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

BRIEF OF APPELLEES CERTAIN INDIVIDUAL INVESTORS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1870

Short Caption: Securities and Exchange Commission, et al. 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):

See Attachment

(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:

TottisLaw

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

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

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

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

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

Attorney's Signature: /s/ Max A. Stein Date: 6/22/2023

Attorney's Printed Name: Max A. Stein

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

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ATTACHMENT

Parties represented by Max A. Stein in this case:

Arthur and Dinah Bertrand, Pat DeSantis, Girl Cat Capital West LLLC, Sidney Haggins, Initium LLC / Harry Saint-Preux, Robert Jennings, Knickerbocker Investment Group LLC, Steven and Linda Lipschultz, Jill Meekcoms, Lori Moreland, Mark Mouty, Glynis Sheppard / J. Fields Living Trust, Randall Sotka / Tahiti Trust / Big Bean LLC, Louis Duane Velez

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1839 Fund I LLC

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Kurtz & Augenlicht LLP and Law Office of Robert J. Augenlicht

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N/A

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

N/A

Attorney's Signature: /s/ Robert J. Augenlicht Date: 14 August 2023

Attorney's Printed Name: Robert J. Augenlicht

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

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(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:

Rieck and Crotty, P. C., Jerome F. Crotty, Kevin P. Brown, Bernard A. Henry

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N/A

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

N/A

Attorney's Signature: /s/ Kevin P. Brown Date: August 14, 2023

Attorney's Printed Name: Kevin P. Brown

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

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None

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N/A

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

N/A

Attorney's Signature: /s/ Jerome F. Crotty Date: August 11, 2023

Attorney's Printed Name: Jerome F. Crotty

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

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JURISDICTIONAL STATEMENT

The Amended Jurisdictional Statement of Appellant, BC57, LLC (Doc. 19) accurately describes the Court's jurisdiction over this appeal.

STATEMENT OF ISSUES

1. Did the District Court correctly hold that, because BC57 cannot establish that they were validly released with authorization, the individual investors' mortgages continue to have higher priority than BC57's subsequent mortgage?

2. Did the District Court correctly apply the Illinois Mortgage Act (765 ILCS 905/2) when it concluded that the individual investors' mortgages were not automatically released as a result of BC57's loan?

STATEMENT OF THE CASE

A. The Original Investment Scheme – Investments in Specific Properties.

The events at issue in this appeal originate around 2010, when defendants Jerome Cohen, Shaun Cohen, EquityBuild, Inc. ("EquityBuild" or "EB"), and EquityBuild Finance, LLC ("EquityBuild Finance" or "EBF") (collectively, "the EquityBuild Defendants"[1]) began selling promissory notes to investors. (R.1, ¶ 20; *see also* A2-8.[2]) Each note represented a fractional interest in a specific residential

[1] The EquityBuild Defendants entered into a consent judgment acknowledging their scheme early in the receivership proceedings (R.40) and did not participate in the claims process at issue in this appeal.

[2] This brief employs the same citations as the Brief and Required Short Appendix of Appellant, BC57, LLC ("BC57's Brief"). "R." refers to docket entries in the record on appeal. "A__" refers to the short appendix bound with BC57's Brief. The facts are generally taken from the SEC's complaint and exhibits submitted by the SEC and BC57. (R.1; R.1147; R.1217.)

property located on the South Side of Chicago. (R.1, ¶¶ 19 and 24.) Investors' funds, frequently paid from investors' retirement savings, were pooled to purchase, renovate, and/or develop each property. (R.1, ¶ 24) The notes provided investors would receive interest on their loans at rates ranging from 12% to 20%. (R.1, ¶ 22.) The parties to the notes were EquityBuild as the borrower and the investors, now commonly referred to as the "individual investors,"[3] as the lenders. (R.1, ¶ 21; *see also, e.g.*, A1.)

Each of the notes was secured by a mortgage on the respective properties purchased. (R.1, ¶ 25; R.1147-1–1147-5.) The mortgages identified EquityBuild as the borrower and the lender as "The persons listed on Exhibit A to the Mortgage c/o" either "EquityBuild Finance, LLC" or "Hard Money Company LLC." (*Id.*) Each mortgage then included an Exhibit A, listing the individual investors for that property. (R.1147-1—1147-5.)

To induce investments, the EquityBuild Defendants assured investors that a default was unlikely and that payments from the third-parties would generate "more than enough revenue to cover note payments [to the investors] as well as all of the property's operating expenses, and still return positive cash flow." (R.1, ¶ 36.) In the event a mortgage went into default, the EquityBuild Defendants further assured

[3] The District Court used the term "individual investors" to refer to the claimants who invested with the EquityBuild Defendants on the five properties at issue in Group 1. (*See, e.g.*, A01.) The individual investors are further identified in the exhibits to the District Court's Distribution Order. (A37-A49.) This Brief is submitted by a group of those individual investors that was referred to in the proceedings before the District Court as the Certain Individual Investors (*see, e.g.*, R.1151; R.1215), and does not necessarily represent the views of all of the individual investors.

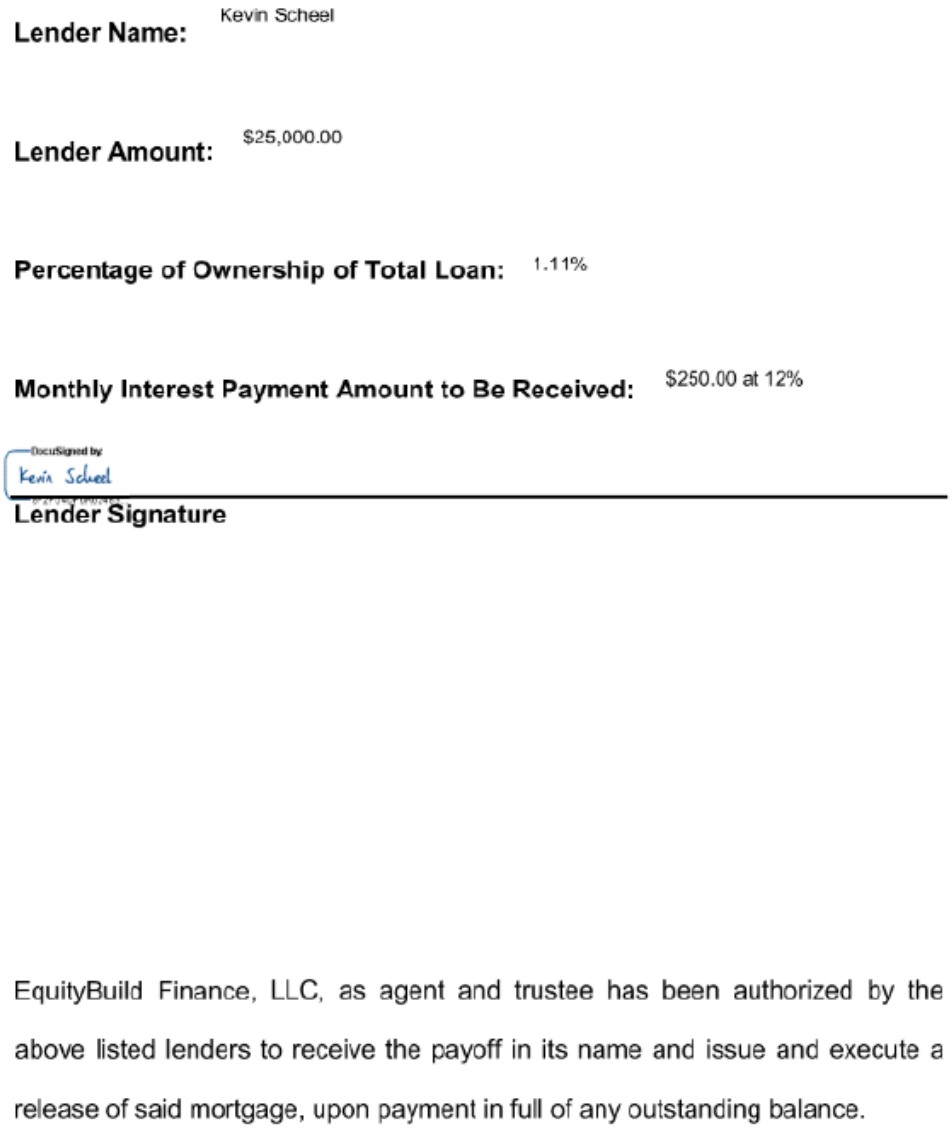
investors they were protected by their mortgages and the EquityBuild Defendants would simply sell the property in a quick sale and get the investors' money out of the investment. (R.1, ¶ 31.)

At the time of their investment, the individual investors executed Collateral Agent and Servicing Agreements (the "Servicing Agreements") drafted by the EquityBuild Defendants. The Servicing Agreement granted certain rights and powers under the notes and mortgages to EquityBuild Finance as "collateral agent." (R.1, ¶ 25; R.1147-1–1147-5.) The Servicing Agreements, however, also included specific limitations on those powers, including express limits on its power to release the mortgages:

- "IN THE ABSENCE OF WRITTEN INSTRUCTIONS FROM THE REQUIRED LENDERS, NEITHER THE COLLATERAL AGENT NOR THE SERVICER SHALL FORECLOSE UPON ANY LIEN WITH RESPECT TO ANY OF THE COLLATERAL OR TAKE ANY OTHER ACTION WITH RESPECT TO THE COLLATERAL OR ANY PART THEREOF."
- "[T]he Collateral Agent shall have no obligation to, and shall not, take any action hereunder or under the Mortgage except upon written instructions from the Required Lenders in accordance with Section 6(a).
- "Collateral Agent shall act only on written instructions from all Lenders with respect to the amendment or termination of the Mortgage."

