

NO. A08-458

State of Minnesota  
**In Court of Appeals**

Crablex, Inc., a Minnesota corporation,

*Appellant,*

vs.

Minneapolis Community Development Agency,  
 Riverside Plaza Limited Partnership, Capmark Finance, Inc.,  
 The City of Minneapolis, Cedar Cultural Center, Inc., and  
 Associated Bank, National Association,

*Respondents.*

**APPELLANT'S BRIEF AND ADDENDUM**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE ISSUES

I. Did the trial court err by concluding that the Foreclosure Judgment and Decree is not *res judicata* as to Riverside Plaza Limited Partnership's, Minneapolis Community Development Agency's and Capmark Finance, Inc.'s defenses, objections and counterclaims to Crablex, Inc.'s Petition in Proceedings Subsequent?

The trial court declined to give preclusive effect to the Foreclosure Judgment and Decree which declared that the purchaser at foreclosure sale, Crablex, Inc., shall take title to the foreclosure premises, "subject only to prior encumbrances of record." (Order, AA 1 at 20-21).

II. If Riverside Plaza Limited Partnership's, Minneapolis Community Development Agency's and Capmark Finance, Inc.'s defenses, objections and counterclaims to Crablex, Inc.'s Petition in Proceedings Subsequent are not barred by *res judicata*, did the trial court err by concluding that interests in the foreclosure premises which are not "prior encumbrances of record" have priority over the mortgage that was foreclosed?

On cross-motions for summary judgment the trial court declared that Riverside Plaza Limited Partnership's, Minneapolis Community Development Agency's and Capmark Finance, Inc.'s claimed interests, none of which were recorded on the Certificate of Title prior to the mortgage that was foreclosed, remain valid and constitute an encumbrance upon the foreclosure premises, and denied Crablex, Inc.'s Petition for Issuance of a New Certificate of Title After Foreclosure Sale "subject only to prior encumbrances of record." (Order, AA 1 at 21-27).

III. Did the trial court err by concluding that that the mortgage foreclosure sale did not terminate the City of Minneapolis', Cedar Cultural Center's and Associated Bank, National Association's claimed interests in the foreclosure premises, none of which are "prior encumbrances of record" that afford a right to redeem from the foreclosure sale?

On cross-motions for summary judgment, the trial court declared that the foreclosure sale did not terminate the interests of any non-parties to the Foreclosure Action, including the City of Minneapolis, Cedar Cultural Center and Associated Bank, National Association. (Order, AA 1 at 17-19).

#### STATEMENT OF THE CASE

In accord with Minn. Stat. § 508.58 *et. seq.* (a part of the "Torrens Act"), on March 1, 2006, Appellant, Crablex, Inc., filed its Petition In Proceedings Subsequent to Initial Registration of Land before the Examiner of Titles, Hennepin County, to obtain a new Certificate of Title in its name free and clear of all interests memorialized on Certificate of Title No. 1091583 which are junior to Mortgage Document No. 1017570 that was foreclosed by action in Hennepin County District Court File No. 95-18455. Respondents, City of Minneapolis, Minneapolis Community Development Agency, Riverside Plaza Limited Partnership, Capmark Finance, Inc., Cedar Cultural Center, Inc. and Associated Bank, National Association objected to the Petition, alleging that certain admittedly "junior" interests in their favor survived the foreclosure and sale.

Because the Petition was "contested," the action was transferred to the Fourth Judicial District Court, Hennepin County, the Honorable Denise D. Reilly presiding. In its October 29, 2007, Order, the trial court denied Crablex's motion for summary

judgment in its entirety, and granted summary judgment in favor of the Respondents, ruling that their claimed easements are “valid, in full force and effect, and constitute an encumbrance on the property.” The trial court further ruled that an alleged 2000 “settlement agreement” between Crablex, Inc., on the one hand, and Respondents Minneapolis Community Development Agency and Riverside Plaza Limited Partnership, on the other hand, is “valid, in full force and effect and subject to enforcement by these Respondents.” (Order, AA 1-27).

In a subsequent December 19, 2007 Order, the trial court specifically identified for the Examiner of Titles any and all memorials that shall remain on Certificate of Title No. 1091583 as a result of its summary judgment ruling. The trial court further Ordered Crablex to “execute and deliver the quit claim deeds and all other documents necessary to effectuate the transfer of real property to Riverside Plaza pursuant to paragraph 2.B of the [2000] Settlement Agreement[.]” (Order, AA 28-58). On January 11, 2008, the trial court entered its Order Directing Entry of Judgment. (AA 59). Judgment was entered on January 15, 2008. (AA 59).

### **STATEMENT OF THE FACTS**

#### **A. THE MORTGAGED PROPERTY, THE PARTIES AND THEIR RESPECTIVE INTERESTS.**

On December 9, 1971, Cedar Riverside Land Company (“CRLC”) mortgaged its fee interest in the real property generally comprising a portion of the block bounded by Fourth Street South, Fifteenth Avenue South, Sixth Street South, and Cedar Avenue South in the City of Minneapolis (the “Foreclosure Premises”) to First Trust National

Association (“First Trust”). (Ex. G, AA 367 at 369). On December 13, 1971, the CRLC mortgage was recorded on Certificate of Title No. 1091583 as Doc. No. 1017570 (the “Mortgage”). (Ex. V, AA 527 at 529).

Minneapolis Community Development Agency (“MCDA”) is the fee owner of real property adjacent to the Foreclosure Premises (the “MCDA Property”). (Ex. G, AA 367 at 369). Riverside Plaza Limited Partnership (“Riverside”) owns the buildings located on, and is currently the vendee named in a December 31, 2001, Contract for Deed to purchase the MCDA property. (AA 161; Ex. G, AA 367 at 369).

MCDA and Riverside both claim the benefit of certain easements over the Foreclosure Premises created by three documents, respectively memorialized on Certificate of Title No. 1091583 as: February 23, 1972, “Easement Agreement,” Doc. No. 1023440; February 23, 1972, “Amendment to Easement Agreement,” Doc. No. 1023441; and July 3, 1974, “Agreement for Relocation of Easements,” Doc. No. 1112776. (Order, AA 1 at 7-8; Ex. 7, AA 612; Ex. 8, AA 628 and Ex. 9, AA 653).<sup>1</sup>

The MCDA and Riverside easements created by the referenced agreements were more particularly identified by the trial court as the: (i) “Exterior Maintenance Easement,” including easements for encroachments and access and repair of exterior walls; (ii) “Tank and Tower Easement,” for construction, maintenance, operation, repair and replacement of three buried oil fuel tanks, a pump house and three cooling towers;

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<sup>1</sup> Capmark Finance, Inc. holds a mortgage on Riverside’s interest in the MCDA property. (Ex. BB, Capmark Answer, not reproduced in Appendix). Because Capmark’s interests are identical to Riverside’s and MCDA’s, all references to MCDA and Riverside shall include Capmark. Capmark is the successor mortgagee to Chemical/Mellon, who were parties to the Foreclosure Action. (Order, AA 1 at 3, n.1; Ex. D, AA 351).

(iii) “McKnight Driveway Easement,” for driveway and access purposes; (iv) “Gas Line Easement”; and (v) “E-Building Parking and Utility Easement,” for driveway and various utility easements (including, without limitation, sewer, water, and electrical). (Order, AA 1 at 8) (the “Riverside Easements”). The Exterior Maintenance Agreement and E-Building Parking and Utility Easements were created by the Easement Agreement, as amended by the Amendment to Easement Agreement; the Gas Line Easement was created by the Amendment to Easement Agreement; and the McKnight Driveway Easement and Tank and Tower Easements were created in their present locations by the Agreement for Relocation of Easements. (*Id.*; Ex. 7, AA 614; Ex. 8, AA 628; and Ex. 9, AA 653).

The City of Minneapolis (“City”) claims the following interests in the Foreclosure Premises, as memorialized on Certificate of Title No. 1091583: November 8, 1973, street easement, Doc. No. 1091325; January 2, 1974, sidewalk easement, Doc. No. 1095591; January 18, 1974, sidewalk easement, Doc. No. 1097179; and April 24, 1974, pedestrian bridge easement, Doc. No. 1105085. (Order, AA 1 at 8-9; Mikhail Aff., AA 786).

Cedar Cultural Center (“Cedar Center”) claims driveway easements over the Foreclosure Premises created by a February 16, 1989, Quit Claim Deed, memorialized on Certificate of Title No. 1091583 as Doc. No. 1995063. (Order, AA 1 at 9-10; Ex. V, AA 527; Simonds Aff. Ex. 3, AA 824). Associated Bank, National Association, holds a mortgagee interest in Cedar Center’s property. (AA 264-265).<sup>2</sup>

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<sup>2</sup> Because the interests claimed are identical, all references to Cedar Center shall include its mortgagee, Associated Bank, National Association. (Order, AA 1 at 5, n.2 and 3).

On July 26, 1994, First Trust assigned its mortgagee's interest to Crablex, Inc. ("Crablex"). (Ex. 20, AA 725). The assignment was recorded on Certificate of Title No. 1091583 as Document No. 2535559. (Ex A, AA 324; Ex. V, AA 527).

