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To be Argued by:
WILLIAM E. BRUECKNER, ESQ.
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New York Supreme Court

Appellate Division—Fourth Department

Docket No.: CA 19-01672

BATAVIA TOWNHOUSES, LTD., ARLINGTON HOUSING CORPORATION, and BATAVIA INVESTORS, LTD.

Plaintiffs-Respondents,

– against –

COUNCIL OF CHURCHES HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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STATEMENT OF QUESTIONS PRESENTED

1. Annually from 2012 through 2019 (and earlier), Batavia Townhouses, Ltd. (the "*Partnership*"), transmitted to its creditor, Council of Churches Housing Development Fund Company, Inc. (the "*Churches*"), written audited financial statements and an auditors' report signed by its independent auditors that reflected a certain WrapAround Note and Mortgage, and interest accrued thereon, as a liability of the Partnership. The Partnership, as obligor and mortgagor on the WrapAround Note and Mortgage, did not make any payments with respect to the liability from March 2012 until February 2019, and the Churches, as creditor and mortgagee, took no action to enforce it. Are the financial statements and auditors reports sufficient, under Article 17 of the New York General Obligations Law, to acknowledge and reaffirm the obligations memorialized by the WrapAround Note and Mortgage?

    The court below ruled that the financial statements and auditors' reports did not reaffirm the debt.

2. Beginning in March 2019, the Partnership made monthly payments to the Churches in an amount sufficient to pay the interest that accrues on the WrapAround Note and Mortgage. Are the partial

payments sufficient, under Article 17 of the New York General Obligations Law and this state's judicial precedent, to acknowledge and reaffirm the obligations memorialized by the WrapAround Note and Mortgage?

The court below held that the partial payments did not reaffirm the debt.

3. Annually from 2012 to 2019 (and earlier), the Partnership prepared federal tax returns signed by its executive director that reflected the WrapAround Note and Mortgage as a liability of the Partnership. These tax returns were delivered by the Partnership to the Churches (and to the limited partners). They were submitted to the lower court as an exhibit to an affidavit opposing the Limited Partners' cross-motion for summary judgment, but the court failed to consider them. Should the lower court have considered whether the tax returns were sufficient, under Article 17 of the New York General Business Law, to acknowledge and reaffirm the obligations memorialized by the WrapAround Note and Mortgage?

The court below failed to even consider the effect of the tax returns to reaffirm the debt.

STATEMENT OF FACTS

In June, 1970, a group of Batavia-area churches formed the Churches as a not-for-profit corporation incorporated under the New York Private Housing Finance Law and the Membership Corporations Law of New York. The mission of the Churches is to develop and operate, on a non-profit basis, a housing project for persons of low income where no adequate housing exists for such persons. A board of directors, all of whom serve in an uncompensated voluntary capacity, manages the Churches. (*R. 68, ¶5.*)

The Churches pursue their mission through involvement in the Birchwood Village Apartments ("*Birchwood Village*" or the "*Apartments*"), a 224-unit apartment complex located at 77-79 River Street in the City of Batavia, New York. Since its inception in 1971, Birchwood Village has operated as affordable housing for families of low and moderate income in the Batavia area. It has provided - and continues to provide - a vital resource to meet a critical need in the community. *(R. 68 ¶6.)*

Plaintiff Batavia Townhouses, Ltd. (the "*Partnership*"), is the limited partnership through which the Churches currently pursues that

mission: the Partnership owns and operates Birchwood Village. The Churches is the sole managing general partner of the Partnership. Plaintiffs Arlington Housing Corporation ("*Arlington*") and Batavia Investors, Ltd. ("*Investors*") are both limited partners in the Partnership. (Collectively, Arlington and Investors are sometimes referred to hereafter as the "*Limited Partners*.") There are no other partners in the Partnership. (*R. 69, ¶7.)*

