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State of Minnesota
In Court of Appeals

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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.

BRIEF AND ADDENDUM OF RESPONDENT CEDAR CULTURAL CENTER

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STATEMENT OF LEGAL ISSUES

In 1989, Cedar-Riverside Land Co., a company controlled by Keith Heller, deeded The Cedar Theater to The Cedar Cultural Center, a non-profit arts organization, for philanthropic reasons. At the same time, Heller's company deeded The Cedar Easement to provide The Cedar with access to the rear of its theater. In 1994, a second Heller entity, Crablex, Inc. took an assignment of a mortgage on which Heller's first entity, Cedar-Riverside Land Company, had defaulted. The Cedar Easement runs over this mortgaged property. In 1995, Crablex brought a Foreclosure Action but did not join The Cedar. In 2005, after entry of the foreclosure judgment, Crablex purchased the foreclosed property at a Sheriff's sale. Crablex admits that at both the time it took the assignment of the mortgage in 1994 and at the time it bought the property in 2005, it had both *record notice* of The Cedar Easement from the certificate of title and *actual knowledge* of The Cedar Easement based upon common control of the two Heller entities.

In 2006, seventeen years after the original conveyance, Crablex sought to terminate The Cedar Easement at the behest of a prospective buyer. Crablex asserted for the first time that the easement granted by its sister company was invalid for lack of consent by the mortgagee, had been terminated by the Foreclosure Action and order confirming Sheriff's sale and should be deleted from the certificate of title. For seventeen years, The Cedar relied upon this conveyance by openly using The Cedar Easement for its intended purpose, *i.e.* operating the theater for its non-profit mission, and foregoing alternative access routes. Did the trial court err in granting summary judgment to The Cedar and declaring that The Cedar Easement should remain on the certificate of title?

Holding I: The Cedar Easement was not terminated by the Foreclosure Action or order confirming Sheriff's sale since The Cedar was not a party or in privity with any party.

Apposite law on Holding I:
Bardwell v. Anderson, 45 N.W. 315 (Minn. 1890).

Holding II: Crablex had record notice and actual knowledge of The Cedar Easement both when it took an assignment of the mortgage and when it acquired the property and is therefore not a good-faith purchaser entitled to the protections of the Torrens Act.

Apposite law on Holding II:
In re Collier, 726 N.W.2d 799 (Minn. 2007)

Holding III: The Cedar's equitable defenses also support the conclusion that Crablex took the property "subject to" The Cedar Easement.

Apposite law on Holding III:
Anderson v. First Nat'l Bank, 303 Minn. 408, 228 N.W.2d 257 (1975)

STATEMENT OF THE CASE

Crablex, Inc. ("Crablex") omits key rulings concerning The Cedar Cultural Center ("The Cedar"). The District Court found that Crablex was not entitled to the relief it sought against The Cedar – termination of The Cedar Easement – on three independent grounds: first, The Cedar was not bound by the Crablex Foreclosure Action and order confirming Sheriff's sale because it was not a party or in privity and had no notice.; second, Crablex was not a "good-faith purchaser" within the meaning of the Torrens Act; and third, two of The Cedar's equitable defenses, estoppel and laches, also compelled the denial of Crablex's request for relief. (SJ Order at 17-19, 24-26, n.14, AA 17-19, 24-26).[1]

STATEMENT OF THE FACTS

In their cross-motions for summary judgment, all parties agreed that there were no material fact disputes. The District Court's decision in The Cedar's favor rests upon these undisputed facts:

A. The Cedar Cultural Center

The Cedar Cultural Center, Inc. is a non-profit cultural organization that owns and operates The Cedar Cultural Center, a theater located at 416 Cedar Avenue, Minneapolis, Minnesota. Since 1989, The Cedar has promoted the appreciation of various cultures with dance and music events at its theater on the West Bank, presenting a diverse selection of world music, folk, jazz and many types of traditional music and dance. (Kubeczko Aff., ¶¶ 2,3, AA 829-31).

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[1] "AA" denotes the Appellant's Appendix filed by Crablex. "CA" denotes The Cedar's Addendum, which is in this brief. "RA" denotes the Respondents' Joint Appendix filed by the Riverside Plaza group.

B. Cedar-Riverside Land Co.'s Conveyance of The Cedar Easement

The Cedar sits in the shadow of Riverside Plaza Towers, an apartment complex developed in the early 1970s by various companies affiliated with the late Keith Heller. The District Court noted that the common control of two Heller companies – Cedar Riverside Land Co. and Crablex, Inc. – was dispositive as to Crablex's failure to establish its good-faith purchaser status under the Torrens Act (SJ Order at 25-26, AA 25-26). Crablex's appellate brief glosses over these key facts.