**B. THE UNDERLYING FORECLOSURE AND TRESPASS ACTIONS.**

On November 20, 1995, Crablex filed an action to foreclose the Mortgage. (Ex. A, AA 324). The Complaint specifically prayed for the "usual decree of foreclosure," and that the purchaser at foreclosure sale ". . . be decreed to be the absolute owner of the Foreclosure Premises purchased at said sale, *subject only to prior encumbrances of record, if any.*" (the "Foreclosure Action"). (*Id.* at AA 329) (emphasis added).<sup>3</sup> In addition to seeking "the usual decree of foreclosure," Crablex also sought in the Foreclosure Action a specific declaration that three driveway easements created by the Easement Agreement and Amendment to Easement Agreement had earlier been contractually terminated by the Agreement for Relocation of Easements (the "Disputed Easements"). (Ex. A, AA 324; Ex. B, AA 332).

The named defendants, CRLC, MCDA, Riverside and Riverside's then mortgagee all appeared and answered. (AA 332, 343, 351 and 363).<sup>4</sup> MCDA and Riverside did not contest Crablex's right to foreclose, but did claim the Disputed Easements had not been terminated. (AA 343).

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<sup>3</sup> On February 5, 1996, Crablex filed an Amended Complaint in the Foreclosure Action which included an identical claim for relief. (Ex. B, AA 332).

<sup>4</sup> Riverside's mortgagee in 1995 was Government National Mortgage Association, succeeded by Chemical Mortgage Company, succeeded by Mellon Mortgage Company, succeeded by Capmark Finance, Inc. (AA 126, 332, 367 and 477).

In 1996 Crablex filed a separate Complaint against MCDA and Riverside, which included five separate claims seeking monetary damages for trespass (the "Trespass Action"). (Ex. OO, AA 940).

On March 27, 1997, Judge Danielson granted summary judgment on the Foreclosure Action claims in favor of Crablex. (Ex. G, AA 367). On appeal, the declaratory judgment as to contractual termination of the Disputed Easements was reversed and remanded for resolution of a factual dispute. *Crablex, Inc. v. Cedar-Riverside Land Co., et al*, No. C9-97-765, 1997 WL 729210 (Minn. App., Nov. 25, 1997) (noting at \*2 that, "In the foreclosure action the district court ordered the foreclosure on the CRLC mortgage, which was not appealed.").

Following remand, on January 26, 1998, an Order was entered consolidating what was left of the Foreclosure Action with the Trespass Action. The consolidated cases were then assigned to Judge Oleisky who, on April 15, 1999, again granted summary judgment in favor of Crablex, including declarations that the Disputed Easements had been terminated by contract and that MCDA and Riverside were liable for trespass. (Ex. H, AA 386; Ex. I, AA 421). The only issue remaining as to MCDA and Riverside in the Foreclosure Action at that point was the priority of the Mortgage relative to the Riverside Easements. (*Id.*). The only issue remaining in the Trespass Action was the amount of damages. (*Id.*).

In February 2000, on the eve of the trespass damages trial, the attorneys for MCDA and Riverside drafted a proposed settlement agreement by which Crablex would agree to drop three specific damages claims from the Trespass Action, Counts I, II and V

of the 1996 Complaint, in return for (i) Riverside's payment of the sum of \$96,000 to Crablex, and (ii) CRLC's agreement to convey certain easement areas to Riverside. (Ex. J, AA 423; Ex. 15, AA 687).<sup>5</sup> The proposed agreement contemplated acceptance and approval by CRLC -- a material party because it was then fee owner of the Foreclosure Premises with a right of redemption following any foreclosure sale -- and included signature blocks both for a CRLC representative and for its attorney, Daniel N. Rosen. (Ex. 15, AA 687).

On the second day of the trespass damages trial, Judge Oleisky was specifically advised that "the settlement with Riverside Plaza takes care of Counts One, 2 and 5 of the [Trespass] Complaint," and that the parties would "enter some formal document" for the record. (Ex. KK, AA 930-935). On the following day of trial the attorneys told Judge Oleisky that:

*"Settlement documentation has been prepared, it's been executed by some of the parties . . . we need one signature on behalf of the attorney for Cedar-Riverside Land Company to complete the settlement."*

(Ex. JJ, AA 928-929) (emphasis added).

CRLC attorney Rosen was not aware of the proposed settlement because he was, at the time, on vacation in Florida. (Ex. II, AA 924 at Tr. p. 49-52; AA 926 at Tr. p. 42-43). In his absence, and without his knowledge or consent, MCDA's and Riverside's counsel presented their proposed agreement directly to Victoria Heller, and she signed in

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<sup>5</sup> Crablex initially applied the \$96,000 toward payment of its attorney's fees, but when it looked as though no settlement would be finalized, the funds were returned to Henson & Efron, P.A.'s trust account, where they remain to this day. (Ex. 19, AA 715).

her capacity as a representative of CRLC. (Ex. II, AA 926, Tr. p. 41-42; Gunn Aff., AA 736 at 736-37).

When Rosen returned from his vacation and learned of the proposed settlement agreement he immediately advised opposing counsel, in writing, that he objected to it and would not sign it unless ambiguous language was changed. (Ex. II, AA 926, Tr. p. 42-44; Ex. LL, AA 936). Riverside's counsel responded that Rosen's signature was not necessary because "clients may settle their own cases, with or without their attorney's permission." (Ex. MM, AA 937; Gunn Aff. Ex. 30, AA 741). Rosen did not sign the proposed agreement for CRLC then, or at any time. (Ex. II, AA 926, Tr. p. 41-42).

A year later, and still with no resolution of Rosen's refusal to sign the proposed agreement, on February 15, 2001, Judge Oleisky entered his Order and Memorandum as to the trespass damages trial, awarding Crablex substantial damages on the two trespass claims that were tried. (Ex. J, AA 423). The Order and Memorandum, at page one, made a passing reference to "other claims" that had been settled, but did not make any findings or conclusions with respect to the proposed and partially-executed settlement agreement, and did not rule on its existence, terms or enforceability. (*Id.*, AA 423-446).

Another year later, on January 25, 2002, Judge Oleisky granted Crablex's motion in the Foreclosure Action for attorneys' fees under Minn. R. Civ. P. 11 and Minn. Stat. §549.21, based on his finding that MCDA and Riverside had, for 13 years:

"[C]lung to unfounded positions solely to delay the ordinary course of the proceedings [and] . . . proceeded to make claims and defenses they knew they could not support."

(Ex. K, AA 447 at 448, 460).

On May 15, 2002, Bradley Gunn, Riverside's attorney, sent Crablex attorney Stanley Efron a proposed deed that required approval by the Hennepin County Examiner of Titles for conveyance of property referenced in the proposed settlement agreement. (AA 748). Efron did not agree with the proposed legal description for the property to be conveyed (AA 751), and there is no indication that CRLC attorney Rosen was copied on the communication from Gunn. (AA 748-49).

On August 23, 2002, a final monetary judgment was entered in favor of Crablex and against MCDA and Riverside in the amount of \$725,200.75, which included an attorney's fee award of \$433,362.50. (Ex. K, AA 447; Ex. M, AA 475-476). After the entry of judgment, on September 25, 2002, Robert Devolve, Gunn's associate, unilaterally submitted a proposed deed for conveyance of the property referenced in the proposed settlement agreement to the Examiner of Titles, but did not send a copy of his transmittal letter to Efron or to Rosen. (AA 753).

In June 2003, the monetary judgment in favor of Crablex, including the trespass damages and fee awards, was affirmed on appeal. (Ex. N, AA 477, *Crablex, Inc. v Cedar-Riverside Land Co, et al*, No. C2-02-1854, 2003 WL 21448807 (Minn. App., June 24, 2003); Ex. O, AA 504, *rev. denied* September 16, 2003). On September 30, 2003, the Examiner of Titles reaffirmed to Riverside's counsel that no deed for conveyance of the property referenced in the proposed settlement agreement could be recorded without a Registered Land Survey ("RLS"). (AA 739, 753). There was a cost involved in preparing an RLS, however, and Riverside was reluctant to pay it. (AA 739). After

September 30, 2003, neither MCDA nor Riverside took any action with respect to conveyance of the easement areas for the next three years. (AA 740).

On February 14, 2005, Judge Oleisky entered his Order for Judgment and Judgment and Decree of Foreclosure. (Ex. P, AA 505). Consistent with the relief originally prayed for in the Foreclosure Complaint, the decree adjudicated the one issue remaining as to MCDA and Riverside, specifically providing that, if redemption is not made during the six months, “[T]he purchaser at such sale shall be deemed to be the absolute owner of the Foreclosure Premises, *subject only to prior encumbrances of record, if any.*” (*Id.* at AA 506, 510) (emphasis added).

