("where the debt is paid or barred by the Statute of Limitations, a mortgage being but incident to the debt, is no longer a lien on the property"), citing *Markus v. Chicago Title & Trust Co*., 373 Ill. 557, 560 (1940); *In re Jansma*, 2011 WL 304865 (Bankr. N.D.Ill. 2011), *3 (the mortgage lien secured by the note was extinguished on the date Jansma satisfied his debt under the note, despite the failure to record a release) (applying Illinois law).

The district court's belief that the Mortgage Act requires a mortgage to be released of record before it is extinguished derives from an apparent failure to distinguish between the

[2] The Investor Lenders argued below that *North Shore Community Bank and Trust Company v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, on which the district court relied, changed the common law rule by holding that under the Mortgage Act, a mortgage was not extinguished until released. *North Shore* contained no such holding. See BC57, LLC's main brief at pp. 24-29.

extinguishment of the mortgage on the one hand and the recordation of a release of mortgage on the other.

The Mortgage Act codified uniform conditions under which lenders are to prepare and deliver a recordable release after payment. The point of the Act was not to change the law about how a mortgage is extinguished, but to aid owners and lenders in keeping the chain of title accurate and up-to-date. *In re Gluth Brothers Construction, supra*, 451 B.R. at 451 ("This [Mortgage Act] protects borrowers, and also protects the free alienability of land.") To accomplish this, "[t]he Act provides a system whereby a mortgagee has an affirmative duty to provide a release upon payment and satisfaction of the loan rather than simply giving mortgagors a right to request payment." *Gluth*, 451 B.R. at 453; 765 ILCS 905/2.

The Mortgage Act works in tandem with the Illinois Conveyances Act, 765 ILCS 5/1 *et seq.*, enacted in 1818, which requires deeds, mortgages and other instruments relating to or affecting the title to real estate be filed of record in the county in which such real estate is situated. 765 ILCS 5/28. The purpose of the recording requirement is to maintain sufficient records to allow third parties the opportunity to ascertain the status of title to the property. *Lubershane v. Village of Glencoe*, 63 Ill.App.3d 874, 879 (1st Dist. 1978). The Conveyances Act created a built-in incentive for parties to record their conveyances and encumbrances: unless a creditor or subsequent purchaser has notice through other means, any unrecorded deeds, mortgages or other written instruments which are not recorded are void as to such creditor or subsequent purchaser until they are filed for record. 765 ILCS 5/30. A party releasing an interest in real property has less incentive to maintain accurate title records as the release relates to property the releasor no longer has reason to protect. To make sure releases are recorded, the Mortgage Act mandated their delivery and added language allowing for a "party aggrieved" by

the mortgagee's failure to deliver a recorded release to recover a monetary penalty, attorneys' fees, and court costs. 765 ILCS 905/4.

The Conveyances Act and the Mortgage Act together aid in keeping the grantor and grantee index accurate. Neither Act changes the common law that underpins the effectiveness of the conveyances that are recorded. Title to real property is still transferred when the deed is delivered. *Maciaszek v. Maciaszek*, 21 Ill.2d 542, 546 (1961). Assignments of mortgages are effective on the date of the assignment, without the need for recordation. *Federal National Mortgage Ass'n v. Kuipers*, 314 Ill.App.3d 631, 639-640 (2d Dist. 2000); *United States v. Eklund*, 369 F. Supp. 1052, 1054-55 (S.D. Ill. 1974) (applying federal law). Mortgages are still extinguished when the debts they secure are satisfied. *Bradley v. Lightcap, supra*, 201 Ill. at 517.

It makes sense that the common law was not repealed by the Mortgage Act. First, the Mortgage Act does not contain any provision that purports to expressly abrogate any portion of the common law, and implied repeal of the common law is unfavored. See 765 ILCS 905/2 et seq.; *People v. Spann*, 20 Ill. 2d 338, 341 (1960); *People ex rel. Nelson v. West Englewood Trust & Savings Bank*, 353 Ill. 451, 460 (1933). As shown in BC57, LLC's brief at pages 17-21, neither the text of the Mortgage Act nor the legislative history of the Mortgage Act gives any indication that the Mortgage Act was intended to supplant the common law rule that payment of a debt extinguishes the mortgage that secures that debt.