The Cedar owes its existence to the first of these Heller companies, its grantor, Cedar-Riverside Land Company ("CRLC"). CRLC is a Minnesota general partnership by and between Cedar-Riverside Properties (a limited partnership whose general partner was Keith Heller) and Cedar-Riverside Land Corporation (a Minnesota corporation whose president was Keith Heller) (*See*, CRLC General Partnership Agreement, Victoria Heller Depo. Ex. 2, Salmon Aff., Ex. A, AA 838-53).[2]

In December 1989, Keith Heller, through CRLC, deeded the Cedar Theater property to The Cedar's predecessor for ten dollars. (Simonds Aff., Ex. 2, AA 818-23). Keith Heller, again through CRLC, separately deeded The Cedar an ingress/egress easement for ten dollars to provide access to the theater's rear service door ("The Cedar

[2] The Cedar also refers the Court to the summary judgment and appellate briefs of Riverside Plaza Limited Partnership, et al. for a more in depth discussion of the Heller entities. *See, e.g.*, Riverside Plaza Summary Judgment Memorandum, at 5. As established by this Court in related litigation, each of these entities was wholly controlled by Keith Heller. *Crablex, Inc. v. Cedar-Riverside Land Co.*, 2003 WL 21448807 at *6 (Minn. Ct. App. 2003) (AA477-503).

Easement").[3] Victoria Heller, Keith Heller's surviving spouse, recalls that the theater property was "very valuable" and that Keith Heller considered it to be a donation. (Victoria Heller Depo. at 44, RA 163). The philanthropic nature of Keith Heller's conveyance is further underscored by the obligation he set forth in the deed that the grantee maintain its status as a non-profit organization and use the theater exclusively for social, educational, artistic, theatrical or cultural purposes for a period of thirty years. (Simonds Aff., Ex. 2, AA 821-22). Victoria Heller identified the signatures on both deeds as being those of her late husband, Keith Heller. (Victoria Heller Depo. at 48, 53, RA 164-166). He was duly authorized by CRLC to sign real estate documents. (Victoria Heller Depo. at 51, RA 165). Jim Sanford, The Cedar's attorney at the time, recalled that Keith Heller expressed his intention to deed the theater, related land and easements to provide The Cedar's predecessor with clear title to the theater and an effective means of

[3] The Cedar Easement, as depicted in an exhibit used at oral argument that is reproduced in the addendum of this brief at CA-1, is comprised of three parcels: first, a 15 by 66 foot parcel at the service door on the west/back side of the theater, on which a concrete pad used for loading, unloading and staff parking sits; second, the Crablex portion of a private road, McKnight Driveway, which The Cedar uses to gain access to its service door; and third, a small strip of land on the south side of the theater that apparently encroaches onto adjoining Crablex property. (CA-1; Summary Judgment Argument Transcript, at 5-6). The separate deed conveying both the theater and The Cedar Easement are dated December 29, 1988, were signed and acknowledged by Keith Heller on February 8, 1989 and were filed on February 16, 1989. (Simonds Aff., Ex. 2 and 3, AA 818-23, 824-28). Crablex does not seek to terminate The Cedar's ownership of the theater that Heller conveyed with the first deed. (AA 818-23). Crablex seeks to terminate The Cedar Easement conveyed by Heller in the second deed. (AA824-28). The second portion of The Cedar Easement as described above, the Crablex-owned portion of the McKnight Driveway, runs over the McKnight Driveway portion of the easement that the District Court ordered Crablex to convey to Riverside Plaza arising out of the 2000 Settlement Agreement in dispute on this appeal.

accessing, in order to effectively operate the theater for cultural and educational purposes on a non-profit basis. (Sanford Aff., ¶ 3,4, 7, AA 832-34).

The Cedar promptly recorded both deeds in February, 1989. (Simonds Aff., Ex. 2, 3)(AA 818-23). It is undisputed that The Cedar Easement has appeared on the certificate of title since that time. (*See*, Crablex's certificate of title, Ex. B to its Petition, at 3, including deed conveying The Cedar Easement to The Cedar's predecessor, Minnesota S.T.A.R., Doc. No. 1995063, recorded February 16, 1989, Petition, AA 70).

C. The Cedar's Reliance Upon and Use of The Cedar Easement.

The Cedar has used The Cedar Easement continuously since 1989. (Simonds Aff., ¶¶ 4, 5, AA 816-17). Its use of The Cedar Easement has been open and obvious. (*Id.*) The Cedar Easement has been an integral part of The Cedar's ability to carry on the organization's non-profit mission, consistent with Keith Heller's requirements. (*Id.*)

On appeal, Crablex asserts for the first time that there is no evidence of record to establish any detrimental reliance by The Cedar or to establish any prejudice to The Cedar from the easement's potential loss. (Crablex Br. at 46).[4] To the contrary, the only evidence of record is that The Cedar has relied on its right to ingress and egress to the service door in conducting its operations and it has not pursued alternative methods of conducting its business as a result. (Simonds Aff., ¶¶ 4, 5, AA 816-17). The potential loss of The Cedar Easement would present a grave hardship to The Cedar since it would

[4] Crablex never raised that issue below. In fact, its only brief in opposition to The Cedar's motion wholly failed to address The Cedar's estoppel, laches, consent and ratification defenses. (AA 908-17).

result in the loss of the only effective means of obtaining access the theater's service door, which is necessary to conduct The Cedar's operations. (*Id.*)

D. The 1994 Assignment of the CRLC Mortgage to Crablex.

After Heller's companies constructed the Riverside Plaza Towers, CRLC defaulted on its mortgage. In 1982, Heller incorporated a second company, Crablex, Inc., and was its sole shareholder for many years. (Victoria Heller Depo. Ex. 4, 5, 6, Salmon Aff., Ex. B, AA 854-60). Thus, as the District Court correctly found, CRLC and Crablex were under common control at all relevant times. (SJ Order at 25-26, AA 25-26).