Paragraph 16 of the foreclosure judgment, as originally entered on February 17, 2005, provided that “MCDA, Riverside Plaza and Chemical/Mellon have previously been adjudicated to have no interest in the Foreclosure Premises, and said defendants therefore have no standing to demand notice or object to entry of this Order for Judgment and Judgment and Decree of Foreclosure.” (AA 510). MCDA and Riverside counsel objected to that paragraph on the ground that a foreclosure judgment will not only do away with the Disputed Easements, but “will also extinguish . . . other easements of record,” including “a number of other recorded driveway, utility, encroachment, and other easements in favor of the defendants over the Foreclosure Premises[.]” (Ex. PP, AA 949). In support of their objections MCDA and Riverside did not claim the settlement agreement Rosen had refused to sign in any way protected or preserved the “other easements” they were concerned with losing, nor did they mention any alleged agreement

which obligated CRLC to convey part of the Foreclosure Premises. (Ex. QQ, AA 951; Ex. RR, AA 953).

In response to the stated objections, Crablex took the position that, “if the easement interests were of record prior to the mortgage, they will be unaffected by the foreclosure . . . . easements . . . not of record prior to the mortgage will not survive the foreclosure.” (Ex. SS, AA 955) (emphasis added). Faced with this reality, and with time to appeal from the foreclosure decree quickly running out, on April 14, 2005, MCDA and Riverside filed a formal Motion with Judge Oleisky asking for:

**“an Order Vacating, Modifying and Re-Entering the Order for Judgment and Judgment and Decree of Foreclosure . . . on the basis that the Order . . . fails to recognize other recorded easements held by the Defendants on the Foreclosure Premises, which interests remain viable. Any sale of the Foreclosure Premises is subject to Defendant’s extant interests and the Order should be modified to reflect the same.”**

(Ex. TT, AA 959) (emphasis added).

Again, however, neither their motion, nor their supporting affidavits and arguments anywhere mentioned that there had been a settlement or any other agreement on the subject. (*Id.*). Furthermore, the MCDA and Riverside Motion referred only to “recorded easements” they sought to protect, with no mention of any alleged right to acquire any part of the mortgaged premises. (*Id.*).

With their Motion to Vacate the foreclosure decree on record, MCDA and Riverside counsel asked Crablex for the second time to agree that the foreclosure sale would be “subject to” “other interests” of record, and not just “prior encumbrances of record.” (Ex. UU, AA 968 at 969-70). Alternatively, they asked Crablex to agree that

the Foreclosure Judgment could be amended to read that “No determination has been made herein regarding the relative priority of Plaintiff’s Mortgage and any outstanding interests of Defendants MCDA, Riverside Plaza and Chemical/Mellon in the Foreclosure Premises.” (*Id.* at 971-73). Crablex rejected both proposals. (*Id.* at 974-78). Here again, MCDA and Riverside did not make any claim that any of the relief they were asking for was the subject of a settlement or any other agreement, including any agreement that granted to them a right to acquire any portion of the Foreclosure Premises. (*Id.*)

Prior to the scheduled hearing on their Motion to Vacate, MCDA and Riverside agreed to alternative language proposed by Crablex (AA 991), and the parties to the Foreclosure Action stipulated to an amendment of the original judgment and decree, as follows:

“MCDA, Riverside Plaza and Chemical/Mellon shall be entitled to notice of, and the right to object to, further proceedings herein, including entry of the Order Confirming Sale, and shall be entitled, to the extent permitted by governing law and procedure, to request the court to adjudicate any issues or claims which have not been finally determined in this action.”

(Ex. Q, AA 511).

The Court accepted the Stipulation on April 15, 2005, and entered its Order correcting the Judgment and Decree of Foreclosure, effective *nunc pro tunc* to February 17, 2005 (the “Foreclosure Judgment and Decree”). (Ex. VV, AA 992; Ex. Q, AA 511). The corrected judgment omitted the original paragraph 16, but still read that “the purchaser at such sale shall be deemed to be the absolute owner of the Foreclosure Premises *subject only to prior encumbrances of record*, if any.” (*Id.*) (emphasis added).

On April 20, 2005, the Foreclosure Premises were sold at public auction. (Ex. R, AA 515). Crablex was the successful purchaser, having bid the amount of its judgment against CRLC, \$89,678,677.00. (*Id.* at 518). MCDA and Riverside did not appear at, or object to the sale. (Ex. S, AA 520).

On May 16, 2005, Judge Oleisky entered his Order Confirming Sale (Ex. S, AA 520), and on May 19, 2005, the Hennepin County Sheriff filed his Certificate of Sale, recorded on Certificate of Title No. 1091583 as Document No. 4116020. (Ex. T, AA 522). The six month redemption period expired, without redemption, on November 17, 2005. (AA 228-239).

**C. PROCEEDINGS SUBSEQUENT TO INITIAL REGISTRATION OF LAND.**

On March 1, 2006, Crablex filed its Petition In Proceedings Subsequent asking that it be issued a new title free and clear of memorials on CRLC Certificate of Title No. 1091583 that are junior to the Mortgage that was foreclosed, i.e., that title be “*subject only to prior encumbrances of record.*” (Ex. U, AA 60) (emphasis added).

Riverside and MCDA (appearing through their newly-hired counsel, Lindquist & Vennum, who replaced Kennedy & Graven and Leonard Street & Deinard) responded to the Petition by alleging, for the first time and contrary to the Stipulated Foreclosure Judgment and Decree, that the 2000 settlement agreement made the Mortgage “subject to” their claimed easements. They also alleged that the foreclosure did not eliminate their junior easements because the Mortgage includes a consent, as does a December 23, 1988, Consent to Easements executed by First Trust. (Ex. AA, AA 126 at 127-28).

Additionally, they claimed that Crablex is not a good faith purchaser for value and is therefore not entitled to the benefits and protections of the Torrens Act. (*Id.* at 128).

The City (through Kennedy & Graven, who represented MCDA and Riverside in the Foreclosure Action) responded by alleging that the foreclosure did not eliminate junior easements recorded in the Registrar's office as Document Nos. 1105085 (pedestrian bridge), 1097179 (sidewalk), 1095591 (sidewalk) and 1091325 (street easement), because the City was not made party to the Foreclosure Action. (Ex. Z, AA 122 at 123).

Cedar Center responded by alleging that First Trust's consent to the easement granted in a 1989 quit claim deed, Document No. 1995063, was not a requirement of the Mortgage and, if it was, there was a "constructive consent." (Ex. DD, AA 262). Cedar Center's amended response added the additional defenses of waiver and estoppel, and claimed that Cedar Center is not bound by the Foreclosure Action because it was not a party. (Cedar Amended Answer, not reproduced in Appendix).

On September 21, 2006, Crablex requested that the case be assigned to Judge Oleisky, because he authored the opinions that would be at issue and because he is most familiar with the Foreclosure Action's 10-year history. (AA 240-243). MCDA and Riverside, through their new counsel, Lindquist & Vennum, opposed the request. (AA 244-246).

### **SUMMARY OF ARGUMENT**

In these Proceedings Subsequent Crablex is asking that a new Certificate of Title for the Foreclosure Premises be issued in its name, subject only to "prior encumbrances

of record,” as is its adjudicated right. The trial court refused to give preclusive effect to the prior Foreclosure Judgment and Decree, as it should have, with the result that we now have two contrary judgments: the first which says that Crablex shall take title to the Foreclosure Premises “*subject only to prior encumbrances of record*”; and a second which says that Crablex shall take title to the Foreclosure Premises “subject to” the Riverside Easements and an asserted right to acquire a part of the Foreclosure Premises -- none of which are “prior encumbrances of record.”

Because the Foreclosure Judgment and Decree and Order Confirming Sale are both final and non-appealable, MCDA and Riverside cannot, under principles of *res judicata*, argue now that Crablex must take title to the Foreclosure Premises “subject to” their junior interests. They have had their day in court and, by their own stipulation (albeit by prior counsel), lost that claim. Additionally, even if they were not bound by the prior judgment as to all claims that were or could have been litigated, MCDA and Riverside have still not identified any facts of record, or any valid legal theory by which the Mortgage and Crablex’s title could be subordinated to their junior interests.

The City and Cedar Center claim easement interests in the foreclosure premises that never afforded them right of redemption from the foreclosure sale. Because they had no right of redemption, it was not necessary to join the City and Cedar Center in the Foreclosure Action, and they are entitled in these proceedings only to a judicial determination of whether their claimed easements are “prior encumbrances of record.” They have admitted, however, and the Certificate of Title conclusively establishes that their claimed interests were all recorded subsequent to the Mortgage. Because the City’s

and Cedar Center's interests are not "prior encumbrances of record," and because they had no right of redemption, their interests were terminated by the foreclosure sale.

### STANDARD OF REVIEW

When reviewing a summary judgment ruling, the appeals court examines the record to determine if genuine issues of material fact remain for trial and if the district court properly applied the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The evidence is considered in the light most favorable to the responding party, and any factual doubts are resolved in its favor. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001). The appeals court need not defer to the trial court's application of the law. *Reads Landing Campers Ass'n, Inc. v. Township of Pepin*, 546 N.W.2d 10, 13 (Minn. 1996). The application of *res judicata* is a question of law, which the Court of Appeals reviews *de novo*. *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 715 N.W.2d 484 (Minn. App. 2006), *review granted, aff'd on other grounds*, 732 N.W.2d 209. Contract interpretation, including a determination of whether a contract is ambiguous, is a question of law reviewed *de novo*. *Employers Mut. Cas. Co. v. A.C.C.T., Inc.*, 580 N.W.2d 490, 493 (Minn. 1998).