Additionally, the common law rule is at the heart of the Mortgage Certificate of Release Act, 765 ILCS 935/1. This Act allows title insurance companies or its agents to issue certificates of release for mortgages being paid pursuant to payoff statements (765 ILCS 935.10) and prior unpaid mortgages (765 ILCS 935.10.1). No title company could release a lien upon evidence of

payment if the common law did not recognize that payment extinguished the mortgagee's lien rights.

Finally, the common law rule that satisfaction of a debt extinguishes the mortgage which it secures is essential to enabling the transfer of real property with minimal complications. Illinois common law recognizes that voluntary transfers are effective between the parties at the time that they occur. See *Maciaszek, supra*, 21 Ill.2d at 546; *Kuipers*, *supra*, 314 Ill.App.3d at 639-640; *Bradley, supra*, 201 Ill. at 517. If the district court's determination that the Mortgage Act supplants the common law is upheld, then at stake are the validity and finality of the countless sales that have been made and that continue to occur every day in which releases are not timely received, or are lost, or contain mistakes.

To understand the magnitude, consider that in the month of April 2023 alone, 10,600 homes were sold in Illinois with a median price of $272,250.00. *Housing Price Forecasts presented to Illinois Realtors by UIC Stuart Handler Department of Real Estate*, May 18, 2023; *http://www.illinoisrealtors.org/wp-content/uploads/2022/12/Annual_Forecast_2023.pdf* Most of those purchases were likely financed. *https://theclose.com/real-estate-statistics/* (78% of homebuyers nationwide financed their home purchase with a mortgage in 2022). This figure represents only the residential transactions closed in one month of one year and excludes residential refinances and countless other purchases or refinances of multi-unit residential, commercial, industrial, agricultural and vacant land in the same timeframe.

Were it not the case that payment of the debt *ipso facto* extinguishes the underlying mortgage, without the need for the recordation of the release of the mortgage, it would not take much imagination to foresee the myriad kinds of problems and disruptions that would ensue to the countless transactions occurring daily. The closings, if they could be scheduled, would lack

finality and remain in limbo as the parties await delivery of the release and its recordation. Lenders would not fund purchases or refinances until the releases of the obligations their loans are repaying are recorded. The domino-like closings which are commonplace for purchasers who rely upon the proceeds from their sales to fund the purchase of their new properties, would be untenable. The time for obtaining a recorded release or releases from the earlier transaction would impede the release of the funds for next purchase. A solution is not to rely on the title companies' ability to record releases under the Mortgage Certificate of Release Act. Inasmuch as not all transactions are closed through title companies and not all mortgages can be released through the Mortgage Certificate of Release Act. See 765 ILCS 935/5 (defining mortgages eligible to be released as those on one-to-four family residential property in the original principal amount of less than $500,000).

For the foregoing reasons, the district court's conclusion that the Mortgage Act replaces the common law is erroneous, and allowing the Order to stand will have adverse consequences for property transfers in this state. The Order should be reversed.

B. A Loan Servicer Who is Authorized to Accept Payments and to Issue a Payoff Letter on Behalf of a Lender has Implicit Authority to Accept Such a Payoff in Satisfaction of the Underlying Debt

Wrongly believing that releases were necessary to extinguish the mortgages, the district court compounded its error by holding that the releases were ineffective because they contained errors rendering them facially defective and because they were executed by the Investor Lenders' servicer (EquityBuild Finance, LLC) without requisite authority (A13-14; A28). The district court believed that the mortgage releases were not authorized by the individual Investor Lenders and concluded that the releases of the Investor Lenders' mortgages executed by EquityBuild Finance, LLC as servicer did not have the effect of releasing the Investor Lenders' mortgages

(A14; A28). The court held that the Investor Lenders' mortgages continue to be valid, remain of record, and have priority over the mortgage of the refinancing lender, BC57, LLC, whose funds paid off the mortgage debts pursuant to the payoff letters (A30). Implicit in the district court's decision is a requirement that, in situations like this where the mortgagee consists of investors, a purchaser or refinancing lender must confirm authorization from each investor that the servicer has authority to release the mortgage and accept delivery of payoff proceeds (A29).

In finding that EquityBuild Finance, LLC lacked authority to execute the releases without the prior authorization of the individual Investor Lenders, the district court stated that "it's not clear why expressly granting an agent authority to issue payoff statements and receive payoffs on the principal's behalf would make an agent reasonably believe that the principal wanted the agent to do a wholly separate thing (release a mortgage)" (A17). The district court's logic cannot be squared with Illinois law on the powers and authority of loan servicers and with the custom and practice of the industry.