Crablex did not conduct any business until 1994, when it took an assignment of CRLC's 1971 mortgage to First Trust on the land surrounding the Riverside Plaza Towers. (Victoria Heller Depo. Ex. 7, 8; Salmon Aff., Ex. C and D, AA 861-62; Crablex certificate of title, Crablex Petition, Ex. B, p. 4, AA 71). The Cedar Easement runs over a portion of this land. Several months later, Keith Heller resigned his various positions as officers of Crablex, and Victoria Warner (now Victoria Heller) became sole officer of Crablex and a member of its board. (Victoria Heller Depo. Ex. 8, AA 862). Keith Heller remained a director of Crablex until February 1, 1996. (Crablex Request for Admission Response, No. 10, on file with Court with The Cedar's Motion to Compel Discovery). Thus, as the District Court correctly found, in additional to having common control, Heller-controlled companies were also on both sides of the 1994 assignment of the mortgage, as both the borrower in default (CRLC) and as successor to the lender/mortgagee (Crablex.)(SJ Order at 25-26, AA 25-26) Keith Heller recognized this dual status in acknowledging the receipt of mortgage assignment documents in 1994 on

behalf of both CRLC and Crablex (Receipt, Salmon Aff., Ex. I, RA 161). Similarly, as of 1994, Heller-controlled entities wore multiple hats insofar as The Cedar Easement was concerned, the first as grantor, through CRLC, and the second as the holder of the mortgage encumbering the land over which The Cedar Easement runs and objector to that easement, through Crablex.

E. Crablex Admits That It Had Both Record Notice and Actual Knowledge of The Cedar Easement Both at the Time it Took an Assignment of the Mortgage in 1994 and at the Time it Acquired the Property at the 2005 Sheriff's Sale.

When the second Heller entity, Crablex, took an assignment of the mortgage in 1994, it is undisputed that The Cedar Easement appeared on the certificate of title. Crablex admits that it was charged with notice of The Cedar Easement for this very reason. (Crablex's Response to Request for Admission No. 13, The Cedar's Motion to Compel Discovery, Ex. A). Based upon their common control and Keith Heller's execution of both deeds on behalf of the first Heller entity (CRLC), Crablex also acknowledged that it had actual knowledge of its existence. (*Id.*) Victoria Heller volunteered at her deposition that her husband was "quite brilliant" and had a "photographic memory." (Victoria Heller Depo. p. 78, RA 169). According to Victoria Heller, Keith Heller was also the person at Crablex who was responsible for orchestrating Crablex's taking of the assignment of the mortgage five years after he signed both deeds. (Victoria Heller Depo. p. 77, RA 169). Finally, internal memos from 1993 and 1995 authored by Keith Heller concerning The Cedar demonstrate Heller's ongoing awareness, before and after the assignment to Crablex, of his instrumental role in establishing The

Cedar and his ongoing interest in insuring that it continued to be a viable non-profit cultural organization. (CRAB 8298-8300 and 8301-8303, Salmon Aff., Ex. E and F, RA 147-51).

Keith Heller died in 1998. Prior to Keith Heller's death, his spouse, Victoria Heller, became a director and officer in the first Heller entity, CRLC, in 1995, following her similar appointments in the second Heller entity, Crablex. (Crablex's Response to Request for Admission No. 7, The Cedar's Motion to Compel Discovery, Ex. A).

F. Crablex Failed to Join The Cedar as a Party in the Crablex Foreclosure Action and Didn't Give It Notice of the Sheriff's Sale.

Crablex admits that it did not join The Cedar as a party to the Crablex Foreclosure Action, either at the time it commenced suit in 1995 or at any time during its ten-year course. (Crablex's Response to Request for Admission No. 19, The Cedar's Motion to Compel Discovery, Salmon Aff., Ex. A.). Crablex argued to the District Court that non-parties such as The Cedar and the City of Minneapolis, which also held easements that Crablex seeks to have removed, were nevertheless bound by the foreclosure judgment. Crablex appears to abandon this argument on appeal, arguing instead that it is the 2005 Sheriff's sale that terminated The Cedar's interest (Crablex App. Br. at 42). With regard to the Sheriff's sale, Crablex admitted at oral argument that the contention in its summary judgment brief that The Cedar received notice of the Sheriff's Sale because it posted notice at The Cedar was in error. (Crablex Br. in Opp. at 7, AA 914; SJ Argument Tr. at 12-13). Crablex now asserts for the first time on appeal that only parties with a right to redeem are entitled to notice and contends that The Cedar has no right to redeem.