### ARGUMENT

#### I. **RES JUDICATA BARS MCDA'S AND RIVERSIDE'S CLAIMS AND DEFENSES.**

##### A. **CONTROLLING LAW.**

*Res judicata* exists "in order to relieve parties of the burden of relitigating issues already determined in a prior action, that a party may not be 'twice vexed for the same

cause.” *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 531 (Minn. 1988) (citation omitted). The doctrine “reflects courts’ disfavor with multiple lawsuits for the same cause of action and wasteful litigation.” *Wilson v. Comm’r of Revenue*, 619 N.W.2d 194, 198 (Minn. 2000).

Sometimes referred to as merger or bar, or estoppel by judgment, *res judicata* bars a party from raising “claims” that were actually litigated or could have been litigated in an earlier proceeding. *Id.* Subsequent claims are barred when the earlier action involved the same parties or their privies and the same claim for relief, and resulted in a final judgment on the merits where the estopped party had a full and fair opportunity to litigate the claim. *State v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001). “[I]t is immaterial whether a judgment on the merits . . . was right or wrong.” *Id.* at 329, n.4.<sup>6</sup>

**B. THE RECORD ESTABLISHES EVERY ELEMENT NECESSARY FOR THE APPLICATION OF *RES JUDICATA*.**

The record in this case establishes all of the elements necessary for *res judicata* to bar MCDA’s and Riverside’s defenses and counterclaims: (i) Crablex, MCDA and Riverside were all parties to the Foreclosure Action, and all are parties to these Proceedings Subsequent; (ii) both actions involve the same claim for relief, i.e., a judgment that the title Crablex acquired through foreclosure is subject only to encumbrances that were “of record” on the Certificate of Title before the Mortgage; (iii) the Foreclosure Action was resolved by a stipulated final judgment on the merits that said

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<sup>6</sup> The doctrine of *res judicata* encompasses both claim preclusion and issue preclusion (also known as collateral estoppel). *In re Estate of Handy*, 672 N.W.2d 214, 226 (Minn. App. 2004), *rev. denied*.

Crablex shall take its title “*subject only to prior encumbrances of record*”; and (iv) during the 10 years the Foreclosure Action was pending, MCDA and Riverside unquestionably had a full and fair opportunity to litigate any claims or defenses they had, or thought they may have by which their junior interests should be given priority over the Mortgage.

**C. ALL OF MCDA’S AND RIVERSIDE’S DEFENSES AND CLAIMS WERE OR COULD HAVE BEEN LITIGATED IN THE FORECLOSURE ACTION.**

The Mortgage was filed of record on the Certificate of Title before any of MCDA’s and Riverside’s claimed interests, and they stipulated to entry of the Foreclosure Judgment and Decree which says that the Mortgage has priority over all but “prior encumbrances of record.”<sup>7</sup> In *Bank of New London v. Western Cas. & Sur. Co.*, 178 N.W. 2d 614 (Minn. 1970), the Minnesota Supreme Court said that a judgment entered by agreement of the parties has the same effect as if it had been entered after a full hearing. Therefore, Judge Oleisky’s determination that the Mortgage has priority over all encumbrances other than “*prior encumbrances of record*” is to be treated no differently than if it had been entered following a full hearing. That means, of course, that any claims as to the priority of the MCDA and Riverside encumbrances, none of which are “*prior encumbrances of record*,” must be treated as if they were actually litigated and decided adversely to MCDA and Riverside.

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<sup>7</sup> Both easements upon, and agreements to acquire land are encumbrances on title. *Minnesota Athletic Club v. Cohler*, 177 N.W. 2d 786, 789 (Minn. 1970) (an easement is an interest in land); *Glaser v. Minnesota Federal Sav. & Loan*, 369 N.W. 2d 763, 765 (Minn. App. 1986) (an agreement to acquire land makes the buyer the equitable owner of the land).

In these Proceedings Subsequent MCDA and Riverside are specifically claiming that their encumbrances have priority over the 1971 CRLC Mortgage because: (i) Crablex knew about the encumbrances when it acquired the Mortgage by assignment in 1994; (ii) the Mortgage was made “subject to” the them; (iii) First Trust, the original mortgagee, “consented” to them; (iv) a settlement agreement subordinated the Mortgage to them and granted a right to conveyance of certain easement areas; and (v) Crablex, the Mortgagee by assignment, and CRLC, the original mortgagor, were under common control. Because all of these claims seek to give priority to encumbrances that were not, under the Judgment and Decree of Foreclosure “*prior encumbrances of record,*” they are all claims that were, or could have been litigated in the Foreclosure Action, and they are barred.

That all of MCDA’s and Riverside’s claims “could have been litigated” is demonstrated by a simple point. In the Foreclosure Action Crablex sought and obtained a judgment that the purchaser at foreclosure sale shall take title free and clear of all encumbrances, other than “*prior encumbrances of record.*” In these Proceedings Subsequent, Crablex, as the purchaser at foreclosure sale, is asking only that title be issued in its name consistent with the prior decree. Because Crablex is seeking the identical relief in both actions, by logic and definition any claim or counterclaim litigated in these Proceedings Subsequent is one that “could have been litigated” in the Foreclosure Action. Because all other elements necessary for the application of *res judicata* are present, the trial court erred in granting summary judgment to MCDA and Riverside, and in denying Crablex’ summary judgment motion.

**D. NO ISSUES WERE WITHDRAWN FROM THE JUDGMENT IN THE FORECLOSURE ACTION BY THE ALLEGED SETTLEMENT AGREEMENT.**

MCDA and Riverside seek to avoid the effect of *res judicata* by arguing that there is a valid settlement agreement, entered into five years before the Foreclosure Judgment and Decree, which effectively withdrew the issue of the Mortgage's priority over their encumbrances from the Foreclosure Action. As discussed below, the claimed settlement agreement was never in effect; but even if it had been the argument fails for three reasons. First, if there was a valid settlement agreement that excepted MCDA's and Riverside's encumbrances from the effect of the foreclosure judgment and sale, they were required to advise the trial court of its terms before judgment was entered. Second, the doctrine of withdrawal of issues does not apply where, as here, the trial court did determine the issues that were allegedly withdrawn. And, third, even if it could be offered as a defense in this action, the claimed settlement agreement does not subordinate the Mortgage to MCDA's and Riverside's interests.<sup>8</sup>

The very case on which MCDA and Riverside rely in support of their withdrawal of claims argument, *Smith v. Smith*, 51 N.W. 2d 276 (Minn. 1952), teaches that issues or claims can be withdrawn from a judgment's scope for purposes of *res judicata* only if the agreement to withdraw them is presented to and approved by the trial court, and the judgment entered does not address the withdrawn issues but does decide others. *Id.* at 279-280 (“[W]here a particular matter is withdrawn from consideration of the court . . .

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<sup>8</sup> The following section of this brief addresses the validity of the claimed agreement.

by stipulation of the parties . . . a judgment entered on other issues will not act as a bar on the issues so withdrawn.”).

None of *Smith's* requirements are satisfied here. On the one hand, Judge Oleisky was never advised of the terms of any claimed settlement, including contractual language that, according to MCDA and Riverside, completely eviscerates the Foreclosure Judgment and Decree he was entering with their consent. On the other hand, in ordering that title acquired through an unredeemed foreclosure sale would be free of all encumbrances other than “prior encumbrances of record,” Judge Oleisky did in fact adjudicate the priority issues that were allegedly withdrawn from his consideration; and we can plainly see from looking at the parties’ positions on priority that Judge Oleisky did not adjudicate any “other issues.”

To expand on the last point, MCDA and Riverside take the position in this litigation that a claimed settlement agreement entered into in connection with the Trespass Action in 2000 was intended to give all of their encumbrances priority over the Mortgage; but five years after the claimed settlement, and without any mention of it, they stipulated to entry of the 2005 Foreclosure Judgment and Decree that says their encumbrances do not have priority. At the time they were stipulating to the Foreclosure Judgment, there were no “other issues” that could be decided as to MCDA and Riverside; both Crablex’s right to foreclose and the issue of whether the Disputed Easements had been terminated by contract had earlier been decided by the 1999 summary judgment. Consequently, the only reason MCDA and Riverside remained as defendants in the Foreclosure Action from 2000 to 2005 was to determine the Mortgage’s priority over

their encumbrances -- which the Foreclosure Judgment and Decree did. That claim could not have been, and was not “withdrawn” from the Judgment’s scope.

The trial court similarly erred in concluding that *res judicata* does not bar MCDA and Riverside from relying on the claimed settlement agreement in these Proceedings Subsequent because the stipulated Foreclosure Judgment and Decree says that MCDA and Riverside “shall be entitled to notice of, and the right to object to, further proceedings herein . . . and shall be entitled, to the extent permitted by governing law and procedure, to request the Court to adjudicate any issues or claims which have not been finally determined in this action.”