(R.1147-6 – 1147-10, §§ 3, 4(a), 6(a) (emphasis in original).) These limitations resulted in a structure in which the individual investors were lenders to EquityBuild which granted mortgages to the individual investors as security for those promissory notes. EquityBuild Finance's role was to service the loans subject to the limitations in the Servicing Agreements. (R.1, ¶ 25; R.1147-1–1147-5.)

As part of their investments, many of the individual investors also executed untitled documents that looked like this:



Lender Name: Kevin Scheel

Lender Amount: $25,000.00

Percentage of Ownership of Total Loan: 1.11%

Monthly Interest Payment Amount to Be Received: $250.00 at 12%

DocuSigned by:
Kevin Scheel

Lender Signature

EquityBuild Finance, LLC, as agent and trustee has been authorized by the above listed lenders to receive the payoff in its name and issue and execute a release of said mortgage, upon payment in full of any outstanding balance.

(A19). In these documents, which were not recorded with the mortgages at issue in this appeal (*see, e.g.*, R.1147-1—1147-5), the individual investors' authorized their investment and the resulting percentage interest in the loan. (A19, A24.) Below that, the document also includes language related to paying off the loans and releasing the mortgages. (*Id.*)

B. The Second Investment Scheme – The Funds.

To address the growing issues with their failing scheme, the EquityBuild Defendants' began offering investments in real estate funds in 2017. (R.1, ¶¶ 52-54.) They told investors these funds would be used to purchase and renovate properties and would generate double digit returns. (*Id.*) Like with the later lenders in their original scheme, large portions of the new investor's money was used to repay earlier investors. (R.1, ¶ 56.) Moreover, many of the properties that fund investors were investing in were the same properties secured by earlier investors' mortgages. (R.1, ¶ 58.)

C. Problems With The Investment Scheme.

Unfortunately, most of what the EquityBuild Defendants promised was untrue and, instead, they were in reality operating a Ponzi scheme. (A14-A15.) Contrary to the EquityBuild Defendants' representations, the loans and resulting mortgages were for significantly more than the actual cost of purchasing the properties and the EquityBuild Defendants kept some of the individual investors' investments as undisclosed fees. (R.1, ¶¶ 37-38.) The EquityBuild Defendants began to use later individual investors' inflated investments to repay earlier investors to continue the scheme. (R.1, ¶¶ 39, 45.) Moreover, because the properties were worth significantly less than the individual investors' investments, their investments were not fully secured. (R.1, ¶ 40.)

When the EquityBuild Defendants' payments to the individual investors became unsustainable, they began extending the payback terms on the notes, often for years. (R.1, ¶ 48.) They also forced investors to either agree to an extension or be

placed on a "buyout list" where investors waited for the EquityBuild Defendants to find another investor willing to buy the original investment. (R.1, ¶ 48.) The EquityBuild Defendants also forced certain investors to accept unsecured promissory notes in lieu of their original "secured" notes. (R.1, ¶ 49.) At the same time, the EquityBuild Defendants continued offering securities to new investors without disclosing any of this information. (R.1, ¶ 49.)

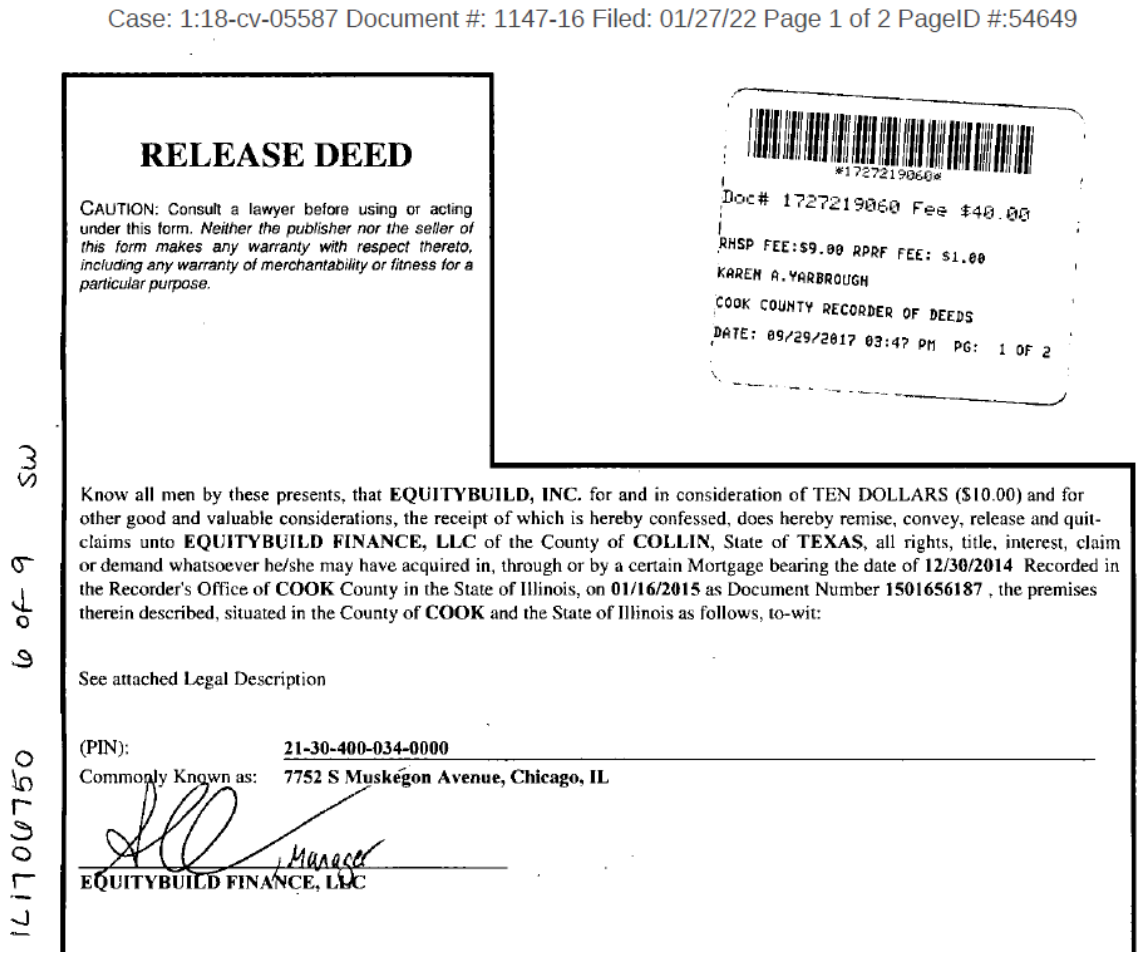
By 2017, investors in more than 1,200 notes had not been repaid almost $75 million in delinquent payments. (R.1, ¶ 59.) By late May 2018, EquityBuild and EquityBuild Finance had less than $100,000 in their bank accounts and no new money to replenish them, ultimately causing their Ponzi scheme to collapse. (R.1, ¶¶ 59-64.)

D. BC57 Loan.

Before it collapsed, the EquityBuild Defendants looked for new ways to repay the individual investors and otherwise keep their Ponzi scheme going. For the properties at issue in this appeal, this led to BC57 making a roughly $5.3 million loan to EquityBuild in September 2017, which was allegedly going to be secured by new first mortgages on the five properties. (R.1147-21 (loan agreement).) At the closing the EquityBuild Defendants provided payoff letters to BC57 purporting to provide the amounts required to repay the existing loans that were secured by the existing mortgages on the five properties. (R.1147-11–1147-15.)

To facilitate the BC57 loan, Shaun Cohen, as Manager of EquityBuild Finance, executed "Release Deeds" that purported to release the individual investors'

mortgages for those properties. (R.1147-16—1147-20.) Identical other than the property-specific information,[4] the Release Deeds looked like:



Case: 1:18-cv-05587 Document #: 1147-16 Filed: 01/27/22 Page 1 of 2 PageID #:54649

RELEASE DEED

CAUTION: Consult a lawyer before using or acting under this form. *Neither the publisher nor the seller of this form makes any warranty with respect thereto, including any warranty of merchantability or fitness for a particular purpose.*

1727219060
Doc# 1727219060 Fee $40.00
RHSP FEE:$9.00 RPRF FEE: $1.00
KAREN A.YARBROUGH
COOK COUNTY RECORDER OF DEEDS
DATE: 09/29/2017 03:47 PM PG: 1 OF 2

Know all men by these presents, that **EQUITYBUILD, INC.** for and in consideration of TEN DOLLARS ($10.00) and for other good and valuable considerations, the receipt of which is hereby confessed, does hereby remise, convey, release and quit-claims unto **EQUITYBUILD FINANCE, LLC** of the County of **COLLIN**, State of **TEXAS**, all rights, title, interest, claim or demand whatsoever he/she may have acquired in, through or by a certain Mortgage bearing the date of **12/30/2014** Recorded in the Recorder's Office of **COOK** County in the State of Illinois, on **01/16/2015** as Document Number **1501656187** , the premises therein described, situated in the County of **COOK** and the State of Illinois as follows, to-wit:

See attached Legal Description

(PIN): **21-30-400-034-0000**
Commonly Known as: **7752 S Muskegon Avenue, Chicago, IL**

Manager
EQUITYBUILD FINANCE, LLC

1617007750 6 of 9 SW

On their faces, the Release Deeds contained multiple errors, each of which can be easily observed by comparing the individual investors' mortgages and the supposed Release Deeds. (*Compare* R.1147-16—1147-20 (Release Deeds) *and* R.1147-1—1147-5 (Mortgages).)

[4] In addition to what is shown here, the Release Deeds contained notarizations. (R.1147-16—1147-20.)