(Crablex App. Br. at 42-44). As explained in the argument section below, Crablex's new argument is procedurally barred and independently fails on its merits.

G. The District Court Suit and Summary Judgment Order.

After the Sheriff's sale was approved the Torrens title examiner issued his report, Crablex brought this proceeding subsequent to registration against The Cedar and others. (Report, AA 76-112, Petition, AA 60-75). Crablex sought to have The Cedar Easement declared invalid and to have it removed from Crablex's certificate of title. Crablex took this action in anticipation of a potential sale of the property over which The Cedar Easement runs, and other property, to Fine Associates, LLC. (Crablex Petition, ¶¶ 12(d), 13(d); Victoria Heller Depo. Ex. 14, Salmon Aff., Ex. H, RA 157-60).[5] Upon the issuance of a Show Cause Order (AA 113-17), The Cedar and its lender objected to the relief sought and the matter was referred to District Court.[6]

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[5] Victoria Heller confirms that from the time of conveyance of The Cedar Easement in 1989 until commencement of this proceeding in 2006, neither she nor anyone from Crablex objected in any manner to The Cedar Easement. (Victoria Heller Depo. pp. 72-73, RA 167-68). Crablex's after-the-fact objection to The Cedar Easement in 2006 was first asserted after counsel for the developer to whom Crablex wants to sell the foreclosure property, Fine Associates, LLC, wrote to object to The Cedar Easement and request that Crablex take steps to have it removed from the certificate of title. (Victoria Heller Depo. Ex. 14, Salmon Aff., Ex. H, RA 157-60). December 10, 2004 correspondence from counsel for Fine Associates identifies a number of objections to a Commitment for Title Insurance including The Cedar Easement, identified as "Schedule B., II, Items… 10", stating, "We object to this item and require that it be deleted from the Commitment and, if applicable, from any Certificates of Title for the Property." (Victoria Heller Depo. Ex. 14, Salmon Aff., Ex. H, RA 158). The copy of the deed conveying The Cedar Easement that Crablex produced in this case is labeled "BII-10" (*See,* Victoria Heller Depo. Ex. 12, Salmon Aff., Ex. G, RA 152), thus corresponding to the reference in Fine Associates' letter of objection).

[6] See The Cedar's Answer, AA 262-63. Crablex also joined The Cedar's lender,

All parties filed cross-motions for summary judgment. The Cedar argued that The Cedar Easement should remain on the certificate of title and that summary judgment should be granted in its favor because (1) it was not bound by the foreclosure judgment or judgment confirming Sheriff's sale because it was not a party or in privity with a party and had not received notice; (2) that Crablex was not entitled to the protections of the Torrens Act because it was not a good-faith purchaser; and (3) that Crablex's claim was independently barred on the grounds of estoppel, laches, consent to and/or ratification of The Cedar Easement by the mortgagee. The District Court granted The Cedar's motion for summary judgment "in its entirety" and denied Crablex's motion "in its entirety." (SJ Order at 1-2, AA 1-2).

STANDARD OF REVIEW

On appeal from summary judgment, appellate courts review the record to determine whether there is any genuine issue of material fact, and whether the district court erred in its application of the law. *McIntosh County Bank v. Dorsey & Whitney, LLP,* 745 N.W.2d 538, 544-45 (Minn. 2008).

Associated Bank, N.A., which also objected. (AA 264-70). Associated has stipulated with Crablex that Associated's interests are fully aligned to The Cedar's and has agreed to be bound by an determination of The Cedar's rights. (SJ Order, at 5, n.3, AA 5).

ARGUMENT

I. Since Crablex Failed to Join The Cedar to Its Foreclosure Action, The Cedar Is Not Bound by the Foreclosure Judgment and Order Confirming Sheriff's Sale.

In a mortgage foreclosure, the proper parties are the mortgagor, mortgagee, and those that have acquired rights or interests in the mortgagor's estate. *Banning v. Bradford*, 21 Minn. 308 (Minn. 1875). The concept of a necessary party arises where a party is *not* joined and that party's presence in the action is necessary to the ability of the court to grant complete relief or to avoid inconsistent obligations. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 321 (Minn. 2004). Thus, when, as here, the foreclosing party elects to foreclose by action, only parties that were joined (or that are in privity with a party) are bound by the foreclosure judgment. *See Minnesota Debenture Co. v. Johnson*, 102 N.W.381, 381-82 (Minn. 1905); *Whalley v. Eldridge*, 24 Minn. 358 (1877); *Harper v. East Side Syndicate*, 42 N.W.86 (Minn. 1889); *Northwestern Trust Co. v. Ryan*, 132 N.W. 202, 203 (Minn. 1905).[7]

In 1995, Crablex commenced its Foreclosure Action against most of the holders of interests in the Foreclosure Property, but it admittedly did not join The Cedar.[8] The

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[7] Like The Cedar, the City of Minneapolis also held easements over the Crablex Foreclosure Property that were granted by CRLC after the 1971 mortgage, but Crablex failed to join the City to the Crablex Foreclosure Action. The Cedar refers the Court to the additional legal authority cited in the City's appellate brief, which is equally applicable to The Cedar.