To begin, MCDA and Riverside were given a right only “to notice of, and the right to object to, further proceedings” in the Foreclosure Action; not a right to notice of or to object to claims in another action. MCDA and Riverside did not, however, raise any further claims in the Foreclosure Action, nor did they even bother to appear at the hearing on the order to confirm the foreclosure sale. Similarly, MCDA and Riverside were allowed only to request adjudication of claims and issues in the Foreclosure Action that “had not been finally determined”; but as explained above the Foreclosure Judgment and Decree did “finally determine” that the purchaser from an unredeemed foreclosure sale would take title free of all encumbrances other than “prior encumbrances of record.” And, finally, MCDA and Riverside were granted leave to request adjudication of additional issues or claims in the Foreclosure Action only to the extent “permitted by

governing law and procedure.” Of course, “governing law and procedure” includes doctrines related to the finality of judgments, like *res judicata*.<sup>9</sup>

Whether raised as an affirmative defense or not, however, MCDA’s and Riverside’s withdrawal of issues position still suffers from an even more basic defect. MCDA’s and Riverside’s theory erroneously assumes that the release language in the claimed settlement agreement operates to subordinate the Mortgage to their encumbrances. It does not, as evidenced by the simple fact that MCDA and Riverside remained as defendants in the Foreclosure Action for five years after they claim the settlement agreement gave them the priority determination they wanted.

MCDA and Riverside rely in particular on an out-of-context excerpt from the claimed settlement agreement that says, “the parties agree, and release any claim, actions, or causes of action to the contrary, that any easements that are or have been filed or recorded with respect to the Foreclosure Premises . . . and which benefit or were intended to benefit . . . the Riverside complex are valid and enforceable and will remain valid and enforceable after . . . foreclosure.” (Ex. 15, AA 687 at 691). The quoted excerpt, they claim, subordinates the CRLC Mortgage to their encumbrances and thus protects them from the reach of the Foreclosure Judgment; regardless that the judgment’s terms are to the contrary (i.e., purchaser at foreclosure sale shall take title “*subject only to prior*

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<sup>9</sup> The trial court put great store in the fact that Crablex “did not ever argue that the settlement agreement was not valid and enforceable.” (Order, AA 1 at 13-14, 24, n. 12). That, however, puts the monkey on the wrong back, for under the “could have been litigated standard,” MCDA and Riverside were required to raise the settlement agreement as an objection and defense to the Foreclosure Judgment that terminated their claimed interests.

*encumbrances of record*”), and despite the fact that they didn’t say one word about this novel theory to Judge Oleisky even as they were consenting to the Foreclosure Judgment which, by its terms, determined the very issue they claim to have been withdrawn.

If the alleged settlement agreement subordinated the Mortgage to all of MCDA’s and Riverside’s encumbrances and settled all claims as to them, as they claim, why did they stay in the Foreclosure Action for five more years after the Disputed Easements issue had been determined, and at considerable cost, only to comment on and object to the order for judgment without even mentioning the claimed settlement agreement? Why did they not instead obtain a recordable subordination agreement and ask to be dismissed from the Foreclosure Action, using the settlement agreement as a free pass? Why did they not even ask for a subordination agreement in recordable form, since they surely knew that the claimed settlement agreement, which lacks both notarization and legal description for the property to be conveyed, did not suffice?

The obvious answer is that the claimed agreement was intended to settle claims in the Trespass Action, not to subordinate the Mortgage to the Riverside Easements. Confirming the correctness of this conclusion, the paragraph from which the excerpted release language relied upon by MCDA and Riverside was taken is titled “Mutual Release and Covenant Not to Sue,” not “Subordination of Mortgage.” Consistent with the stated purpose for the release, Section 3B of the claimed settlement agreement says that Crablex may continue to maintain and prosecute its existing claims in the Trespass Action and Foreclosure Action (together defined as the “Litigation”) except for the

identified monetary claims. The quoted language, although inartful, is in context clearly intended to release only monetary claims for trespass damages.<sup>10</sup>

The bottom line, however, is that regardless of purpose, intent or interpretation, any claims or issues related to the validity and meaning of the agreement itself “could have” and should have been litigated before Judge Oleisky in the Foreclosure Action. The agreement was, at the time, a subject of dispute, in that Rosen objected to and refused to sign it, and MCDA and Riverside, at best, exhibited indifference toward it. Because they failed to claim in the Foreclosure Action that a settlement agreement either withdrew claims from, or granted rights contrary to those adjudicated by the Foreclosure Judgment and Decree, MCDA and Riverside are barred by *res judicata* from so claiming in these Proceedings Subsequent.

**II. EVEN IF MCDA’S AND RIVERSIDE’S CLAIMS WERE NOT BARRED BY *RES JUDICATA*, THEY FAIL AS A MATTER OF LAW.**

**A. THE ALLEGED SETTLEMENT AGREEMENT IS NOT VALID.**

**1. The Proposed Agreement Was Rejected and Never Took Effect.**

MCDA and Riverside drafted a proposed settlement agreement for signature by Dan Rosen, CRLC’s attorney, and the lawyers told Judge Oleisky in open court that they needed Rosen’s signature to complete a settlement. When he was first presented with the

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<sup>10</sup> Page 2 of the alleged agreement recites that, “The claims settled are all existing or potential claims based upon Exhibits A and B attached hereto.” (Ex. 15, AA 687 at 688). “Exhibit A” is a copy of Counts I, II and V from the Trespass Complaint. (AA 696). “Exhibit B” is a copy of the corresponding counterclaims. (AA 698). Crablex’s right to complete its foreclosure was specifically preserved. (AA 692).

proposed agreement on his return from vacation, however, Rosen objected and refused to sign it.

If “it is the manifest intention of the parties that the contract is not to be effective until signed by all intended parties,” then, “in the absence of any of the signatures so required, the contract, being joint, cannot be enforced against those who do sign.” 17 Am. Jur. 2d, *Contracts*, § 175, p. 188; cf. *Am. Fed’n of State, County and Mun. Employees, Council No. 14 v. City of St. Paul*, 533 N.W.2d 623, 627 (Minn. App. 1995) (“There can be no contract where the parties’ actions indicate an expectation that something remains to be done to establish contractual relations.”); *Asbestos Prods., Inc. v. Healy Mech. Contractors, Inc.*, 306 Minn. 74, 78, 235 N.W.2d 807, 809 (1975) (“[w]hen contracting parties make the reduction of their agreement to writing and its signature by them a condition precedent to its completion, there will be no contract until that is done.”).

The claimed settlement agreement plainly was not intended to be effective until signed by all those for whom signature blocks were provided, including Rosen, and because he did not sign it never took effect. Why draft the agreement for signatures by all of the attorneys for all of the parties unless it was anticipated that each had to sign, as all of the lawyers save Rosen did? And why tell Judge Oleisky that Rosen’s signature was required if it was not? Attorneys are of course critical players when it comes to the language, terms and conditions of an agreement to settle a contested litigation matter, since the parties themselves often don’t understand the issues or their implications.

## **2. The Alleged Agreement is Void as Against Public Policy.**

Signature by the lawyers is also prudent in practice, as it is evidence that the attorneys have observed the Code of Professional Conduct's prohibition on dealing directly with another lawyer's client. Because that prohibition was not observed in this case, the claimed settlement agreement is void as against public policy.

Rule 4.2 of the Minnesota Rules of Professional Conduct provides that, "in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." This rule is designed to assure that a lawyer does not take advantage of an adverse party, and it can only be waived by the adverse party's counsel, not the adverse party. *State v. Miller*, 600 N.W. 2d 457, 463-464 (Minn. 1999).

When the claimed settlement agreement was submitted for signature, it included a signature block for CRLC attorney Dan Rosen, who was then on vacation. In Rosen's absence, and before he had ever seen or even been advised of a proposed settlement agreement, MCDA and Riverside obtained CRLC's signature on the document. As soon as Rosen got back from his vacation, however, he immediately objected in writing to the claimed settlement agreement because, among other things, it was ambiguous, and he refused to sign it. (Ex. II, AA 922 at 926-27, Tr. p. 40-48).

Although the intent of MCDA and Riverside counsel, on the front end, was undoubtedly to give Rosen an opportunity to review and comment on the document (they put the signature line in for him), when on the back end they found his comments not to their liking they determined to take unfair advantage of the situation. Having in hand a

document signed by CRLC, MCDA's and Riverside's attorneys refused to address Rosen's objections, and instead took the position that the agreement was effective without his signature because Minn. R. Prof. Conduct 1.2(a) says that "Consent of the parties, not their attorneys, is all that is required to create an enforceable settlement agreement." (Order, AA 1 at 23-24).

MCDA's and Riverside's position is unsupportable. Rule 1.2(a) applies only to an agreement the parties make between themselves, without lawyers; not to an agreement that a party signs without its attorneys' knowledge or consent at the request of opposing counsel. CRLC could not, consistent with Rule 4.2 and public policy, validly assent to an agreement drafted and presented directly to it by opposing counsel in litigation, unless its attorney subsequently agreed to and ratified the direct communications. Rosen, however, did just the opposite. The proposed settlement agreement therefore, having been procured in violation of Rule 4.2, is void as against public policy. *See, e.g., Barna, Guzy & Steffen Ltd. v. Beens*, 541 N.W.2d 354, 356 (Minn. App. 1995) (concluding that the agreement at issue did not in that case violate the Rules of Professional Conduct, but clearly suggesting that an agreement that did violate the Rules would be void as against public policy); *accord*, 17 Am. Jur. 2d, *Contracts*, § 229, p. 223 ("A contract which violates or contravenes a . . . state . . . regulation is illegal, invalid, unenforceable and void.").