These errors begin in the language of the release itself. There, the wrong party issues the release. Each Release Deed identifies EquityBuild as the releasing party, even though it is identified as the Borrower, not the Lender, on each of the mortgages and so would not have a security interest it could release. (*Compare* R.1147-16—1147-20 *and* R.1147-1—1147-5.) Next, each Release Deed states that EquityBuild "does hereby remise, convey, release, and quit-claims unto EQUITYBUILD FINANCE, LLC … all rights, title, interest, claim or demand whatsoever he/she may have acquired in, through, or by" the individual investors' mortgages" even though EquityBuild Finance is not identified as the Lender on any of the mortgages (and, for the Muskegon property, is not even named anywhere on the mortgage since it references Hard Money Company, LLC). (*Id.*) Rounding out the errors, each Release Deed is executed not by the party identified in the text as granting the release (EquityBuild) nor by the Lenders identified on the mortgages ("The Persons Listed on Exhibit A to the Mortgage"), but rather by EquityBuild Finance (which, again, is not even named anywhere on the mortgage for the Muskegon property). (*Id.*)

Despite these obvious errors, no one working on the BC57 loan identified any issues with the final versions of the Release Deeds.[5] (*See, e.g.* A25-26.) Instead, each of the people working on closing the loan for BC57 claimed it was someone else's responsibility to identify any issues. (R.1151 at 10-11 (summarizing deposition testimony of witnesses regarding responsibility for review of the Release Deeds); A25-

[5] Beyond the errors, none of the people involved in BC57's loan were even familiar with the term "Release Deed." (R.1151 at 7, n.5.)

26 (same).) The attorney representing BC57 regarding the loan disclaimed any responsibility despite having requested changes earlier in the due diligence process to drafts of the Release Deeds. (R.1151 at 10-11.) Further, despite these obvious issues, no one from BC57 ever did anything to confirm EBF's authority to issue releases of the individual investors' mortgages, including requesting, let alone reviewing, copies of the Servicing Agreements or Authorization Documents upon which it now relies. (R.1152 at 13; A25.) Consequently, BC57 closed the loan without knowing whether the obviously flawed Release Deeds could do what the EquityBuild Defendants claimed they did. (A25.)

E. The SEC Files Suit.

In August 2018, the United States Security and Exchange Commission filed suit, alleging a fraudulent and unregistered securities offering. (R.1, ¶¶ 65–83.) The SEC subsequently obtained a temporary restraining order against defendants. (R.3, R.14 – 15.) The District Court appointed a receiver and directed him to "develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Assets." (R.16, ¶ 62.) The Receiver filed a liquidation plan in late November 2018, informing the court of the properties he had identified that were owned by EquityBuild. (R.166.) Among those properties are the five at issue here: 3074 Cheltenham Ave. (Property 74), 7625-33 S East End Ave. (Property 75), 7635-43 S East End Ave. (Property 76), 7750 S Muskegon Ave. (Property 77), and 7201 S Constance Ave. (Property 78). (R.1006; R.1201 at 1, 18, 21, 23, 25, 28.) With approval of the District Court, the receiver sold these five properties and is holding the proceeds of those sales (currently over $3 million) pending the

resolution of the Group 1 claims process. (A31-32; A37-A49.) The claims against these properties are the Group 1 claims and there are 169 claimants who submitted proof-of-claims forms in Group 1. (R.1201 at 1.)

F. Proceedings Regarding Mortgage Priority Before The District Court.

As part of the claims resolution process ordered by the Court, the parties engaged in extensive discovery and briefing. (R.1006 (order setting the process for Group 1).) The Receiver, SEC, and individual investors argued that the individual investors' mortgages have priority over the mortgage that the EquityBuild Defendants gave to BC57 when it obtained a loan from it to refinance the individual investors' loans. (R.1118; R.1146; R.1151; R.1201; R.1215; R.1216; R.1227.) They reached this conclusion based on facial defects with the Release Deeds provided to BC57 by the EquityBuild Defendants and because, pursuant to the language in the Servicing Agreement detailed above, EquityBuild Finance lacked authority to release the individual investors' mortgages without written consent from all of them. (R.1146; R.1151; R.1215; R.1216.)

They also argued that, even if the releases were not facially defective and EquityBuild Finance had the authority to release the mortgages, BC57 was on inquiry notice of the EquityBuild Defendants' fraud given numerous red flags and BC57's woefully inadequate due diligence efforts, including BC57's failure to review the individual investors' recorded mortgages or to even obtain copies of, let alone review, the Servicing Agreements or the Authorization Documents. (R.1118; R.1146; R.1147-26; R.1151; R.1227.) As a result of BC57's failure to properly investigate that

fraud, they argued that BC57 did not qualify as a bona fide purchaser, and any transfer was fraudulent. (R.1118; R.1146; R.1151; R.1227.)

BC57, on the other hand, argued that it has priority because, notwithstanding what it termed scrivener's errors in them, the Release Deeds were valid because EquityBuild Finance had express, implied, and apparent authority to unilaterally execute them. (R.1152; R.1217.) BC57 also argued it was a bona fide purchaser and that the transfer was not fraudulent. (R.1152; R.1217.)

On February 15, 2023, after reviewing the parties' position papers, the District Court issued its Memorandum Opinion and Order and ruled that the individual investors' mortgages had priority over BC57's mortgages. (A01-A30 (the "Opinion").) Specifically, the District Court concluded that the Release Deeds were facially defective because they listed EquityBuild, the borrower, rather than EquityBuild Finance, the lender, as the party granting the release in the body of each document. (A01.) The District Court also found that EquityBuild Finance lacked express, implied, or apparent authority to execute the releases on the investors' behalf. (A14-A28.) The District Court also found that BC57's payments to EquityBuild Finance were insufficient to extinguish an investor's mortgage liens because the releases were not signed by each of the individual investors, pursuant to the Illinois Mortgage Act, 765 ILCS 905/2. (A28-29.) As a result of its rulings on these issues, the District Court

did not reach issues related to whether the releases of the mortgages were fraudulent transfers and whether BC57 could qualify as a bona fide purchaser. (A11-A12.)[6]

Based on those rulings, the District Court instructed the Receiver to "submit a proposed order for disbursement of the proceeds from the Group 1 properties." (A30.) On May 3, 2023, the District Court entered an order disbursing the proceeds from the Group 1 properties, in accordance with its February 15, 2023 Priority Order. (A31-A36.) Over objections by certain of the individual investors and the SEC, the District Court subsequently granted BC57's motion to stay distribution of the proceeds pending the outcome of this appeal. (R.1504.) As a result, the investors have received no compensation for their losses.

SUMMARY OF THE ARGUMENT

At its core, this appeal presents a simple question: which mortgages have priority? On one hand, there are the mortgages of the individual investors, who, it is not disputed, got their mortgages in exchange for investments the EquityBuild Defendants promised would be used to purchase, renovate, and develop the mortgaged properties. When they made those investments, the individual investors were promised, including in text presented in all caps in the Servicing Agreements, that their mortgages could not be released without their written directions to do so. On the other hand, is the mortgage of BC57, who got its mortgages in exchange for a loan to the EquityBuild Defendants that it believed would be used to refinance the

[6] In the event that the Court reverses the District Court on the issues it did reach, it should, in addition to whatever else it may decide, remand this matter to the District Court for resolution of those issues.

loans made by the individual investors and secured by their mortgages. Despite knowing that purpose and despite knowing of the individual investors' recorded mortgages that plainly identified the individual investors as the lenders, BC57 made its loan to the EquityBuild Defendants without doing anything to check the EquityBuild Defendants' authority to release the existing mortgages.

To resolve this question, the District Court considered the evidence developed during the court-ordered claims process and concluded that, for a variety of reasons, the Release Deeds on which BC57 relies were ineffective. Noting that "BC57 entirely outsourced due-diligence work and failed to look at the most basic documents" (A28), the District Court rejected BC57's arguments regarding the EquityBuild Defendants' supposed authority to issue the Release Deeds in the first place. Accordingly, the District Court held that the individual investors' mortgages remained valid, therefore had higher priority than BC57's subsequent mortgages, and ordered that the proceeds from sales of the five mortgaged properties be distributed to the individuals investors based on their pro rata interests in the loans to EquityBuild.

In this appeal, BC57 challenges a few aspects of the District Court's rulings regarding priority, all in an effort to prevent the plan for distributing the receivership assets to the individual investors from proceeding. Nothing that BC57 presents here, though, changes the outcome. First, BC57 cannot show that the "Release Deeds," on which it relies, actually released the individual investors' mortgages. To the contrary, the documents' terms are so flawed that they cannot do what BC57 claims, and those flaws cannot be brushed aside be they termed scrivener's errors (as BC57 argued

before the District Court) or mutual mistakes (as BC57 argues to this Court). Moreover, BC57 cannot establish that the EquityBuild Defendants, and EquityBuild Finance in particular, actually had the authority to grant those releases as BC57 claims, meaning that even if Release Deeds could do what BC57 claims, they still would not be effective–something BC57 could have known prior to closing its loan had it bothered to do adequate due diligence.

Second, BC57's arguments regarding the Illinois Mortgage Act and the survival of common law doctrines not discussed in Illinois law for over a century similarly fail. The plain language of the Illinois Mortgage Act makes it clear that it is the Act, and not the long-forgotten common law doctrines upon which BC57 relies, that sets forth the requirements for releasing mortgages under Illinois law. No matter how much space BC57 dedicates to its efforts to argue otherwise (two pages before the District Court, 18 pages before this Court), BC57's argument still fails because the terms of the Act are clear and the authorities on which BC57 relies fail to support its arguments otherwise.