[8] In its summary judgment brief to the District Court, Crablex recognized its obligation to join other easement holders such as Riverside Plaza and MCDA, which its brief stated Crablex joined "because they had claimed certain easement interests for the benefit of adjacent 'property, and alleged that those interests would survive foreclosure....'"

Cedar was the holder of an easement shown as a memorial on the certificate of title. The Cedar Easement was and still is an interest in the estate of the mortgagor, CRLC. Therefore, The Cedar was a proper and necessary party in the foreclosure action in the event Crablex wanted to foreclose upon The Cedar Easement. Because Crablex failed to join The Cedar as a party to the foreclosure, the District Court correctly found that The Cedar is not bound by the foreclosure judgment.

On appeal, Crablex seemingly abandons its argument based upon the foreclosure judgment, instead limiting its argument to the contention that it is the order confirming Sheriff's sale that terminated The Cedar Easement. Crablex did not serve The Cedar with notice of the foreclosure sale as required by Minn. Stat. § 580.03 (2006) (AA 515). Further, on its face, such a rule would defy common sense since foreclosure actions end in sales. Instead, the District Court correctly concluded that Minnesota has long recognized that the junior interest of an omitted party survives both the foreclosure action and the resulting sale. (SJ Order at 18, 19, AA 18-19). *See Harper*, 42 N.W. at 86 (omitted junior interest survived after foreclosure judgment and sale conducted pursuant to it); *Northwestern Trust Co.*, 132 N.W. at 203 (same).

Crablex asserts for the first time on appeal that only those parties with a right to redeem were required to be joined. The Court should reject this argument for three

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(Crablex SJ Br., at 11, AA 287). On the other hand, Crablex's brief did not explain why it did not join The Cedar, which similarly held an easement running over the Foreclosure Property, in the event it was Crablex's intention to foreclose upon The Cedar Easement. Crablex's failure to join The Cedar is compelling evidence of its consent to and/or ratification of The Cedar Easement, consistent with Keith Heller's philanthropic motive in deeding the theater and easement. *See,* Argument III, B, *infra*.

reasons. First, Crablex failed to raise this argument below and it cannot do so now. *See, Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).[9] Second, Crablex's new argument fails on its merits. None of the Minnesota authority cited by Crablex supports its position. At best, it simply holds that where, *unlike here*, the foreclosing party follows the proper procedure, foreclosure terminates the junior interests held by parties that are joined. For instance, the *Gerdin* case cited by Crablex explains the outcome of a foreclosure sale where the foreclosing party meets procedural requires, but it does *not* hold that junior interest of omitted parties are foreclosed. *Gerdin v. Princeton State Bank*, 384 N.W.2d 868 (Minn. 1986). Similarly, Crablex's reliance on secondary authorities is also misplaced. The passage Crablex quotes appears in a discussion of a junior lienor's redemption rights; it does not stand for the proposition that only those with redemption rights must be joined. (See Crablex Appeal Brief, at 44-45, citing 1 Nelson and Whitman, *Real Estate Finance Law* (4th Ed. 2002), at 647-48). Third, Crablex cites no legal authority for its bald assertion that easement holders do not have redemption right and it ignores; authority to the contrary. *See, e.g.,* Minn. Stat. § 581.10 (2006) ("those claiming under" mortgagor may redeem); *Morey v. City of Duluth*, 69 Minn. 5, 71 N.W. 694 (1897). Further, if this Court were to conclude that easement holders had no right to redeem, there would be nothing to prevent collusion between an owner and

[9] A close review of Crablex's summary judgment brief and brief in opposition reflects that it did not raise this issue below. The District Court mentioned "the right to redeem" in its order in passing, not because Crablex had argued that it only had to join those with redemption rights,, but refuting Crablex's misplaced reliance on another passage from a treatise that it had relied upon. (SJ Order at 19, AA 19). Thus, Crablex cannot raise this issue for the first time now.

lender, which could omit the easement holder with impunity. The Cedar is similarly situated to the City of Minneapolis on this issue and respectfully refers the court to the city's brief for additional legal authority that also supports The Cedar's position. For these reasons, the District Court correctly held that The Cedar was not bound by the foreclosure judgment or resulting order confirming Sheriff's sale.[10]

II. The District Court Correctly Held That Crablex Wasn't a Good-Faith Purchaser and Therefore, That it Wasn't Entitled to the Protections of the Torrens Act.

Minn. Stat. § 508.25 (2006) provides that:

> Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title *in good-faith* and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar...

(emphasis added).

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[10] In addition to being afforded statutory protections, The Cedar's constitutional rights also compel this same conclusion. The Cedar's right to due process would be violated by a holding that The Cedar Easement was extinguished by a foreclosure judgment in a proceeding in which it was not joined, as to which Crablex failed to provide notice and in which The Cedar had no opportunity to be heard. *See e.g., Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Due process requires that The Cedar receive notice of any action where The Cedar Easement is an issue and that it be afforded an opportunity to be heard. The law does not permit Crablex to deny The Cedar these basis rights and to thereafter bring a mop-up lawsuit to correct this procedural irregularity. Since it received neither notice nor an opportunity to be heard, The Cedar is not bound by any findings or by the judgment in the Crablex Foreclosure Action. Although not expressly addressed in its decision, the District Court granted The Cedar's motion "in its entirety" and, in any event, the District Court's decision is independently supported by due process requirements.