**B. MCDA AND RIVERSIDE ARE NOT ENTITLED TO A DECREE OF SPECIFIC PERFORMANCE.**

The trial court erred by ordering Crablex to convey certain property to Riverside in accord with the terms of the alleged settlement agreement. (Order, AA 28 at 30). The

agreement cannot, by its terms, be specifically enforced and, even if it could, MCDA and Riverside have by their conduct forfeited any claim to equitable relief.

The alleged settlement agreement does not contain a legal description of the easement areas to be conveyed. Generally, a court cannot order specific performance of a contract that remains subject to conditions, such as the need for parties to agree to the material terms of a contract. *Lake Co. v. Molan*, 131 N.W. 2d. 734, 739-740 (Minn. 1964). And, specifically with respect to this action, a trial court cannot order specific performance by means of a decree that does not describe the land to be conveyed. *Brownlee v. Ertzos*, 289 Minn. 83, 92-93, 182 N.W.2d 697, 702-703 (1970) (where terms of contract for sale of real property are left open for future agreement “it is clear that the contract is not specifically enforceable”); *accord*, *Morgan v. United States Fid & Guar. Co.*, 191 So.2d 851, 854 (Miss. 1966) (“in decreeing specific performance, a court of equity must require the specific performance of some certain and specific act . . . and it cannot enter a general decree that in the future the delinquent party shall perform the acts required of him by the contract”); *Schienfeld v. Murray*, 481 S.E.2d 194, 195 (Ga. 1997) (“Because a decree for specific performance operates as a deed . . . , the description in the decree should be as definite as that required for a deed.”). The reason for the *Morgan* and *Schienfeld* rules is obvious, for if an order for specific performance demands performance without being specific, the party subject to the order is at risk of contempt of court without knowing how to avoid the risk.

There is no record evidence that the parties ever agreed upon a legal description for the subject easement areas. On the contrary, Exhibit 33 to the Gunn Affidavit (AA

751) is a letter from Efron stating that the parties have not agreed to a description, and there is no evidence that the deed Gunn submitted to the Examiner of Titles for approval had been approved by Efron. Nor has any party even made a proposed deed approved by or even submitted to Efron a part of the record in this proceeding, by affidavit or otherwise.

Moreover, even if that deed was in the record, it would be of no value at all, for MCDA and Riverside have submitted evidence that the Examiner of Titles will not record any deed for the proposed conveyance unless the legal description is derived from a Registered Land Survey by which a separate tract or tract would be created for the parcels to be conveyed. There is no record evidence that any party had yet obtained the required survey, and certainly no evidence that the parties have agreed that a tract in a Registered Land Survey accurately depicts the parcel to be conveyed.

The trial court's non-specific order for specific performance is also particularly inappropriate in the context of the Torrens Act. Minn. Stat. § 508.47, Subd. 1 states that "no voluntary instrument of conveyance purporting to convey . . . registered land . . . shall take effect as a conveyance, or bind or effect the land, but shall operate only as a contract between the parties . . . . The act of registration shall be the operative act to convey or affect the land." In the absence of a Registered Land Survey making a recordable deed possible, the trial court's order compelling a conveyance could only be obeyed by executing an unrecordable deed which, under Section 508.47, would not operate as a conveyance. As an unrecordable contract between the parties, it would simply duplicate the claimed settlement agreement.

Even if the agreement did contain a legal description for the property to be conveyed, specific enforcement would still not be permitted. In Minnesota, “[w]hen either party to a contract of sale fails or refuses to claim or act under the contract, for such a length of time as to give the impression that he has waived or abandoned the sale or purchase, and more especially when the circumstance justify the belief that his intention was to perform the contract only in case it suited his interest, he will necessarily forfeit all claim to equity.” *Boulevard Plaza Corporation v. Campbell*, 94 N.W. 2d 273, 282-283 (1970).

The record here is replete with evidence that MCDA and Riverside allowed the claimed agreement to lay dormant for over six years (more than four times as long as the delay at issue in *Boulevard Plaza*), and they have only tried to resurrect it now because it conveniently fits into their new lawyers’ litigation strategy. And while MCDA and Riverside have obtained a decree requiring Crablex to perform the alleged settlement agreement, it does not require them to perform or to obtain a Registered Land Survey -- meaning that, even now, more than eight years after the fact, MCDA and Riverside can still leave their options open as it may suit their interest.

The most compelling evidence that MCDA and Riverside recognized there is no binding settlement agreement, but were just trying to keep their options open, is their conduct in the Foreclosure Action. Although the settlement agreement supposedly became effective in 2000, purportedly granted all of MCDA’s and Riverside’s encumbrances priority over the Mortgage, and allegedly obligated both Crablex and CRLC to convey property on which certain of the easements lay, MCDA and Riverside

never mentioned any of these things when they objected to, and moved to vacate the Foreclosure Judgment and Decree in 2005.

More importantly, however, not only did MCDA and Riverside fail to mention the claimed settlement agreement which granted to them a free pass in the Foreclosure Action, and never once claimed that they have a right to acquire any part of the Foreclosure Premises, they stipulated to a judgment that said the purchaser in an unredeemed foreclosure sale would acquire title free of all encumbrances other than “prior encumbrances of record.” They of course knew at the time that, even though the claimed subordination agreement and agreement to convey property were “encumbrances,” neither is “prior” to the Mortgage or “of record” -- which means that MCDA and Riverside, contrary to everything they claim now, knowingly stipulated their claimed interests out of existence. It is simply inconceivable that MCDA and Riverside would have done so if in fact they believed the claimed settlement agreement, resurrected by their new lawyers solely for purposes of this litigation, was at the time in any respect valid or enforceable.

All of MCDA’s and Riverside’s other conduct from 2000 to 2006 is likewise inconsistent with the existence of or the desire to perform or enforce a valid settlement agreement. According to them, the 2000 settlement agreement called for an immediate conveyance of real property on which certain easements lie. For 15 months after the claimed agreement was made, however, no one even mentioned a deed. Then Riverside took another year to propose the form of a deed, six more months to submit the proposed deed to the Examiner of Titles for approval, and yet another year to obtain the

Examiner's final decision that no deed could be recorded without a Registered Land Survey; but during all of this time MCDA and Riverside never sought to involve the fee holder, CRLC, or its attorney (who objected and refused to sign) in any of the discussions. And after the Title Examiner turned them down, MCDA and Riverside did nothing further until they filed a counterclaim in these Proceedings Subsequent in 2006.

Nor did MCDA and Riverside perform other material obligations under the claimed settlement agreement. George Sherman, who signed the agreement on behalf of Riverside, gives no indication that he executed the required indemnity agreement, or that Riverside has paid the required real estate taxes. (AA 770-772). His excuse for not doing so, that Riverside wasn't given tax statements, is unconvincing, for he gives no indication that he requested statements, which in any event are a matter of public record, and the proposed settlement agreement sets forth the formula by which the Riverside's share is to be determined. (*Id.*).

For all of these reasons, *Boulevard Plaza* does not permit specific performance of the alleged agreement.

**C. THE MORTGAGE WAS NOT MADE "SUBJECT TO" MCDA'S AND RIVERSIDE'S ENCUMBRANCES.**

The trial court read the Mortgage to say that First Trust "took its lien interest 'subject to' certain 'restrictions, exceptions, reservations, limitations, interests and . . . other matters [identified] in Schedule A [attached to the mortgage]' and 'subject to' other Permitted Encumbrances [defined in the mortgage]," which included all of the Riverside Easements. (Order, AA 1 at 6-8; Ex. 5, AA 586). Contrary to the trial court's reading,

however, First Trust did not take its Mortgage “subject to” any of the Riverside Easements.

As a preliminary matter, the Mortgage could not have been made “subject to” any of the Riverside Easements because they were all created, in their present forms and locations, by the Amendment to Easement Agreement and/or Agreement for Relocation of Easements, both of which post-date the Mortgage. (Order at AA 8; Exs. 7, 8 and 9, respectively AA 614, 628 and 653). First Trust, therefore, could not, in the words of the trial court, “[have taken] its lien interest ‘subject to’” easements which did not exist at the time the lien of the Mortgage attached to the Foreclosure Premises.

The trial court also misread, and misapplied the Mortgage’s “Permitted Encumbrances” and “Permitted Exceptions” clauses. Page 11 of the Mortgage defines Permitted Encumbrances to include:

“easements over . . . any property owned by [the mortgagor] granted or reserved for the purpose of pipelines, telephone lines, telegraph lines, power lines, roads, streets, alleys, highways, ditches, canals, railroads and other like purposes, or for the joint or common use of other real property . . . [.]”

(AA 603, exception no. 5). In words not quoted by the trial court, this exception permits the described easements only if they do not adversely affect use of the property. (*Id.*).