In the modern mortgage loan industry, many loans are owned by asset securitization trusts and groups of investor lenders.[3] Most mortgage lien holders routinely rely upon loan servicers to collect payments, communicate with borrowers, and manage escrow funds. A loan servicer is generally an entity responsible for the collection of payments on mortgage loans. See 765 ILCS 935/5 *(*defining a mortgage servicer as "the last person to whom a mortgagor . . . has been instructed by a mortgagee to send payments on a loan secured by a mortgage"). See also 38

[3] The most significant change is the development of the secondary market and the widespread securitization of residential mortgages. R. Wilson Freyermuth, *Why Mortgagors Can't Get No Satisfaction*, 72 Mo. L. Rev. 1159, 1164 (2007). Most originating mortgage lenders no longer retain loans in their portfolios, but promptly assign them on the secondary market (facilitating the eventual securitization of those loans and the issuance of mortgage-backed securities to remote investors). *Id.* Today, mortgagees also commonly outsource servicing of their loans to remote servicers. *Id.*

Ill. Admin. Code § 1050.110 *(*defining a servicer as a licensee "who is responsible for the collection or remittance for . . . any lender, noteowner, or noteholder, . . . of payments, interest, principal, and trust items such as hazard insurance and taxes on a residential mortgage loan in accordance with the terms of the residential mortgage loan") (ellipses added). By definition, a loan servicer has the authority to accept payments on behalf of the mortgagee. Here, there is no dispute that EquityBuild Finance, LLC was a loan servicer and that it had actual authority to accept payments.

Loan servicers also typically have the authority and, in some circumstances, the obligation to issue payoff letters. This is consistent with numerous provisions in the Illinois statutes and administrative code. For instance, the Illinois Mortgage Foreclosure Act requires a lender or its authorized agent (*i.e.*, loan servicer) to provide an accurate payoff of statement if the borrower requests during the course of a foreclosure action. 735 ILCS 5/15-1505.5(a). Under the Illinois Administrative Code, licensed loan servicers are obligated to issue a payoff statement within 7 business days of a written request. 38 Ill. Admin. Code §1050.860.

In this case, paragraph 10 of each Investor Lender mortgage provided in full as follows:

> Release. Upon payment of all sums secured by this Security Instrument, Lender *shall release* this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

(R. 1147—1 – 11470-5 (emphasis added). The Investor Lenders had no discretion about whether or not to release the mortgage "upon payment of all sums secured by this Security Instrument." The consensual mortgages that they entered into required that such releases be executed. That was apparent to any reader of the Investor Lenders' mortgages, including BC57, LLC. Such mandate was consistent with Illinois law.

Here, the district court acknowledged that EquityBuild Finance, LLC had actual authority under the CAS to issue payoff statements for the mortgage loans—and to receive the payoffs—on behalf of the Investor Lenders (A15-17). In keeping with its authority, EquityBuild Finance, LLC issued payoff statements, each of which contained the customary and requisite information about the amount due, when due, and wire instructions that one would expect a payoff statement to contain.[4]

Having received payoff statements from EquityBuild Finance, LLC, it was altogether reasonable and natural for BC57, LLC to conclude that EquityBuild Finance, LLC was authorized to receive the payoffs. The district court does not appear to quarrel with this. What was missing, the district court held, was clear consent from the 160-plus Investor Lenders, after EquityBuild Finance, LLC's receipt of the payoffs, for EquityBuild Finance, LLC to release the Investor Lenders' mortgages (A18, A28). From this omission flowed the court's erroneous holding that the Investor Lenders' mortgages were not extinguished.

The district court's analysis is wrong. As shown above, a mortgage is extinguished the moment that the underlying debt is paid. Extinguishment is not conditioned on the execution, delivery, or recordation of written releases. As a consequence, whether or not the individual Investor Lenders authorized EquityBuild Finance, LLC in writing to execute releases of the Investor Lenders' mortgages is beside the point. The mortgages were extinguished and were no longer enforceable.