In *In re Collier*, 726 N.W.2d 799 (Minn. 2007), the Minnesota Supreme Court held that the Torrens Act embraced equitable principles and that it prohibited one with *actual knowledge* of an unrecorded interest from becoming a good-faith purchaser who was entitled to the protections under the Torrens Act. In *Collier*, a buyer sought to take advantage of an unrecorded mortgage by purchasing the property from the mortgagor-in-default and then initiating the identical procedure commenced here, a petition for a proceeding subsequent to registration. As in this case, the purchaser in *Collier* sought a declaration that its interest was superior to the interest being challenged. As here, the facts conclusively established that the purchaser had actual knowledge of the interest. (But unlike *Collier,* the purchaser here, Crablex, *also* had *record notice* since The Cedar Easement was promptly recorded.) The Minnesota Supreme Court held that the buyer's actual knowledge of the other's interest, in and of itself, defeated his ability to become a good-faith purchaser.

In so holding, the court recognized that as far back as 1913, it had presumed that the good-faith language in the Torrens Act contained a notice or knowledge component. *In re Collier*, 726 N.W.2d 799, 805 (Minn. 2007) (citing *Henry v. White*, 123 Minn. 182, 185, 143 N.W. 324, 326 (1913) and *In re Juran*, 178 Minn. 55, 226 N.W. 201 (1929)). The Court further recognized that more recent authority was in accord. *Id.*, 726 N.W.2d at 807, citing *Nolan v. Steubner*, 429 N.W.2d 918 (Minn. App. 1988) (*rev. denied*) (Minn. Dec. 16, 1988)[11].

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[11] On appeal, Crablex cites pre-*Collier* case law for the conclusion that a *bona fide* purchaser succeeds to his grantor's rights as a *bona fide* purchaser regardless of whether

Applying *Collier*, the District Court properly found that Crablex was not a good-faith purchaser and, therefore, it took its interest "subject to" The Cedar Easement. Further, the District Court properly rejected Crablex's contention that when it took an assignment of the mortgage in 1994 and purchased the property in 2005 at Sheriff's sale, its interest "related back" to execution of the original mortgage in 1971, thereby "cleansing" its corporate knowledge and trumping its sister company's granting of The Cedar Easement in 1989. Since it was not a good-faith purchaser, its interests did not "relate back." The District Court held:

> The record before the Court shows that Crablex had actual notice of The Cedar Easement, the City Easements, and the Riverside Easements at the time it took assignment of Mortgage in 1994. This knowledge is not merely constructive notice, nor was it simply gained from reviewing the Certificate of Title. Crablex's knowledge came from directly its principal, and agent, Keith Heller, who was actively involved in the granting of the easements in favor of each of the Respondents. Indeed, Mr. Heller executed the documents granting the Riverside Easements, the City Easements, and The Cedar Easement. (Grote Aff. Ex. 7 at 8-10, Ex. 8 at 9-11, Ex. 9 at 3-5; Mikhail Aff. Exs. A-D; Salmon Aff. Ex. 3, Ex. 7 at 48, 53). Thus, Crablex is charged with knowledge of these easements at the time it chose to take the assignment of the Mortgage and foreclose its lien against the Property. *See, Oldewurtel v. Redding*, 421 N.W.2d 722, 726 n. 3 (Minn. 1988) ("A corporation can be charged with the knowledge of its officers when the corporation consists wholly of those officers and others having notice of inconsistent claims."); *see also, Hill v. Wilmington Chem. Corp.*, 156 N.W.2d 898, 901 (Minn. 1968) (recognizing that any knowledge of sole owner of corporation is imputable to the entity); *Minneapolis Plumbing Co. v. Arcade Inv. Co.*, 145 N.W. 37, 38 (Minn. 1914) (holding corporation that owned building was charged with knowledge of repairs ordered by lessee because

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he is one himself. (Crablex App. Br. at 40, citing *Henske v. Christian*, 36 N.W.2d 547 (Minn. 1949), *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522 (Minn. 1970)). Neither case was decided under the Torrens Act or supports Crablex's position after *Collier*.

> Secretary of corporation had actual notice thereof; thus, mechanic's lien attached to the property). This is particularly [true] where, as here, affiliated corporate entities controlled by the same individual were both mortgagee (Crablex) and mortgagor (CRLC). The "good faith" requirements imposed by the Torrens Act will not allow two affiliated corporate entities (Crablex and CRLC) that are controlled by the same individual to exploit their distinct corporate identities to extinguish interest that CRLC freely granted. *Cf. Carl v. DeToffol*, 25 N.W.2d 479, 482 (Minn. 1946) (highlighting principle that Torrens Act only applies to parties acting in good faith). This is not a case in which an unaffiliated third party took assignment of a mortgage and sought to eliminate junior interests that it had no hand in creating. Accordingly, the Court holds that, on the evidence before it and under the equitable principles applicable to Torrens Act proceedings, Crablex is not a good faith purchaser of the Property entitled to protection under the Act. *In re Collier*, 726 N.W.2d at 808.