Permitted Exception 182 in Schedule A to the Mortgage lists:

“non-exclusive private easements . . . for purposes of driveways, storm sewers, underground electrical transmission lines and underground gas lines for the benefit of adjoining lands as set forth in Document No. 390762.”

(AA 613, no. 182) (emphasis added). Doc. No. 390762 is the original Easement Agreement, which was recorded with the Register of Deeds before the CRLC Mortgage

was recorded, but not recorded with the Registrar of Titles for Torrens purposes until after the Mortgage was recorded. Only easements created by the original Easement Agreement can be Permitted Exceptions.

At the outset it is clear as a matter of law that the quoted boiler plate language of the Permitted Encumbrances provision did not make the Mortgage subject to the Riverside Easements. The boiler plate Permitted Encumbrances refer to easements which, in their nature, are not known to the mortgagee -- if they were known they would have been listed among the 189 exceptions to title attached to the Mortgage. As shown by the cases discussed below, a mortgage on Torrens property is only subject to encumbrances "actually known" to the mortgagee.

Equally important, the Exterior Maintenance Easement, which includes an encroachment easement, is not a Permitted Exception, because neither "maintenance" nor "encroachment" is a permissible use under Permitted Exception 182. In addition, the Exterior Maintenance Easement is an exclusive easement; but only non-exclusive easements can be Permitted Exceptions.

The McKnight Driveway Easement is not a Permitted Exception because it was created in its present location by the Agreement for Relocation of Easements, which was signed after the Mortgage was recorded. The Tank and Tower Easement is not a Permitted Exception because buried fuel tanks and cooling towers are not defined permitted uses and, in any event, would be prohibited exclusive uses. The Gas Line Easement is not a Permitted Exception because it was created by the Amendment to Easement Agreement, which was signed after the Mortgage was recorded.

That leaves only the E-Building Parking and Utility Easement, which is arguably a non-exclusive private easement, created by the Easement Agreement, for a use permitted by exception 182. But even here the Mortgage was not made “subject to” the easement because the Amendment to Easement Agreement created a new, post-Mortgage easement, thereby taking it outside of the Permitted Exceptions.

The trial court also failed to take into consideration that, when the Mortgage was made, abstract Document No. 390762 (the “Easement Agreement”) had never been filed of record on the Certificate of Title -- and was not filed of record until February 23, 1972, two months after the Mortgage. (Order, AA 1 at 7; Ex. 7, AA 614). Because the Easement Agreement was “off record” for Torrens purposes, it was MCDA’s and Riverside’s burden to show that First Trust had “actual knowledge” that it was intended to affect Torrens, as opposed to abstract property at the time the Mortgage was made. *In re Juran*, 178 Minn. 55, 60, 226 N.W. 201, 202 (1929) (burden of proving “actual notice” of an unrecorded interest is on the party asserting it; actual notice requires actual -- not constructive -- knowledge). MCDA and Riverside, however, presented no evidence that First Trust knew the Easement Agreement, then filed only in abstract, affected registered land. Nor is there any basis to conclude First Trust did have knowledge.

The Foreclosure Premises originally included both abstract and Torrens property, making it not only logical, but acceptable for First Trust to conclude that the Easement Agreement, which was not “of record” on the Certificate of Title, did not, and was not intended to affect the Torrens property. As a matter of law, in fact, First Trust was entitled to rely on the Certificate of Title, and was not required to examine “off record”

documents referenced in the hundred plus page Mortgage, and filed only with the Register of Deeds (abstract property) to determine the state of the Torrens Title. *See Kane v. State*, 237 Minn. 261, 55 N.W.2d 333 (1952) (although plat was memorialized on certificate of title, purchaser who did not have actual knowledge of restrictions contained in plat document, but not memorialized on title, took free of them); *Petition of Willmus*, 568 N.W.2d 722 (Minn. App. 1997) (where a certificate of title contained a memorial to a Registered Land Survey which, in turn, created easements that were not memorialized on the certificate, a purchaser who had not read the survey took free of easements created by it).

Accordingly, because all of the Riverside Easements either post-date the Mortgage, do not fit within the definition of Permitted Encumbrances or Permitted Exceptions and/or were created by an “off record” document as to which MCDA and Riverside have not met their burden of proving First Trust’s actual knowledge, the Mortgage is not “subject to” them.

**D. FIRST TRUST’S 1988 “CONSENT” DID NOT SUBORDINATE THE MORTGAGE TO MCDA’S AND RIVERSIDE’S ENCUMBRANCES.**

MCDA and Riverside argue, and the trial court held that, by consenting to the Riverside Easements in 1988, First Trust subordinated its Mortgage to them. However, they cite no authority and no facts to suggest that First Trust intended to subordinate its Mortgage to the easements, and their position is otherwise wholly without any legal basis.

A lender that consents to easements merely acknowledges that it does not object to their existence; it does not by doing so subordinate its Mortgage to them. By the trial court's reasoning, a first mortgagee that consents to a second mortgage would swap places with the second mortgagee -- which would be an absurd and unintended result. That is why there is a clear distinction between a consent and a subordination, both of which are terms of art. *See, e.g.*, Minn. Stat. Uniform Conveyancing Form No. 20.8.2 Subordination Agreement (“ . . . the undersigned hereby subordinates the lien on the real property . . .”); *Black's Law Dictionary* (West 5th Ed. 1979)( a “Subordination Agreement” is one “by which the subordinating party agrees that its interest in real property should have a lower priority than the interest to which it is being subordinated.”)

That First Trust knew the difference between a consent and a subordination is confirmed by the trial court's own order. As support for its ruling in this proceeding, the trial court mistakenly pointed to language in Judge Oleisky's 1999 Summary Judgment Order, where he said that certain lenders had “intentionally and knowingly subordinated their liens to the operation and effect of the Relocation Agreement.” (Order, AA 1 at 27, n.15). The trial court was mistaken because Judge Oleisky was talking about easements on the MCDA Property, not easements on the Foreclosure Premises; and he was referring to a 1974 document by which lenders other than First Trust agreed to language of subordination, not to the 1988 consent by First Trust. (Ex. H, AA 386 at 409). So, different property, different lenders, different document. Inadvertently, however, the trial court has shown that lenders know the difference between a consent and a subordination.

**E. THERE IS NO FACTUAL OR LEGAL BASIS TO CONCLUDE THAT CRABLEX IS NOT A GOOD FAITH PURCHASER ENTITLED TO THE BENEFITS AND PROTECTIONS OF THE TORRENS ACT.**

When Crablex acquired the Mortgage in the mid 1990s, it of course knew of the Riverside Easements -- they were recorded on the Title as junior easements. This knowledge, the trial court held, is actual knowledge that prevented Crablex from being a “good faith” purchaser entitled to the benefits and protections of the Torrens Act. The trial court’s ruling turns Torrens law inside out.

CRLC gave its mortgage to First Trust in 1971. In 1972 and 1974 MCDA and Riverside recorded their junior interests. Twenty years later, in 1994, First Trust assigned the Mortgage to Crablex. Because Crablex steps into the shoes of its assignor, it is only First Trust’s knowledge when the Mortgage was made in 1971, not Crablex’s knowledge when the Mortgage was assigned in 1994 that is relevant to the “good faith” analysis. *See Henschke v. Christian*, 36 N.W.2d 547, 550 (Minn. 1949) (“... a purchaser from a bona fide purchaser succeeds to his grantor’s rights as a bona fide purchaser, regardless of whether he himself is one”); *accord, Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 524 (Minn. 1990).

The trial court also held that Crablex was not a “good faith” purchaser when it took assignment of the Mortgage in 1994 because it and CRLC were controlled by the same person. However, no authority is cited for this novel proposition, other than a case which states as a general principle that the Torrens Act does not protect people acting in

bad faith;<sup>11</sup> and the trial court points to no facts of record which show that Crablex was a bad faith actor. For example, the trial court stresses common control of Crablex and CRLC, but does not refer to any evidence of identical or even largely similar ownership. To the contrary, the trial court itself acknowledged that: “CRLC is a Minnesota general partnership by and between Cedar-Riverside Properties, a limited partnership,” and “Cedar Riverside Land Corporation, a Minnesota corporation”; but that “Crablex was incorporated in 1982,” more than 10 years after the easements in question were granted by CRLC and other entities, and “On January 1, 1989, Cedar-Riverside Associates became the sole shareholder of Crablex.” (Order, AA 1 at 15).

The trial court also cites no cases holding that a mortgage purchaser related to the owner is in any way different from the original mortgagee. If anything, the MCDA and Riverside were better off with Crablex as mortgage holder than they would have been if First Trust had retained the Mortgage. Crablex foreclosed by action, in proceedings that took ten years, giving the MCDA and Riverside an opportunity to raise defenses and try to work something out. First Trust in all likelihood would have foreclosed by advertisement, obtaining title free of the MCDA and Riverside easements in a relatively short time.

Crablex, therefore, cannot be characterized as a “bad faith” purchaser, and under the Torrens Act and the Foreclosure Judgment and Decree it is entitled to judgment as a matter of law on its Petition for a New Certificate of Title, “*subject only to prior encumbrances of record.*”

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<sup>11</sup> *In re Collier*, 726 N.W.2d 799 (Minn. 2007).