BC57 arguments to this Court suffer from the same flaws the District Court identified in its ruling. This Court should affirm the District Court's rulings regarding priority and the distribution of the receivership assets.

ARGUMENT

BC57 appeals the District Court's Order directing the distribution of the assets of a receivership. (A31-A36.) As BC57 recognizes, such orders are reviewed for an abuse of discretion. (Doc. 5 at 12-13 (citing *SEC v. Wealth Management., LLC*, 628

F.3d 628, 332-33 (7th Cir. 2010)).) Despite this, BC57 argues that the District Court's resolutions of "questions of law" needed to reach its decisions regarding the distribution of assets should instead be reviewed *de novo*.[7] Under either standard, BC57's arguments fail. This Court should affirm the District Court's order and allow the proceeds collected by the Receiver to be distributed to the individual investors.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE INDIVIDUAL INVESTORS' MORTGAGES WERE NOT PROPERLY RELEASED, AND SO THEY HAVE HIGHER PRIORITY THAN BC57'S SUBSEQUENT MORTGAGES.

After a newly emphasized attempt to ignore the long-standing Illinois Mortgage Act (addressed in detail below), BC57's Brief belatedly turns to the fundamental question at issue before the District Court and on this appeal: Were the investor lenders' mortgages properly released? (Doc. 5, pp. 31-44.) As the District Court rightly concluded, the answer is unequivocally, no. Nothing BC57 offers to this Court changes this conclusion.

Underlying the District Court's ruling on this question are two key facts that BC57 does not dispute: First, the individual investors had valid mortgages that predate BC57's mortgage. Second, the terms of the documents on which BC57 now relies (documents it has repeatedly acknowledged that it never saw when making its loan) make clear that EquityBuild Finance lacked authority to release the mortgages

[7] BC57 seeks application of *de novo* review despite basing the Court's jurisdiction on its appeal of a distribution order. (Doc. 20, at 5-6 (discussing how the collateral order doctrine applies here because the "District Court's Disbursement Order 'conclusively determines the disputed question—how the recovered assets in the receivership will be distributed'" (citing *Wealth Mgmt.*, 628 F.3d at 331).)

except with "written instructions from all Lenders." (R.1147-6—1147-10.) Thus, to prevail on its arguments that the individual investors' mortgages were properly released by EBF, BC57 bears the burden of establishing both that EBF had the authority from the required "written instructions from all Lenders" to release the mortgages and that the Release Deeds EBF executed pursuant to that authority properly released the mortgages. *See, e.g.*, *Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 892 (3d Dist. 2010); *see also* A14. As the District Court properly found, BC57 cannot carry its burden on any of these issues, meaning the individual investors' undisputed mortgages remain in place and, necessarily, have higher priority than BC57's subsequent mortgage.

A. BC57 Cannot Show That EquityBuild Finance Had Authority To Release The Individual Investors' Mortgages.

1. BC57 has not challenged the District Court's rulings rejecting its arguments regarding EBF's supposed implicit or apparent authority.

BC57 argued in the court below that EquityBuild Finance had the actual authority to release the individual investors' mortgages based on either (1) the express grant of that authority in the Authorization Documents or (2) an implied grant in the Servicing Agreements. (R.1217 at 6-11; A15.) BC57 also argued that since EBF had been authorized to issue payoff statements and receive those payments, EBF had apparent authority to release the individual investors' mortgages. (R.1217 at 17-24; A8, 24.) The District Court rejected each of these arguments, concluding that EBF had neither express, implied, nor apparent authority to release the mortgages. (A14-28.) Explaining its conclusions, the District Court held that EBF

lacked express authority because the Authorization Documents on which BC57 relied (and relies) for that authority did not actually grant it. (A18-24.) On implied authority, the District Court rejected BC57's argument that because the Servicing Agreements authorized EBF to issue payoff statements and collect payments, those documents also implicitly granted EBF the authority to unilaterally execute mortgage releases because, among other things, the Servicing Agreements (that BC57 never bothered to check) expressly required that such releases could only be issued upon written instructions from the individual investors. (A15-18.) Finally, the District Court rejected BC57's arguments regarding apparent authority, finding that BC57 could not establish that it reasonably believed EBF had the authority to release the individual investors' mortgages. (A24-28.) As the District Court explained, BC57's failure to obtain, let alone review, either the Servicing Agreements or the Authorization Documents during the refinancing process meant that it failed to exercise "ordinary diligence," a failure that should fall on it, not the individual investors. (A25 (citing *Sphere Drake Ins. Ltd. V. Am. Gen. Life Ins. Co.*, 376 F.3d 664, 673-74 (7th Cir. 2004).)

In this appeal, BC57 now argues only that EquityBuild Finance had express authority to release the individual investors' mortgages. (Doc. 5 at 12 (noting that the individual investors' "servicing agent, EBF, was ***expressly*** authorized to issue payoff statements and, pursuant to the Authorization Document, execute and issue the Releases"), 31 ("the District Court erroneously concluded that EBF lacked authority to issue and execute the Releases, notwithstanding the Authorization Document[s]

expressly conferring that authority on EBF"), 32 (arguing that "the District Court misinterpreted the Authorization Document[s], the [Servicing Agreements], and Illinois law" when it "rejected BC57's argument that EBF had ***express*** authority to issue and execute the Releases") (emphasis added).) Thus, likely in a hope to avoid this Court focusing on BC57's "lack of knowledge [or] its own failure to do its homework" and obtain and review either the Servicing Agreements or the Authorization Documents (A28), BC57 has waived any challenge to the District Court's rulings regarding EBF's supposed implied or apparent authority.

The Amicus Brief of Illinois Land Title Association in Support of Defendant-Appellant BC57, LLC (the "Amicus Brief") argues that a servicer, like EBF, authorized to accept payments and issue payoff letters has implicit authority to accept the resulting payoff. (Doc. 20 at 9-14.) BC57's decision not to appeal the District Court's conclusions regarding EBF's supposed implicit authority, however, means that the Court should now ignore this issue, as a non-party cannot raise issues on appeal not raised by a party. *See, e.g.*, *New Jersey v. New York*, 523 U.S. 767, 781 n. 3 (1998) (courts "must pass over" arguments of amici that the named party to the case has not raised); *see also* 16AA Charles Alan Wright et al., Federal Practice & Procedure § 3975.1 (4th ed. 2008) ("In ordinary circumstances, an amicus will not be permitted to raise issues not argued by the parties.").

Even if the issue could be raised, the Amicus Brief's argument does not change the outcome since it addresses a ruling not actually made by the District Court. Contrary to that argument (*see, e.g.*, Doc. 20 at 9), nothing in the District Court's

opinion regarding EBF's lack of authority to issue ***mortgage releases*** changes its authority to accept a ***payoff payment***. Instead, the District Court held that EBF lacked the authority to release the individual investors' mortgages without their written directions required by the Servicing Agreements while also concluding, among other things, that authorizing an agent to accept a payoff payment does not also authorize that "agent to do a wholly separate thing (release a mortgage)." (A14, A17; see also A15-A18 (rejecting BC57's implied authority arguments).)

2. BC57 cannot establish that the individual investors gave the written directions required to grant EBF express authority to release the mortgages.

BC57 argues that the so-called "Authorization Documents" individual investors may have signed at the time of their investments granted EBF express authority to release their mortgages.[8] (*Id.*, pp. 32-34.) BC57's arguments fail both legally and factually.

BC57's argument fails legally because, as the District Court rightly concluded, reading the Authorization Documents to provide the required authority makes no sense. (A23.) BC57's reading of the Authorization Documents renders key provisions of the investment documents superfluous or meaningless, which is not allowed under

[8] As it did before the District Court, BC57 has dubbed these documents the "Authorization Documents." In reality, however, the documents bear no such title. Rather, they are untitled and first memorialize the amount of each individual investor's investment before including a confusing and/or ambiguous statement (discussed further below) regarding EBF's role in releasing mortgages. (A19.) Thus, though the District Court used Authorization Document in its opinion and this Brief uses Authorization Documents to avoid needless confusion, even BC57's name for the documents upon which it so heavily relies is rhetoric of which the Court should be skeptical.

Illinois law. *See, e.g.*, *White v. White*, 62 Ill. App. 3d 375, 378 (1st Dist. 1978) ("… in construing a contract, meaning and effect must be given to every part, and no part should be rejected as surplusage unless absolutely necessary since it is presumed that each provision was inserted deliberately and for a purpose."). This is particularly true of the Servicing Agreements' assurance and requirement, made in multiple provisions, including one that is emphasized by all capital letters, that EBF, as either the collateral agent or servicer, could take no action with respect to the individual investor's collateral without written instructions.

BC57's argument that the investors authorized the release of their mortgages in the documents they signed acknowledging their loans would mean that the individual investors released their mortgages at the very same moment they were created. This, of course, makes no sense, since it would mean that the provisions in the Servicing Agreements that the individual investors' mortgages could not be released without written directions had no meaning or effect. BC57 acknowledges that the Servicing Agreements and the so-called Authorization Documents were executed together. (Doc. 5, p. 33.) Under Illinois law these documents are to be read in a way that gives meaning to both. *IFC Credit Corp. v. Burton Industries, Inc.*, 536 F.3d 610, 614 (7th Cir. 2008) (quoting *McDonald's Corp. v. Butler Co.,* 511 N.E.2d 912, 917 (2nd Dist. 1987) (mandating that when "different instruments are executed together as part of one transaction or agreement, they are to be read together and construed as constituting but a single instrument"); *see also Labor World, Inc. v. Just*

Parts, Inc., 735 N.E.2d 149, 152 (2nd Dist. 2000) *(*instruments do not even need to be executed simultaneously if executed as part of the same transaction).[9]

Based on this principal, the District Court correctly construed the Authorization Documents and the Servicing Agreements together when it rightly rejected BC57's argument: "Assuming that the CAS required the individual investors to authorize EquityBuild Finance's release of the mortgages, and that the Authorization Documents simultaneously gave EquityBuild Finance permission to release those mortgages (as BC57 claims they did), what was the point of the CAS provision in the first place?" (A23.) To hold otherwise, would render the restrictions on EBF's authority (including those presented with emphasis) entered for the protection of the individual investors as mere surplusage, an outcome that cannot stand. *White*, 62 Ill. App. 3d at 378.