(SJ Order, at 25-26, AA 25-26) (footnote omitted).

Crablex argues on appeal that reversal is warranted because "the trial court points to no facts of record which show that Crablex was a bad faith actor." (Crablex Br. at 41). This is not the standard. The District Court correctly applied the correct standard from *Collier*, concluding that it would violate "notions of justice and good faith" to rule in Crablex's favor. (SJ Order, at 25 n.13, AA 25, quoting *Collier*, 726 N.W.2d at 808). The District Court carefully limited its holding based on two key facts: first, the common control between the granting and objecting companies, and second, those companies' dual roles as both mortgagor and mortgagee. (SJ Order, 25, 26, n. 13, , AA 25-26). The District Court's finding as to Crablex's lack of good-faith purchaser status is strongly supported by the undisputed evidence of record. Therefore, the Court should affirm.

III. Other Equitable Principles Independently Compel the Affirmance of the District Court's Conclusion That The Cedar Easement Survived the Crablex Foreclosure Action and Should Remain on the Certificate of Title.

A. Crablex is estopped from seeking to extinguish The Cedar Easement. Its claim is also barred by the doctrine of laches.

Estoppel is based upon the theory that where one has by his or her conduct induced another to change his or her position to his damage, disadvantage, or detriment, he is estopped from benefiting by such conduct. *Am. Jur.*, Estoppel § 82. The defense of estoppel applies to legal and equitable causes of action alike. *Macomber v. Kinney*, 128 N.W. 1001, 1003-1004 (Minn. 1910). An essential element of "estoppel" is that the party asserting the estoppel acted, or failed to act, in reliance upon the representation claimed to give rise to the estoppel, whereby he has changed his position for the worse. *Stribling v. Fredericks, Clark & Co., Inc.*, 219 N.W.2d 93, 95 (Minn. 1974). A second equitable principle, the doctrine of *laches* is 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. *Aronovitch v. Levy*, 56 N.W.2d 570, 574 (Minn. 1953). The District Court held that The Cedar's estoppel and laches arguments were "mere restatements" of the good-faith purchaser issue. (SJ Order, at 26, n.14, AA 26).

Crablex argues on appeal that "[t]he record is bereft of any evidence that would establish estoppel or laches..." (Crablex Br. at 46). To the contrary, the only evidence of record on these issues comes from affidavits submitted by The Cedar, which Crablex did not dispute. That evidence shows that for seventeen years The Cedar detrimentally relied upon The Cedar Easement by using it and foregoing an alternative method of conducting

its business and that it would be prejudiced by a loss of its only means to access its service door at this late date. (Kubeczko Aff, ¶¶ 4-6, AA 829-31; Simonds Aff., ¶¶ 4,5, AA 815-17). Further, Crablex's delay in asserting its rights has prejudiced The Cedar due to its inability to obtain the testimony of Keith Heller, who died in 1998, three years after Crablex brought its Foreclosure Action against others. The District Court's decision should be affirmed on this independent basis. *Myers Through Myers v. Price,* 463 N.W.2d 773, 775 (Minn. App. 1990 (citing *Brecht v. Schramm,* 266 N.W.2d 514, 520 (Minn.1978); *Northway v. Whiting,* 436 N.W.2d 796, 798 (Minn.App.1989)).

B. Crablex has failed to prove lack of consent to and ratification of The Cedar Easement by the mortgagees.

Whether due to the Heller entities' dual role as both grantors of The Cedar Easement and after-the-fact "objectors" to it for alleged "lack of consent," their dual role as parties-in-default on the mortgage and successors to the lender/mortgagee, or for some other reason, the Title Examiner's May 4, 2006 report required Crablex to affirmatively establish the following as to The Cedar:

> 9. There should be evidence at the hearing to support a Finding in the Order to be entered in this matter [t]hat easements and other rights in Doc. No. 1995063 [the deed conveying The Cedar Easement] were created subsequent to the filing of Mortgage Doc. No. 1017570 [the 1971 mortgage], were not consented to or ratified by the mortgagee, and have terminated by virtue of the mortgage foreclosure proceedings.

(*See*, Report, AA 77). In response, Crablex's Petition in this case sought a declaration that The Cedar Easement had not been consented to or ratified by the mortgagee (*See* Petition ¶¶ 12(d), 13(d), AA 62). But Crablex wholly failed to offer any evidence on the

mortgagees' lack of consent or ratification. Indeed, its briefs to the District Court did not even address these issues.