Beginning in March 1971, the Churches originally developed, owned and operated Birchwood Village independent of the Partnership, through a loan that was insured by the United States Department of Housing and Urban Development ("*HUD*"). That loan was evidenced by a promissory note with a maturity date of March 1, 2012 (the "*Original Note*"), which was insured by HUD, and was secured by a mortgage (the "*HUD Mortgage*"). In exchange for HUD's agreement to insure the Original Note, the Churches agreed to operate Birchwood Village in compliance with certain HUD regulatory agreements that ensure the project would provide ongoing benefits to low- or moderate-income families. (*R. 69, ¶8.)*

In the early years of its existence, Birchwood Village was poorly managed and poorly maintained. The complex experienced financial difficulties through 1977, and at that time, the Board and management of the Churches recognized a need to take action to improve physical and financial conditions at the Apartments. (*R. 69, ¶ 9.)*

After considering a number of available options, the Churches elected to take advantage of the benefits to be obtained by structuring the project as a limited partnership tax shelter. Through that structure, an infusion of capital would be brought to the project by a group of investors who would recognize the tax advantages of the tax shelter (through the limited partnership status of their investment fund), and another general partner – with expertise in construction and facility rehabilitation - would be introduced to the project. (*R. 70 ¶ 10.)*

On or about December 1, 1979, by operation of an agreement titled "Amended and Restated Certificate and Agreement of Limited Partnership of Batavia Townhouses, Ltd." (the "*Partnership Agreement*"), the Churches became one of two general partners of the Partnership,[1]

[1] At that time, the Partnership's second general partner was an individual named David C. Green. His contribution to the project was his construction/rehabilitation expertise.

and was designated as the Partnership's managing general partner. (*R. 70 ¶11; R. 86.)*

The Churches became the Partnership's managing general partner in exchange for the Churches' conveyance of Birchwood Village into the Partnership. At the time of the conveyance, the Apartments were still encumbered by the HUD Mortgage. (*R. 70 ¶12.)*

The Churches conveyed Birchwood Village to the Partnership in exchange for the Partnership's execution of the WrapAround Note and Mortgage dated September 1, 1979. The Wraparound Note and Mortgage memorialized the Partnership's debt to the Churches in the amount of $5.5 Million, together with interest at the annual rate of six percent (6%). Because the Churches' prior HUD Mortgage remained partially unpaid at the time of the conveyance, the Wraparound Note and Mortgage was subordinate to the HUD Mortgage. (R. 70, ¶13).

At that time, Investors was the Partnership's sole limited partner. Investors -itself a limited partnership, comprised of individuals seeking opportunities to realize federal tax benefits - contributed a total of $400,000 into the Partnership: this infusion of capital afforded the

opportunity to rehabilitate the Apartments' physical and financial condition. The Apartments' status as a HUD regulated property afforded opportunities to realize significant tax advantages with respect to the Limited Partners' federal income tax liabilities.

In May 1981, the Partnership's second general partner withdrew, and was replaced by Plaintiff Arlington. Arlington's president is Lawrence F. Penn. Mr. Penn is also the president of Investors' general partner.[2] *(R. 71 ¶15.)* After Arlington joined the Partnership, the Churches remained the managing general partner, and Investors remained a limited partner. (*R. 72, ¶17 - 18.)*

Section 2.4 of the Partnership Agreement sets forth the following Purpose of Business for the Partnership:

> The sole purpose and business of the Partnership shall be to acquire real property, together with the improvements thereon, as described in the Project Documents, and to own, hold, manage, maintain, and operate thereon the Project together with such other activities related directly or indirectly to the foregoing as may be necessary, advisable, or convenient to the promotion or conduct of the business of the Partnership,

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[2] During the two years of Mr. Green's status as co-general partner, the Partnership completed the contemplated improvements to the physical condition of the Apartments, and he fulfilled his role in the project. At the time, Mr. Penn was involved in numerous HUD properties across the nation, and he was viewed – at that time - as a person who could assist the Churches to optimize the operation of Birchwood Village.

> including without limitation the incurring of indebtedness and the granting of liens and security interests in the real and personal property of the Partnership to secure the payment of such indebtedness; all in such manner as will conform to all rules and regulations of Agency, and insofar as is consistent therewith, will maximize the Federal, state and local income tax benefits available to the Partnership. The specifications of such business shall be deemed a limitation upon the powers of the General Partner. (emphasis added)

(R. 88).