BC57's argument also fails factually. Under the Servicing Agreements it failed to review when it made the loan, BC57 must demonstrate that ***each*** individual investor provided written direction to EBF authorizing the release of the individual

[9] BC57 appears to acknowledge that the investment-related documents should be read together when, later in its brief, it argues that the District Court erred by concluding that the Release Deeds that EBF provided were not valid. In support of that argument, BC57 asserts that "[t]he District Court erred in failing to take into account the Authorization Document[s], the [Servicing Agreements], and BC57's loan agreement, all of which demonstrate the parties' intent to authorize EBF to release" the individual investors' mortgages. (Doc. 5, p. 42.) Setting aside the fact that BC57's Loan Agreement fails to demonstrate anything about the intent of the individual lenders when they made their investments, often years earlier, and who knew nothing about it, BC57 should not be allowed to have it both ways. Because it is right when it later argues that the "Authorization Documents" and the Servicing Agreements must be read together, thus, its argument now that they should not be read together must be rejected.

investors' mortgages. (R.1147-6—1147-10, §§ 3, 4(a), 6(a).) BC57 cannot do that. While it tries to rely on the Authorization Documents (that it also failed to review when it made the loan), BC57's briefing before the District Court candidly acknowledged that it had no evidence of Authorization Documents or other written directions from a number of individual investors. (*See, e.g.*, R1152 at 7-8; R1217at 6-8.) As it is BC57 arguing that the individual investors authorized the releases, it is BC57 that bears the burden of proof of proving that such written directions existed. *See Gabe Young v. Wilkinson,* 2022 IL App (4th) 220302, ¶ 110 (relying upon the principal that "[o]ne who asserts an affirmative defense has the burden of proving it").[10]

In the briefing before the District Court, BC57 tries to gloss over these failures, asserting that "the only reasonable conclusion" about the investors for whom it acknowledges it has no proof of written direction is that "this small subset of [individual investors] agreed to" the Authorization Documents. (R.1152 at 8, n.6.) Similarly, in its responsive statement, BC57 offers a variety of suggestions for why the required written directions might be missing and reasons for overlooking that fact. (R.1217 at 6-10.) BC57 even went so far as to argue that "the Authorization Document was an integral part of the Investment Packages" without even attempting to explain how it fits with other parts of those packages, like the Servicing Agreements that prohibit the very thing—requiring written direction to release the

[10] Though the District Court made it clear that BC57 bears this burden (A14), BC57 makes no mention of its burden, let alone argues that it somehow satisfied it.

mortgages—BC57 claims it allows. (*Id.* at 9-10.) None of BC57's arguments, though, do anything to demonstrate that EBF actually received written directions from every individual investor, as the Servicing Agreements require. Thus, even if there were no other issues with them, BC57's arguments about EBF's authority fail because it cannot establish that each of the individual investors provided the required written directions.

The problems with BC57's arguments do not end there. Its arguments also fail because the Authorization Documents do not provide the express authorization that BC57 claims. According to BC57, the language of the Authorization Documents gave EBF the "[e]xpress authority to issue and execute" documents releasing the individual investors' otherwise valid mortgages. (Doc. 5 at 32.) The language is not nearly so clear:

> EquityBuild Finance, LLC, as agent and trustee has been authorized by the above listed lenders to receive the payoff in its name and issue and execute a release of said mortgage, upon payment in full of any outstanding balance.

(A19.) As the District Court notes, this "language does not specify to whom the payment in full must be made." (A20.) That, though, is not all that the language leaves unclear, as it also leaves the following items unclear, at best:

- Though it says that EBF "***has been*** authorized" to receive the payoff and issue and execute a release, it fails to indicate who, where or when that authorization was given and BC57 has not otherwise identified any source for it, even though this language is in the past tense, suggesting that the authorization had already been granted.
- The language references "said mortgage," but omits any other reference to a mortgage and there is no reference to a mortgage anywhere else in the document.

- The language refers to the "above listed lenders" in the plural, but only a single lender is identified.

Taken together, these issues with the language in the supposed Authorization Documents demonstrate that whatever that language may do beyond memorializing the individual investors' investment (A24), it does not unambiguously authorize EBF to issue mortgage releases on behalf of the individual investors. This is especially true since it is undisputed that the individual investors themselves never received the "payment in full" which the Authorization Documents require.

BC57 next presents multiple arguments that are of no moment. (Doc. 5, pp. 35-42.) First BC57 argues that, under the Illinois Mortgage Act, payment can be made to a "legal representative." This is true. It is also irrelevant. The issue here is not whether EBF was authorized to accept payments, but rather whether EBF was authorized to release the individual investors' mortgages. Likewise, BC57's argument that it had no duty to make sure its payment was actually received by the individual investors is similarly irrelevant. (Doc. 5 at 36-39.) Even if BC57's argument is correct, this does nothing to establish that EBF had the authority to release the mortgages. Nor is BC57 right when it asserts—without any support—that payments and payoffs to EBF extinguished the individual investors' liens where EBF lacked the authority to release them. (Doc. 5 at 39.)

Finally, BC57 asserts that the Illinois Fiduciary Obligations Act applies (Doc. 5 at 39-41), even though the Servicing Agreements ***expressly disclaims any fiduciary relationship*** between EBF and the investor lenders. (*See, e.g.*, R.1147-6 – 1147-10, § 2(a).) In support of this position, BC57 relies primarily on the "purpose"

of the Fiduciary Obligations Act and cases that discuss fiduciary obligations in the context of a partnership. (Doc. 5, pp. 40-41.) BC57 cannot, however, explain how the Act applies to this situation as there is no suggestion of a partnership between EBF and the individual investors which would make these authorities applicable.

B. Even If EBF Had The Authority To Release The Individual Investors' Mortgages, The Release Deeds Failed To Do So.

BC57 next argues that EquityBuild Finance properly exercised the authority BC57 claims was granted to it in the Authorization Documents to release the individual investors' mortgages. (Doc. 5, pp. 42-44.) In support, BC57 relies on the same fatally flawed arguments about the authority supposedly granted to EBF in the Authorization Documents to claim that EBF could properly execute the Release Deeds. (Doc. 5 at 43.) As discussed above, BC57's arguments regarding any express (or any other) authority granted by the Authorization Documents fail, and so too then must its arguments about the effect of the Release Deeds fail, without even getting into their other fatal flaws.

Turning to those fatal flaws, even if EBF had the express authority to issue releases that BC57 claims, the District Court rightly held that the Release Deeds are facially invalid and therefore ineffective. (A12-13.) As even BC57 acknowledges (Doc. 5 at 42), the text of each release has ***EquityBuild***, not EquityBuild Finance, granting the release, even though EquityBuild was the borrower, not the lender who holds the mortgage or the lender's agent. Thus, the party executing the release was neither the mortgagee, nor the mortgagee's agent and, therefore lacked the ability to release

anything. Remarkably, BC57, its lawyers, and title insurance agents all missed this obvious, fatal flaw in the final Release Deeds.

BC57 now argues that the errors in the Release Deeds resulted from a mutual mistake, and therefore can be excused. (Doc. 5 at 42.) BC57, however, failed to argue that there was a mutual mistake to the District Court. Before the District Court, BC57 instead argued that the issues with the Release Deeds were due to a scrivener's error, an argument that the District Court rejected because BC57 failed to provide any evidence in support of it, let alone the required evidence that is "'clear, precise, convincing and of the most satisfactory character.'" (A12-13 (quoting *Young v. Verizon's Bell Atl. Cash Balance Plan*, 667 F.Supp.2d 850, 894 (N.D.Ill. 2009), *affirmed* 615 F.3d 808 (7th Cir. 2010)).) While BC57's Brief notes the District Court's rejection of those arguments (Doc. 5 at 12, 31) and nonetheless asserts the existence of a scrivener's error in an argument heading (Doc. 5 at 42), it does not actually challenge it. Instead, BC57 now attempts its new mutual mistake argument. (Doc. 5 at 42-44.) By not making this argument to the District Court, however, BC57 waived this flawed argument. *See, e.g.*, *Wheeler v. Hronopoulos*, 891 F.3d 1072 (7th Cir. 2018).

Even if it had not been waived, BC57's mutual mistake argument still fails. Establishing a mutual mistake requires "very strong, clear and convincing evidence" that the parties to the transaction made a ***mutual*** mistake in drafting and executing their documents. *Sheldon v. Colonial Carbon Co.*, 116 Ill. App. 797, 800 (1st Dist. 1983). Here, BC57 offers ***no*** evidence of ***any*** mistake by either EquityBuild or EquityBuild Finance, the actual parties to the Release Deeds. Indeed, it offers no

evidence—testimonial, documentary, or otherwise—showing the intent of either party or their principals. Instead, it argues that the Servicing Agreements and the Authorization Documents somehow show a mistake because, when read together, they show EBF could be authorized to release the mortgages. (Doc. 5 at 42-43.[11]) 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. They do nothing to suggest, let alone prove, a mutual mistake by both EB and EBF when they later executed the flawed Release Deeds. Similarly, BC57's reliance on its own loan agreement with EquityBuild (Doc. 5 at 43), does nothing to suggest a mistake in the Release Deeds made by both EB and EBF.