Faced with that problem on appeal, Crablex now seeks to sidestep these issues, arguing that issues its own Petition raised are irrelevant because the rulings were made by a judge, not a Torrens examiner, and because its only burden was to show that the interest through which it claimed came first-in-time. (Crablex Br. at 46). But as *Collier* holds, determining priorities on Torrens property requires that the court consider the equities. *Collier*, 726 N.W.2d at 805-09. The mortgagee's consent to and/or and ratification of The Cedar Easement provide independent support for the District Court's declaration that The Cedar Easement was valid.

As a threshold matter, Crablex did not demonstrate that any terms in the underlying mortgage required that the original mortgagee, First Trust Company of St. Paul, or any assignees, such as itself, consent to The Cedar Easement. (*See, Indenture of Mortgage and Deed of Trust*, Ex. S to Grote Affidavit to Riverside Plaza Summary Judgment Memorandum). Here, Keith Heller wore two hats. The first hat was general partner of CRLC and its duly authorized representative with respect to land transactions such as the granting of The Cedar Easement via the deed he signed. The second hat was as sole shareholder of Crablex at the time it took an assignment of the mortgage.

Documents produced by Crablex showed that in both the year before and the year after Crablex took an assignment of the land over which The Cedar Easement ran, Keith Heller continued to demonstrate an ongoing interest in The Cedar's non-profit cultural operations. (Salmon Aff., Ex. E and F, RA 147-51). Further, when Crablex

acknowledged receipt of the mortgage assignment documents in 1994, Keith Heller signed the receipt in his dual roles with CRLC and Crablex, thereby establishing a merger of the mortgagor and mortgagee's interests for merger of estate purposes. *Am.Jur.2d*, Estates, § 374 (discussing merger of estates). The nominal purchase price, the cultural-use restriction and Keith Heller's communications with The Cedar's attorney contemporaneously with the negotiations that culminated in the conveyances also conclusively establish the true nature of this transaction: Keith Heller intended to convey clear title to the theater and an effective means to gain access to it so that The Cedar could effectively operate the theater for cultural and educational purposes on a non-profit basis. (Sanford Aff., ¶ 7, AA 832-34). That a related company, Crablex, later took an assignment of the mortgage over which The Cedar Easement ran and held it for 12 years without objection underscores its consent. Finally, Crablex's failure to join The Cedar as a party to the Crablex Foreclosure Action at any time during the 10 years it was pending starting in 1995, as contrasted to its joinder of other easement holders like Riverside Plaza whose interests it actually wanted to discharge, independently establishes its consent to The Cedar Easement.

In addition to requiring that Crablex prove the lack of consent to The Cedar Easement by itself and its predecessor, the Examiner of Titles independently required Crablex to show that the mortgagees, including itself, did not ratify it. Under Minnesota law, ratification occurs when one, having full knowledge of all the material facts, confirms, approves, or sanctions, by affirmative act or acquiescence, the originally unauthorized act of another, thereby creating an agency relationship and binding the

principal by the act of his agent as though that act had been done with prior authority. *Anderson v. First National Bank of Pine City*, 303 Minn. 408, 410, 228 N.W.2d 257, 259 (1975). Crablex had both record notice and actual notice of The Cedar Easement. Yet it did not seek to extinguish The Cedar Easement by joining The Cedar as a party in the Crablex Foreclosure Action. Nor did it take any action to extinguish The Cedar Easement until after Fine Associates requested that it do so 18 years later, in contemplation of its purchase of the property. (The Cedar App. Br., n. 5). The undisputed facts demonstrate Keith Heller's true intention to deed The Cedar an easement that was necessary to discharge its cultural mission. When Crablex took assignment of the mortgage in 1994, and took no action to object to The Cedar Easement for the next 12 years, it ratified CRLC's granting of The Cedar Easement. Crablex's failure of proof regarding the mortgagees' lack of consent to or ratification of the Cedar Easement independently support the affirmance of the District Court's decision to grant The Cedar's motion "in its entirety" even thought to District Court did not directly address these two issues. *Myers Through Myers v. Price,* 463 N.W.2d 773, 775 (Minn. App. 1990).

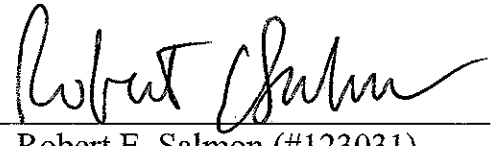
CONCLUSION

The District Court correctly determined that there were no genuine issues of material fact, as all parties acknowledged, and it correctly applied the law to the undisputed facts. The District Court's declaration that The Cedar Easement shall remain on the certificate of title and its denial of Crablex's cross-motion to terminate that easement are well supported on three independent grounds: first, The Cedar was not

bound by the Crablex Foreclosure Action and order confirming Sheriff's sale because it was neither a party nor in privity with a party and had no notice; second, Crablex was not a good-faith purchaser either at the time it took an assignment of the mortgage in 1994 or it purchased the property in 2005, and therefore, was not entitled to protections under the Torrens Act; and third, The Cedar's other equitable defenses, which are also embodied in the Torrens Act, independently support an affirmance. Therefore, The Cedar respectfully requests that the District Court's decision be affirmed.

Respectfully submitted,

Dated: May 20, 2008

By 

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