To ensure that the operating losses that supported the tax savings would flow primarily to the investors, the Partnership Agreement allocated 99% of the Partnership's property, profits and losses to the limited partners. *(R. 71 ¶16 and n.2).*

At some time in or after 2001, the Churches received a copy of a memorandum dated April 3, 2001, advising all HUD Multifamily Field Offices that HUD had entered into a settlement agreement with "Lawrence Penn and all his affiliates," pursuant to which Penn and all his associated entities were to divest all interests in any HUD properties. The memo further explained that the settlement agreement was intended to resolve all outstanding criminal, civil and administrative

matters involving HUD, the United States Department of Justice, Penn, and Penn's entities. (*R. 72, ¶19.)*

The divestitures were required by a Consent Judgment relating to multiple criminal and civil claims – including an indictment against Penn, personally – presented in U.S. v. Lawrence F. Penn, identified as Case No. CR-00-0084-SC in the United States District Court for the Northern District of California. *(R. 110 – 126).*

As a consequence, and given that Birchwood Village was a HUD property, Arlington was not permitted to continue in its capacity as a general partner of the Partnership. Arlington was permitted, however, to participate as a limited partner. By an amendment to the Partnership Agreement dated March 10, 2004, Arlington's status in the Partnership changed from general partner to limited partner. *(R. 73, ¶21.)*

In summary, as of and since 2004, the Partnership has been comprised of the Churches, as its sole managing general partner, and two limited partners, Plaintiffs Arlington and Investors. The Churches elected to operate the Apartments in the structure of the Partnership at a time early in the history of the Churches' effort to fulfill their mission, when the Churches recognized a need for capital and expertise in the

operation of the Apartments: the Churches contributed the $5.5 Million facility into the Partnership (subject to the WrapAround Note and Mortgage that ensured the Apartments would be returned to the Churches when the tax shelter had run its course); and, in comparison, the limited partners contributed a one-time infusion of $400,000; and the involvement of a man who was forced to remove himself from the project's management to resolve a criminal investigation by the project's regulating agency. *(R. 73, ¶22).*

In 2012, the Partnership paid the final installment due on the Original Note, and discharged the HUD Mortgage. The Wraparound Note and Mortgage became the only encumbrance on the Apartments, entitled to first priority. *(R. 73, ¶23).*

This declaratory action is the Limited Partners' effort to invalidate the WrapAround Note and Mortgage, and to secure the Partnership's ownership of Birchwood Village free and clear. *(R. 73, ¶23).*

Every year since at least April 2000, the Partnership has distributed to its partners (both general and limited), written annual financial statements that have been prepared under the oversight of the

Partnership's independent certified public accountants, EFPR Group, CPAs, PLLC. *(R. 74, ¶¶25 – 27).*

Those financial statements include balance sheets that reflect the WrapAround Note and Mortgage as a liability of the Partnership, state the then-present amount of the liability (including both principal and accrued interest), and report the Partnership's obligation to repay the amount due. Every one of the financial statements specifically refers to the obligation as a "Note and mortgage payable." The financial statements were distributed to the Churches annually, under a signed auditors' report, most recently in April 2019. *(R. 74 - 75 ¶¶28 – 31; R. 129 – 212).*

The Partnership also prepared, filed, and shared with the Churches its annual tax returns. (*R. 233 – 234 ¶¶13 – 14; R. 270 – 296*). Every one of those returns acknowledged the mortgage obligation in writing *(R. 274; R. 288 [acknowledging outstanding "non-recourse loan" in exact balance of mortgage at beginning of year and year-end])* and was signed by the Executive Director who oversees the daily operation of the apartment complex that is the subject of this litigation. *(R. 271; R. 272; R. 281; R.*

285; R. 296 [signature of Partnership's Executive Director, Barbara Greenbaum]).