[4] The Mortgage Certificate of Release Act defines a payoff as "means a statement for the amount of the (i) unpaid balance of a loan secured by a mortgage, including principal, interest, and any other charges due under or secured by the mortgage; and (ii) interest on a per day basis for the unpaid balance." 765 ILCS 935/5. Moreover, the Illinois Administrative Code provides that a payoff is "a written notice of the total amount required to pay in full on an outstanding mortgage loan, as of a specified date." 38 Ill. Admin. Code §1050.860.

Moreover, under general agency principles the authority of an agent to receive payment on behalf of a principal includes authority to receive payment in full satisfaction of a debt. *See* Restatement (Second) of Agency § 72 (1958). "The agent is also authorized to make any release of record which is required, as where a statute requires a mortgagee upon payment of the mortgage to enter a release in the office of the recorder." *Id*. at cmt. g. Illinois law is consistent with the Restatement approach. See *Rockford Life Insurance Company v. Rios*, 128 Ill.App.2d 190, 194 (3d Dist. 1970) ("[i]f 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"); *Carneke v. Kietrys*, 1 Ill.App.3d 224, 226 (2d Dist. 1971) (it was the duty of the agent of the prior mortgagee "to see that the first mortgage was paid," without having to advise the source of the payoff funds whether the mortgagee would actually receive the funds). See also *Nattymac Capital v. Pesek*, 2010 S.D. 51, 784 N.W.2d 156, 161 (S.D. 2010) (servicer who was authorized to receive payments on behalf of noteholder had authority to execute mortgage release).

If affirmed, the district court's opinion would mean that purchasers, refinancing lenders, and title insurance companies could no longer rely on the authority of the disclosed servicer to accept payoffs. Instead, the authority of the servicer would have to be confirmed by each investor in a securitized mortgage, no matter the number. In effect, each of the thousands of transactions in which a servicer issued a payoff statement or otherwise accepted payments on behalf of a mortgage would have to be double-checked and confirmed for authority to do the kinds of things that right now the Illinois statutes, administrative code, and lending and title insurance industries say that a servicer can do without pausing each transaction to peer behind the veil. The custom and practice in the industry is to assume that actors tell the truth. The district court's reasoning would turn that custom and practice on its head, obligating purchasers,

lenders, and title insurance companies to treat, by default, every transaction or encounter with a servicer as though the servicer was not to be trusted.

The district court acknowledged that it was common practice in the industry to accept payoffs and releases from a loan servicer without requesting proof of the loan servicer's scope of authority. However, the court found that such industry practice was "sloppy and too trusting" (A28). The court's wholesale dismissal of industry custom and practice ignores that such practice is premised on legal obligations imposed upon servicers not only in their servicing agreements, but under the law. The industry is not blindly trusting. Instead, purchasers, lenders, and title insurance companies know that they can rely upon the legal frameworks discussed above in reasonably expecting that a loan servicer has the authority to issue payoff statements, receive payments, and release a mortgage upon receipt of payment made pursuant to such payoff statement, and that under such legal frameworks they can hold a loan servicer accountable when necessary.

If the default rule is that purchasers, lenders, and title insurance companies must suspect, *ex ante*, that all of the tens of thousands of residential, commercial, industrial, and agricultural real estate transactions entered into every year in Illinois were somehow fraudulent, and that the authority of servicers could not be relied upon, fewer transactions would close, and those that did would require time-consuming inquiries into the interest and consent of each investor and the attendant expense that goes with it.

Conclusion

For the foregoing reasons, the court should (a) reverse the district court's February 15, 2023, Memorandum Opinion and Order and its May 3, 2013, Order Approving Distribution of Group 1 Proceeds, and (b) should remand this matter to the district court with instructions to

enter an order finding that BC57, LLC's mortgage lien has priority to the sales proceeds of the Group 1 properties against the unsecured claims of the Investor Lenders.

ILLINOIS LAND TITLE ASSOCIATION

By: */s/ J. Michael Williams* .
One of Its Attorneys

J. Michael Williams (mwilliams@cohonraizes.com)
Carrie A. Dolan (cdolan@cohonraizes.com)
Amy E. Daleo (adaleo@cohonraizes.com)
Cohon Raizes & Regal LLP
208 South LaSalle Street, Suite 1440
Chicago, Illinois 60604
312-726-2252 (office)

Date: June 21, 2023

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,576 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 16 in 12-point Times New Roman font for the main text and footnotes.

Dated: June 21, 2023

By: */s/ J. Michael Williams*