This is hardly a surprise given that it is undisputed that the EquityBuild Defendants, including EB and EBF, were perpetuating a Ponzi scheme when BC57 made its loan. If, rather than being mistaken, the "error" was made as part of their scheme (at least as reasonable an assumption as the many that BC57 asked the District Court to make (*see, e.g.*, R1152 at 8, n.6, 25)) then there would be no mistake by the parties to the Release Deeds. This failure of evidence means BC57 cannot carry its burden. *See, e.g.*, *Praxair, Inc. v. Hinshaw & Culbertson*, 235 F.3d 1028, 1034-35 (7th Cir. 2000) (a unilateral mistake is generally not grounds for rescinding or reforming a contract). Since BC57 is the one claiming mutual mistake and is seemingly asking the Court to simply ignore that mistake (since it never argued that

[11] It is here that BC57 suggests the documents should be read together.

the releases should be reformed), its failure to provide any evidence of the mindset, knowledge, or intentions of either EB or EBF dooms its argument.

BC57's further arguments that it is entitled to releases pursuant to the Illinois Mortgage Act (Doc. 5, pp. 43-44), also fail. As the authorities they cite in support of it explain, the Act would allow a mortgagor who has paid in full, to seek a release. Here, that mortgagor would be EquityBuild and BC57 offers no evidence that EB (a) paid the mortgagees in full or (b) ever sought to compel a release. (Doc. 5, p. 44 (citing *Franz v. Calaco Dev. Corp.*, 352 Ill. App. 3d 1129, 1150 (2d Dist. 2004) and *Rockford Life Ins. Co.*, 128 Ill. App. 2d 190 (3rd Dist. 1970) 193, 195.) Thus, by even the standards articulated by BC57, its argument fails.

II. THE ILLINOIS MORTGAGE ACT ESTABLISHES THE REQUIREMENTS FOR THE RELEASE OF A MORTGAGE.

At the conclusion of its Opinion, the District Court properly rejected BC57's (very brief) alternative argument that BC57's payment to EquityBuild Finance acted to automatically release the individual investor's mortgages. (R1038 at 28-29.[12]) As the District Court noted, BC57's argument relied on the 120-year-old decision of *Bradley v. Lightcap* holding that "when [a] debt is paid, discharged, [or] released…the mortgagee's title is extinguished by operation of law." 201 Ill. 511, 517 (1903). As the District Court correctly found, this was no longer valid law in Illinois (and has not been for over 60 years):

> Assuming this was the common-law rule, the Illinois legislature replaced that rule in 1961 when it passed the Illinois Mortgage

[12] The contrast in emphasis that BC57 placed on its arguments before the District Court and this Court is telling. *Compare* R.1038 and Doc. 5.

> Act, 765 ILCS 905/2. The Act says a payment (together with a request for a mortgage release) triggers an *obligation* to release the mortgage—it doesn't trigger the release itself.

(A29.)

Now, BC57 vigorously argues that the common law rule should continue to control and that the Illinois Mortgage Act does not evince a "legislative intent" to overrule it. BC57 claims that the Illinois Mortgage Act is meant to be read as an "administrative supplement" to the common-law rule and that, to do otherwise, would result in a scenario where lenders receive payment, fail to release mortgages, and thereby render it impossible for anyone to make a mortgage loan in Illinois. (Doc. 5 at 22-23.) BC57's arguments contradict the plain language of the statute, are unsupported by any relevant legal authority, and simply make no sense.

A. The Plain Language Of The Illinois Mortgage Act Abrogates Any Common Law Doctrine Regarding Release Of A Mortgage.

Under Illinois law, a court's "primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature." *Solon v. Midwest Medical Records Ass'n*, 236 Ill. 2d 433, 440 (2010). To determine the plain meaning of a statute, a court should consider the statute as a whole, the subject it addresses, and the legislature's apparent intent in enacting it. *Id.* When the language of the statute is unambiguous, however, courts must "give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction," as it is not the court's "function to rewrite a statute or depart from its plain language by reading into the statute exceptions, limitations, or conditions not expressed therein." *Bd. of*

Education of Woodland Comm. Consolidated School Dist. 50 v. Ill. State Bd. of Education ("*Bd. of Ed.*"), 2018 IL App (1st) 162900, ¶ 9.

Applied here, these standards prove the failings of BC57's arguments. Section 2 of the Illinois Mortgage Act sets forth the requirements for releasing a recorded mortgage in Illinois:

> Sec. 2. Every mortgagee of real property ... having received full satisfaction and payment of all such sum or sums of money as are really due to him or her from the mortgagor,... shall, ***at the request of the mortgagor*** … in case such mortgage ... has been recorded or registered, ***make, execute and deliver to the mortgagor ... an instrument in writing executed in conformity with the provisions of this Section*** releasing such mortgage ... which release shall be entitled to be recorded or registered and the recorder or registrar upon receipt of such a release and the payment of the recording fee therefor shall record or register the same. 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*** or as provided in the Mortgage Certificate of Release Act. ...

765 ILCS 905/2 (emphasis added). Thus, the plain language of the Mortgage Act provides that the only way to release a mortgage is by (1) the mortgagee making, executing, and delivering a signed release, *id.*, or (2) through a release under the Mortgage Certificate of Release Act, 765 ILCS 935/1 *et. seq*., which governs the recording of a certificate of a release by a title company (something no one is claiming happened here). The plain language of Section 2 of the Illinois Mortgage Act provides that payment by itself is insufficient to release a mortgage.

There is similarly no conceivable ambiguity in the phrase "shall be released of record only in the manner provided herein." 765 ILCS 905/2. The plain and ordinary meaning of this phrase is that mortgages are only released as set forth in the Illinois

Mortgage Act. Any attempt to interpret the statute's use of "only" to mean "in addition to remedies provided by common law" is to improperly add exceptions and conditions not included by the legislature. *Bd. of Ed.*, 2018 IL App (1st) 162900 ¶ 9.

BC57 correctly notes that interpreting a statute to abrogate the common law is generally disfavored. (Doc. 5 at 17.) However, where the legislature shows a clear intent to abrogate the common law, the statute must be construed as written. *See DuPage County v. Graham, Anderson, Probst & White, Inc.*, 109 Ill.2d 143, 151 (Ill. 1985). "The best evidence of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning." *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 375 (2008). Further, a statute will be deemed to have abrogated the common law where there is an "irreconcilable repugnancy" between the statute and the common law right such that both cannot be carried into effect. *Rush Univ. Med. Center v. Sessions*, 2012 IL 112906, ¶17.

As set forth above, the Illinois Mortgage Act provides that the ***only*** method for releasing a mortgage is execution of a written instrument by (1) a mortgagee or (2) a title company under the Certificate of Release Act. 765 ILCS 905/2. This necessarily means that any other method of effecting the release of a mortgage, such as payment under common law, cannot also be effective. Thus, there is an "irreconcilable repugnancy" between the Illinois Mortgage Act and the century-old common law doctrine BC57 now seeks to invoke. The legislative intent to establish the exclusive method of releasing a mortgage in Illinois is set forth in the plain language of the Illinois Mortgage Act

Importantly, as discussed in more detail below, this is exactly what an Illinois appellate court held in *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784 ("*North Shore*"), ¶72 (citing 765 ILCS 905/2) when it rejected the very argument that BC57 makes here.[13] BC57's reliance relies on a 120-year old opinion that predates both the Illinois Mortgage Act and *North Shore*, however, dooms its arguments.

B. The Authorities Cited By BC57 Do Not Support Its Position That Payment Automatically Releases A Mortgage.

Despite *North Shore*'s clear statements to the contrary, BC57 expends great effort to argue that Illinois law recognizes the common law principle that payment, without delivery of a written release, terminates a mortgage. In support of this position, BC57 cites several Illinois decisions, none of which are helpful to it. Three of the cases BC57 relies upon to support its argument are over a century old: *Bradley v. Lightcap*, 201 Ill 511 (1903); *Pollock v. Maison*, 41 Ill. 516 (1866); and *Vansant v. Allmon,* 23 Ill. 26 (1859). These decisions cannot possibly provide any guidance as to whether the Illinois Mortgage Act, enacted in 1961, now exclusively controls the requirements for releasing a mortgage in Illinois.

While BC57 does provide three cases decided after the enactment of the Illinois Mortgage Act, none are on point. BC57 first relies upon language taken out of context from *City of Chicago v. Elm State Prop. LLC*, 2016 IL App (1st) 152552, ¶21, to

[13] BC57 argues that *North Shore* is not focused on "the effect of payment of the debt secured by a *mortgage lien*." (Doc. 5 at 24.) This contention, however, is flatly contradicted by the court's opinion. 2014 IL App (1st) 123784 ¶ 72.

support its argument that the common law rule remains in effect. (Doc. 5 at 14.) In *Elm State,* the Illinois appellate court considered whether an assignment of a mortgage was a transfer of a "beneficial interest in real property" subject to the City of Chicago's real estate transfer tax. 2016 IL App (1st) 152552 ¶¶3, 6. Citing the Restatement (Third) of Property, the court held that being a mortgagee is not a beneficial interest in real property, as a mortgage only "conveys a security interest that may be extinguished by the mortgagor paying in full any time prior to foreclosure." *Id.* ¶21. While the court gave a lengthy exposition regarding what does, and does not, constitute a beneficial interest in real property, no part of its opinion addressed the requirements for releasing a mortgage, be it under the Illinois Mortgage Act or common law. Thus, nothing in the court's opinion somehow endorsed a common law doctrine that has not been invoked by Illinois courts for more than a century.