### **III. THE MORTGAGE FORECLOSURE SALE TERMINATED THE JUNIOR INTERESTS CLAIMED BY THE CITY OF MINNEAPOLIS AND CEDAR CULTURAL CENTER.**

The City of Minneapolis (the "City") and Cedar Cultural Center ("Cedar Center") argued below that their junior easements encumber the foreclosure title acquired by Crablex because they were not joined in the Foreclosure Action and, in the words of *Bardwell v. Anderson*, 46 N.W. 315, 317 (1890), "the judgment [in foreclosure] binds only those who are parties to the suit, and those in privity with them." (Order, AA 1-27 at 17-19). Their argument fails to distinguish between the effect of the Foreclosure Judgment and the effect of the foreclosure sale -- it is the foreclosure sale, not the judgment, that extinguished the City's and Cedar Center's junior easements.

Absent privity, parties omitted from foreclosure proceedings are not generally bound by the judgment and are entitled to their day in court. For the City and Cedar Center, however, these Proceedings Subsequent were that day in court. Contrary to their view, the only question as to them in this case is whether their easements had priority over the Mortgage. They did not.

Minn. Stat. § 581.03 provides that, in a foreclosure by action, the foreclosure sale shall be governed by the provisions for execution sales, which are contained in Minnesota Statutes Chapter 550. Section 550.22 says that the certificate of sale in execution sales shall "upon expiration of the time for redemption . . . operate as a conveyance to the purchaser of all the right, title and interest of the person whose property is sold in and to the same, at the date of the lien upon which the same was sold." The quoted language is identical in all material respects to Minn. Stat. § 580.12, which governs the effects of a

non-judicial foreclosure sale (foreclosure by advertisement) and which provides that the certificate of sale shall, “upon expiration of the time for redemption . . . act as a conveyance to the purchaser . . . of all of the right title and interest of the mortgagor in and to the premises named therein at the date of such mortgage.”

Sections 550.22 and 580.12 both convey title to a mortgage foreclosure purchaser as of the date of the mortgage, which obviously cuts off encumbrances created after that date, and the Minnesota Supreme Court has so held. In *Hokanson v. Gunderson*, 56 N.W. 172, 173 (1893), the Court said that the purchaser at a non-judicial foreclosure sale “succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgage precisely as if the mortgage had been an absolute conveyance at its date. . . . The purchaser is, then, only concerned with the state of the title at the date of the mortgage . . . [.]” *Accord, Gerdin v. Princeton State Bank*, 384 N.W. 2d 868, 871 (Minn. 1986) (“the purpose of a mortgage foreclosure sale, whether by action or advertisement, is ‘to terminate all interests junior to the mortgage being foreclosed and to provide the sale purchaser with a title identical to that of the mortgagor as of the time the mortgage being foreclosed was executed.’”).

The principal case cited by the City, Cedar Center and the trial judge supports the conclusion that the foreclosure sale in a foreclosure by action extinguishes subordinate interests held by parties not joined in the action. In *Northwest Trust Co. v. Ryan*, 132 N.W. 202 (1911), the mortgagee joined the property owner in the foreclosure by action, but not his wife, who had statutory rights in the property. The Court noted that the wife

had redemption rights, and held that she retained those rights following sale because she had not been joined in the action. The Court also held, however, that her interest was extinguished by the foreclosure sale, even though she hadn't been joined in the action, for it said that "the only right [the wife] can . . . assert against [the foreclosure purchaser's] title to the tracts of land here involved is her right of redemption." *Id.* at 203. The Court gave her a right of redemption, and if she didn't redeem, her interest was lost.

*Ryan* would therefore help the City and Cedar Center in this case if they had redemption rights, but they do not. Minn. Stat. § 550.24 states that, if a debtor doesn't redeem, creditors having "a lien, legal or equitable" can do so. Under this language, easement holders, like the City and Cedar Center, do not have a right of redemption, for easements are not liens. This conclusion is confirmed by Section 580.25, which requires a redeeming lien holder to present an affidavit setting forth "the amount actually claimed" on his lien; there is no determinable "amount claimed" on an easement.

None of the cases cited by the City, Cedar Center or the trial court speak to the rights of an omitted party without redemption rights. As noted above, *Bardwell v. Anderson* addresses the effect of a foreclosure judgment, not a foreclosure sale, and the interest referred to in that case is a second mortgage, which would of course give a right of redemption. *Harper v. East Side Syndicate*, 42 N.W. 86 (1889), also involved a second mortgage.

The conclusion that a sale in a foreclosure by action extinguishes encumbrances held by parties with no right of redemption is supported by 1 Nelson and Whitman, *Real*

*Estate Finance Law* (4th Ed. 2002), 647-648, which indicates that courts protect the rights of parties omitted from a foreclosure by action only if they have a right to redeem.

In determining the rights of encumbrance holders omitted from a foreclosure by action, the effect of Minn. Stat. § 550.22, read in conjunction with *Hokanson, Ryan and Gerdin*, is clear. A sale pursuant to a foreclosure by action extinguishes subordinate encumbrances of omitted parties, subject only to whatever rights those parties would have had if they had been joined. For parties with a lien, the rights include a right of redemption and a right to a judicial determination of priority. For parties without a lien, the rights include only a right to the judicial determination of priority that they would have had if they had been joined in the foreclosure action.

These Proceedings Subsequent gave the City and Cedar that right to a judicial determination of priority. But neither of them disputed that their easements were granted and recorded after the Mortgage was recorded. The City's brief and reply brief on summary judgment were based solely on the fact that it was not joined in the foreclosure action. Cedar Center made the same argument below, and in addition argued that the Mortgage was subordinated to its easements by reason of (a) Crablex's knowledge of those easements when the Mortgage was assigned in 1994, (b) common control of Cedar Riverside Land Company and Crablex, and (c) First Trust's consent to easements. These claims are all addressed and disposed of in the preceding sections of this brief regarding the Riverside Defendants.

Cedar Center also argues that its easements trump the Mortgage because Crablex has failed to show that First Trust did not consent to or ratify them, as required by the

Report of Examiner, and that the doctrines of estoppel and laches now preclude Crablex from challenging the Cedar Center easements.

The quoted language from the Examiner's Report refers to evidence required at a hearing before the Examiner, but these Proceedings Subsequent are not a hearing before the Examiner; they are before the Court. Cedar Center cites absolutely no authority for its startling proposition that Examiner requirements establish or, in this case, modify, Minnesota law. Under Minnesota law, a mortgagee's priority does not turn on lack of consent or ratification, and requirements in an Examiner's Report do not change that.

The record is bereft of any evidence that would establish estoppel or laches with respect to Cedar Center's easements. As Cedar Center itself concedes, estoppel requires a showing of detrimental reliance flowing from the conduct allegedly giving rise to estoppel. Cedar Center acquired easements that were subordinate to a recorded mortgage, and its interest would have been extinguished by foreclosure of the Mortgage, regardless of who held it. In obtaining the easements, Cedar Center obviously did not rely on Crablex holding the Mortgage or dealing with Cedar Center in its capacity as mortgagee, for it acquired its easements in 1989, and Crablex did not acquire the Mortgage until 1994. Cedar Center cites no conduct of Crablex that caused Cedar Center to change the position it was in when Crablex acquired the Mortgage.

Cedar Center characterizes laches as "an equitable doctrine intended to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." What's missing here, obviously, is prejudice. Cedar Center has now enjoyed the benefit of its easements for nearly 20 years.

If First Trust had held and foreclosed the mortgage, those easements would have been extinguished years ago. Cedar Center has benefited from the delay.

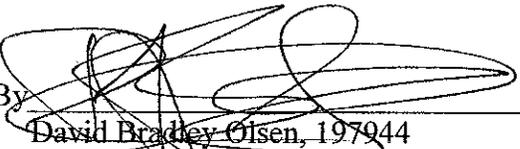
The trial court erred in denying summary judgment against the City and Cedar.

### CONCLUSION

For all of the foregoing reasons, the trial court's January 15, 2008, judgment should be reversed, and this case should be remanded with directions to enter judgment in favor of Crablex on its Petition, and against MCDA, Riverside, Capmark Finance, Inc., the City, Cedar Center and Associated Bank National Association.

HENSON & EFRON, P.A.

Dated: April 2, 2008

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### CERTIFICATE OF WORD COUNT COMPLIANCE

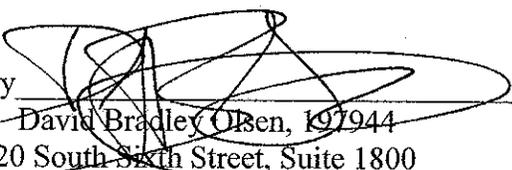
Pursuant to Minn. R. Civ. P. 132.01, Subd. 3(a)(1) and (c), the undersigned certifies that Appellant Crablex, Inc.'s Brief was prepared using Microsoft® WORD® version 2002 and complies with the typeface requirements of Rule 132.01, Subd. 1 (13 point Times New Roman font). According to the software's "Word Count" tool

application the numbered pages contain 13,057 words, inclusive of all text, footnotes, headings and quotations.

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