Similarly, *Rockford Life Ins. v. Rios*, 128 Ill. App. 2d 190 (3rd Dist. 1970), also does not "confirm" the common law rule at issue, as BC57 claims. (Doc. 5 at 15.) In *Rockford Life Insurance*, a bank purchased a mortgage through a company that acted as the bank's loan servicing agent. 128 Ill. App. 2d at 192. The defendant home buyer bought the property from its former owner and made full payment of the mortgage indebtedness to the bank's servicing agent. *Id.* The servicing agent then failed to remit those funds to the bank. *Id.* The home buyer's new lender contacted the bank seeking a written release of the mortgage and the bank thereafter sought to foreclose

its mortgage. *Id.* at 192-93. The defendant purchaser and its new lender filed a counterclaim for the release of the bank's mortgage. *Id.* at 191.

The trial court found the note secured by the mortgage had been paid in full and consequently, "[the bank] was not entitled to foreclose its mortgage and the ***defendants were entitled to a release of the mortgage***." *Id.* at 193 (emphasis added). The appellate court then considered whether the servicing agent had actual or apparent authority, such that payment to the servicing agent was binding upon the bank, its principal. *Id.* The court held that the servicing agent had authority to receive payments on behalf of the bank and consequently upheld the trial court's decision to release the bank's mortgage. *Id.* at 193, 195.

No part of the *Rockford Life* decision suggests that payment operates to release a mortgage as a matter of law. Rather, to the extent that this issue is addressed, it suggests the opposite: the trial court had to order the plaintiff bank to release the mortgage because it was still an encumbrance on the property. *Id.* at 191-92. This is wholly consistent with both the language of the Illinois Mortgage Act and the decision in *North Shore* and wholly inconsistent with BC57's argument that the mortgage is automatically released. Most importantly, the *Rockford Life* court did not find that the purchaser and the lender were entitled to a release because they made payment (although that was a necessary condition), but because they made that payment to the bank's ***authorized*** agent. *Id.* at 195. No part of the court's decision addressed any common law doctrine regarding the release of mortgages or the Illinois Mortgage Act and it is therefore irrelevant to the issue at hand.

The final Illinois decision, *Jurado v. Simms*, 166 Ill. App. 3d 380 (1st Dist. 1988), cited by BC57 is likewise completely irrelevant. (Doc. 5 at 15.) In *Jurado*, the plaintiff, a 1/5th beneficiary of a land trust, was personally liable for a mortgage on the trust's property along with the other beneficiaries. 166 Ill. App. 3d at 381-82. In exchange for an assignment of the note and mortgage to himself, the plaintiff paid off the mortgage indebtedness which was in default. *Id.* The plaintiff thereafter filed suit to foreclose on the mortgage which would have resulted in him obtaining the entire interest in the property. *Id.* at 382, 384. The trial court granted summary judgment to the defendants (the other trust beneficiaries) "on grounds that plaintiff's interest in the property as a beneficiary of the land trust merged with his interest as holder of the note." *Id.* at 382. The appellate court held that the doctrine of merger applied and therefore the plaintiff could not foreclose on the mortgage. *Id.* at 383.

No part of the *Jurado* decision, in any way shape or form, relates to the requirements for releasing a mortgage in Illinois. The court's opinion does not discuss, or even implicate, the common law doctrine that BC57 is seeking to invoke or the Illinois Mortgage Act. While a useful exposition of Illinois merger of title doctrine, *Jurado* does nothing to support BC57's argument.

Although not argued by BC57, the Amicus Brief presents an additional Illinois decision, *Dunas v. Metropolitan Trust Com.,* 41 Ill App. 2d 167 (1st Dist. 1963) issued after the adoption of the Illinois Mortgage Act for the proposition that "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." (Doc. 20 at 5.) *Dunas*, however, contains

no discussion of how a mortgage is released and no mention whatsoever of the Illinois Mortgage Act. Rather, *Dunas* addressed the ability of a trust's beneficiary to enforce a debt secured by a mortgage on trust property after the statute of limitations had run. 41 Ill App. 2d at 171-72. The court referenced payment of a mortgage debt simply as a fact which was not present in the case. *Id*. at 170. Thus, the single sentence from *Dunas* relied upon by the Amicus Brief is simply dicta, *see Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 277 (Ill. 2009) (noting that dicta is "an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication.") (citing *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988). *Dunas* does not represent any authoritative rule of Illinois law, and certainly provides no basis for ignoring the plain language of the statute or the same appellate court's much more recent ruling in *North Shore* directly addressing the issue at hand.

Finally, BC57 presents cases from a menagerie of other jurisdictions to support its argument for the common law rule. (Doc. 5 at16 & n.4.) None of these decisions discuss Illinois common law or the Illinois Mortgage Act and are consequently irrelevant to the issue at hand. While these decisions may, or may not, reflect the law of those states, they obviously do nothing to rebut the plain language of the Illinois Mortgage Act which mandates that a mortgage is only released upon delivery of a written instrument from the mortgagee. 765 ILCS 905/2.

C. Illinois Law Does Not Recognize Common Law Doctrines for Releasing a Mortgage.

1. The *North Shore* opinion is directly on point.

As noted above, Illinois' First District appellate court has ruled squarely that the Illinois Mortgage Act abrogated any common law doctrine for releasing mortgages. *N. Shore Cmty. Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶72 ("*North Shore*"). In *North Shore,* the bank was the mortgagee of a construction loan granted by the property's owner. *Id* at ¶7. The owner thereafter defaulted on the terms of the mortgage and the bank filed a foreclosure action. *Id*. at ¶9. The foreclosure court appointed a receiver to control the property during the pendency of the case. *Id*. at ¶ 10.

The owner of the property also failed to pay contractors who recorded mechanic's liens against the property and served notice of those liens on the owner and the bank. *Id*. at ¶18, 36. The contractors filed counterclaims in the foreclosure suit to foreclose their mechanic's liens. *Id*. The bank entered into an agreement with the owner to sell the property to a third party. *Id*. at ¶11. The court approved the sale, but specifically found that the sale would not impact the contractor's claims. *Id*. Thereafter, the bank executed a release of its mortgage which was held in escrow pending resolution of the foreclosure suit. *Id*. at ¶12. The third-party buyer obtained a special warranty deed to the property and granted a new mortgage to its own lender, both of whom became parties to the suit. *Id*. at 13. The trial court granted summary judgment in favor of the bank, the new owner and the owner's lender finding that the contractors' mechanics liens were unenforceable. *Id*. at ¶53-54. The contractors

appealed the trial court's decision and argued (among other issues raised) that the bank lacked standing in the foreclosure case because it executed a release of mortgage and received full payment. *Id*. at ¶67.

North Shore found that "the authorities that the [contractor] cites simply do not support its legal theory that full payment or anything short of delivery is sufficient to give effect to a mortgage release." *Id*. at ¶70. The court directly rejected the contractor's' contention that full payment releases a mortgage under the Illinois Mortgage Act. *Id*. at ¶¶71, 72. The court considered the legislative intent as to what effects a release of a mortgage in Illinois by looking to the plain language of the statute:

> While the plain language of Section 2 does indicate that full payment is a ***necessary*** condition before a mortgagee is obligated to release a mortgage, it does not suggest that full payment, by itself, is a ***sufficient*** condition to release a mortgage. On the contrary, once a mortgagee receives full payment it must further "make, execute and deliver * * * an instrument in writing * * * releasing such mortgage.

Id. at ¶71-72 (citing 765 ILCS 905/2) (emphasis original). The court noted that, to do otherwise, would "render the statutory requirement to 'make, execute and deliver' meaningless and superfluous." *Id*. at ¶72. Consequently, the court held that the bank had standing, as payment alone did not release its mortgage:

> [The contractor's] challenge to the Bank's standing rests entirely on the theory that the Bank released its mortgage by receiving full payment. However, ***even if there was full payment, the plain language of the Mortgage Act indicates that delivery is necessary before a mortgage is released***. Since it is undisputed that there has been no delivery, the mortgage has not been released.

Id. at ¶76 (emphasis added).

Here, the District Court properly found *North Shore* dispositive of BC57's arguments. Yet BC57 again seeks to avoid the effect of *North Shore* by arguing that its holding is somehow inapplicable to the facts of this case:

> The conclusion in *North Shore*—limited to the effect of an undelivered release held in escrow on a party's standing to challenge the opposing party's mechanics' lien claim—does not speak to the Illinois common law rule that payment of a mortgage debt extinguishes the lien of the mortgage. Nor does *North Shore* suggest that the Illinois Mortgage Act overruled the common law rule, which was never raised by the parties.

(Doc. 5 at 26.) BC57 never actually explains why the holding in *North Shore* would be "limited to the effect of an undelivered release held in escrow." This is understandable, as there is no conceivable reason why it would be. Rather, the court directly addressed the argument that BC57 is now trying to make that payment alone is sufficient to trigger a release of a mortgage under Illinois law and unambiguously stated that it is not. It is difficult to imagine how this ruling could be more on point. The only distinction between this case and *North Shore* is that in *North Shore*, the bank actually executed a release of mortgage, whereas in this case, the individual investors never did. If anything, this would appear to make BC57's position even weaker than the contractors in *North Shore*. Moreover, while it is unclear if the parties in *North Shore* discussed the common law rule,[14] that does not change the reality that the court directly addressed the text of the Illinois Mortgage Act and

[14] The *North Shore* court noted that the "authorities" cited by the contractors "do not support its legal theory that payment or anything short of deliver is sufficient to give effect to a mortgage release" which strongly suggests that it was an attempt to invoke the common law doctrine, but this is never specified. 2014 IL App (1st) 123784 ¶70.

found that it did not allow for any other method of releasing a mortgage. This holding explicitly rejects the common law theory that BC57 seeks to apply here.

2. *AAMES Capital Corp.* confirms that a mortgage remains in effect until delivery of a written release.

BC57's suggests that *AAMES Capital Corp. v. Interstate Bank*, 315 Ill. 3d 700 (2nd Dist. 2000), "embraces" the import of the common law rule at issue here. (Doc. 5 at 22.) This is odd given that the holding in this case directly contradicts that proposition. 315 Ill. 3d at 710. In *AAMES Capital*, married homeowners executed a mortgage with a senior lender, Standard, and a second and third mortgage with a junior lender, Suburban, on their home. *Id.* at 702. Thereafter, a judgment creditor of the homeowners, Interstate, recorded its memorandum of judgment with DuPage County. *Id.* The homeowners entered into a refinance agreement with a new lender, AAMES, that paid Standard and Suburban in full and recorded its mortgage 20 days after the judgment creditor recorded its memorandum. *Id.* The mortgages of Suburban and Standard were of record both when the judgment creditor recorded its memorandum and when AAMES recorded its mortgage. *Id.*

AAMES later filed a foreclosure suit against the homeowners and alleged that Interstate's judgment, recorded 20 days prior to its own mortgage, was inferior. *Id.* at 702-03. The trial court held that Interstate had priority since its lien was recorded prior to that of AAMES. *Id.* at 703. AAMES appealed and the appellate court held that the doctrine of subrogation meant that AAMES was "entitled to the benefit of the security attaching to the debt that it satisfied with the expectation of receiving an equal lien." *Id.* at 709. The court explained that a new lender "is entitled to be

subrogated to the original lien, and its corresponding priority position, established by the original mortgagee, under the doctrine of conventional subrogation, up to the amount that the original mortgage secured at the time of its perfection." *Id*. at 710. The court put an important caveat on its ruling which emphasized that a lien continues to remain in effect until it is released of record:

> The doctrine of conventional subrogation will apply if the original mortgage lien is in full force and effect at the time that the refinancing mortgage lien is recorded.
>
> However, nothing in our holding modifies in any way the ability to extinguish the original mortgage lien. If the original mortgagee ***files a release of lien*** prior to the recordation of the refinancing mortgagee's lien and if a third party records its lien after the release is recorded but before the refinancing lien is recorded, then conventional subrogation will not apply.

Id. (emphasis added). The decision in *AAMES Capital* thus emphasized that even though a debt is paid in full, a mortgage continues to be in effect until a written release is recorded such that a new lender can be subrogated into its place. *Id.* This is the diametric opposite of the common law rule BC57 proposes where payment, by itself, acts to release a mortgage.

3. The only law on point indicates that the Illinois Mortgage Act controls the release of mortgages.

BC57 attempts to argue that the silence of modern authorities regarding the century-old common law rule somehow supports its continued validity: "No case citing *North Shore* since its publication relies on it for its limited discussion of the Illinois Mortgage Act, much less reads it to overrule the longstanding common law rule" and "[t]ellingly, these cases do not even mention the common law rule." (Doc. 5 at 22, 28.) BC57's reasoning misses the obvious point: Illinois courts are not discussing the

application of the common law doctrine because the subject matter has been controlled by the plain language of the Illinois Mortgage Act for over sixty years. And, tellingly, BC57 cannot cite any authorities of its own that suggest otherwise.

While it is true that no case has "relied" upon *North Shore* regarding the Illinois Mortgage Act since its 2014 publication, this speaks to the clarity of the statutory scheme which largely obviates the need for litigation regarding how a mortgage is released. Moreover, no court has "relied" upon the reasoning of *Bradley v. Lightcap* in over 120 years. *North Shore* is the only case addressing the question of whether payment automatically triggers the release of a mortgage in Illinois and it answers, unambiguously, "no."

D. BC57's Policy Argument That The Illinois Mortgage Act Cannot Be Read Literally Is Misplaced.

BC57 attempts to argue that a literal reading of the Illinois Mortgage Act would contradict its "purpose" and would result in an unworkable system. To this end, BC57 cites *In re Gluth Bros. Constr. Inc.*, 451 B.R. 447, 451 (Bankr. N.D. Ill. 2011), for the proposition that the Illinois Mortgage Act was intended for the "benefit" of mortgagors. (Doc. 5 at 20, 23.) Once more, BC57's arguments miss the mark.

Initially, as noted above, such an interpretation would violate the basic precepts of statutory construction, which require that when a statute's language is unambiguous, its plain and ordinary meaning must be given effect. *Bd. of Education of Woodland Comm. Consolidated School Dist. 50*, 2018 IL App (1st) 162900 ¶ 9.

While *In re Gluth Bros.* identified the purpose of the Illinois Mortgage Act as protecting mortgagors, it did so in deciding that a creditor could not refuse to release

a lien simply because the creditor wanted security against potential, future, liability. 451 B.R. at 451. By requiring the lender to provide such a release under Section 4 of the Illinois Mortgage Act, the court recognized, implicitly if not explicitly, that a mortgage remained in effect until a written release is delivered. *Id*. at 452-53 & 454. Indeed, the ongoing ability of the lender to use the mortgage in the event it incurred future liability due to the borrower's conduct was the very reason for the case. *Id*. at 450-51. Thus, applying the *In re Gluth Bros.* logic here once again defeats BC57's argument.

Moreover, an argument that the "purpose" of the Illinois Mortgage Act is to protect mortgagors only reinforces the need to interpret the act based on its plain language. The Illinois legislature, apparently acting to protect mortgagors, set bright-line rules for how a mortgage is released and provided a mechanism (Section 4) for an aggrieved mortgagor to obtain a release and receive monetary compensation for its inconvenience. 765 ILCS 905/4. The legislature showed that it was fully cognizant of the concerns of mortgagors by the fact that the Illinois Mortgage Foreclosure Act also references the Mortgage Certificate of Release Act which allows for a ***title company*** to issue a "certificate of release" when it has proof of full payment of a mortgage debt. *See* 765 ILCS 905/2 & 765 ILCS 935/1 *et. seq*. BC57 makes no argument and presents no evidence of EquityBuild, the mortgagor here, employing this mechanism.

Notably, even under the Mortgage Certificate of Release Act the legislature placed an important restriction on ***title companies*** issuing such releases: "This

grant of authority is subject to the condition that the issuer of the mortgage certificate of release does not have ***notice that the lender opposes its release***." 765 ILCS 935/10.1 (emphasis added). Thus, even the statute designed to facilitate releases of mortgages provides that such a release is still not automatic. This further reinforces the view that the legislature did not intend to allow payment, by itself, to release a mortgage in Illinois.

BC57's final arguments claim that applying the plain language of the Illinois Mortgage Act would result in a situation where "consumers may be hard-pressed to find a lender willing to refinance in Illinois" and invite this Court to ignore the appellate court's decision in *North Shore* (Doc. 5 at 23, 29.) Neither of these arguments are grounded in logic.

In the sixty plus years since the adoption of the Illinois Mortgage Act, there is virtually no case law addressing how, exactly, a mortgage is released. Indeed, to find any Illinois law to support its position, BC57 is compelled to rely upon a case that was decided when horses and buggies still dominated the streets of America's cities. The Illinois legislature chose to draft the Illinois Mortgage Act to achieve its intended purpose of protecting mortgagors by giving them a statutory mechanism to release encumbrances on their property and new lenders by giving them certainty as to the status of title to property. There is no evidence suggesting that these protections were insufficient and that the flow of capital requires the viability of an ancient common law rule that no modern authority ever mentioned.

While BC57 is correct that this Court is not bound by the appellate court's decision in *North Shore* as it is not a decision of the Illinois Supreme Court (Doc. 5 at 29 (citing *AR Aircraft & Engine Grp., Inc. v. Edwards*, 272 F.3d 468, 470 (7th Cir. 2001))), there is no basis to disregard that persuasive authority here. The decisions of the appellate courts are generally authoritative unless this Court has "a compelling reason to doubt that they have stated the law correctly…." 272 F.3d 470. BC57 presents no reason to doubt that the Illinois appellate court is mistaken, let alone a "compelling" reason.

BC57's essential argument against the plain language of the Illinois Mortgage Act, and thus, the *North Shore* decision interpreting it, is that BC57 believes that the system created by the Illinois legislature when it sought to protect mortgagors is unwise and failed to achieve that purpose such that it "must" have meant to keep a common law rule in place. Nothing in the record supports this. To the contrary, the system put in place by the Illinois Mortgage Act and the Mortgage Certificate of Release show that the legislature has considered how it wishes to handle the release mortgages in Illinois. While BC57 may not agree with this policy determination (at least in the present situation), this Court has noted that it is "not in the business of second-guessing legislative judgment calls." *S. Branch LLC v. Commonwealth Edison Co.*, 46 F.4th 646, 652 (7th Cir. 2022). The Court should decline BC57's invitation to legislate and, instead, enforce the Illinois Mortgage Act in accordance with its plain language and the interpretation of the state's appellate court.

CONCLUSION

For the reasons set forth in the District Court's opinions and orders and this brief, the undersigned individual investors respectfully request the Court enter an order affirming the District Court's priority determinations and the distribution plan.

Dated: August 11, 2023

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c), that this brief contains 12,270 words, excluding Fed. R. App. P. 32(f)'s exclusions. I also certify, pursuant to Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 12-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that, on August 11, 2023, I filed the foregoing via the Court's ECF system, which will send notice to all users registered with that system.

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