Starting in February 2019, upon the Churches' demand, the Partnership began making payments to the Churches against the WrapAround Note and Mortgage. The monthly payments to the Churches were in the amount of $27,500 – the amount of monthly interest due on the obligation. *(R. 76 ¶33.)*

On May 28, 2019, Plaintiffs Arlington and Investors brought this declaratory judgment action in the form of a derivative action, seeking a declaration that the WrapAround Note and Mortgage are unenforceable because the Partnership did not make any payment in connection with the WrapAround Note and Mortgage from 2012 until February, 2019. (*R. 68, ¶3; R. 52 – 56).*[3] The Limited Partners contend that, during that

[3] The Partnership Agreement provides that the partnership is to be governed by the laws of the District of Columbia. *(R.104, §16.10).* Under those laws:

> A partner may maintain a derivative action in the Superior Court to enforce a right of a limited partnership if: (1) The partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or (2) A demand would be futile.

D.C. Code 29-709.02 (West 2019). As the Partnership's only general partner, the Churches acknowledge that it would be futile for the limited partners to formally demand that the Partnership repudiate its obligation to the Churches,

interim, the limitation period for enforcement of the agreements has expired.

The potential result of a successful challenge is obvious, but deserves to be expressly stated. If the WrapAround Note and Mortgage is found to be unenforceable, the Apartments will be free and clear of any encumbrance, and, at the sale of the Apartments or dissolution of the Partnership, the gain from the sale of the Partnership's assets will be allocated overwhelmingly to the Limited Partners, and the original intent of the respective partners will be put on its head.

The Churches acknowledged service of the Summons and Complaint on May 29, 2019. The Churches timely filed an Answer on June 18, 2019, *(R. 57 – 64),* and this Motion for Summary Judgment was filed the same day. *(R. 65 - 66).* The Limited Partners cross-moved for summary judgment on July 17, 2019. (*R. 216*).

On August 16, 2019, the court below issued its Decision and Order awarding summary judgment to the Limited Partners. *(R. 3 – 16).* That

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as the Churches will not accede to the limited partners' effort to misappropriate Birchwood Village.

Order was entered August 21, 2019 *(R. 17)*, and the Churches' Notice of Appeal was filed August 28, 2019. *(R. 1)*.

This appeal follows.

SUMMARY OF THE ARGUMENT:

THE WRAPAROUND NOTE AND MORTGAGE IS ENFORCEABLE BECAUSE THE PARTNERSHIP REPEATEDLY AND REGULARLY REAFFIRMED ITS OBLIGATIONS

The parties and the court below all agreed that this action presents an actual and justiciable controversy for which this Court may appropriately award declaratory judgment. The parties and the court below also agreed that the matter is appropriate for resolution by summary judgment.

Because the Partnership has repeatedly reaffirmed the debt and other obligations memorialized in the WrapAround Note and Mortgage – as recently as July 2019 – there is absolutely no merit to the Limited Partners' contention that the governing limitations period has expired. Applying ordinary business understanding and rules of common sense, and understanding of the litigants' respective roles in the Partnership, the Partnership's financial reporting to the Churches was sufficient to

acknowledge the WrapAround Note and Mortgage and extend the applicable limitations period. The Partnership's partial payments of the debt similarly reaffirmed those obligations and extended the limitations period.

This Court should reverse the Decision and Order of the court below, and award summary judgment to the Churches declaring that the WrapAround Note and Mortgage are valid, binding and enforceable obligations owed by the Partnership to the Churches. To rule otherwise would result in a happy accident for the Limited Partners, producing an unexpected windfall to the Limited Partners and an undeserved benefit no party ever anticipated they might obtain.

I.

THE EVOLUTION OF NEW YORK LAW REGARDING THE REAFFIRMATION OF DEBT

New York law has long recognized there are instances when a promisor, like the Partnership, will wish to honor a contractual promise, even when the promisee has elected not to involve the machinery of the judiciary to enforce that promise, and even when the time to involve the machinery of the judiciary might have otherwise expired. *See, e.g.,* CPLR §213 (providing six-year limitation period for contract claims).

In those circumstances, New York law provides that an otherwise time-barred claim to recover a debt can proceed when there is a later acknowledgement or partial payment of the debt by the debtor. *See, e.g.,* *Scheurer v. Scheuer,* 308 N.Y. 447, at 450 - 451 (1955) ("At common law, an acknowledgment or promise to perform a previously defaulted contract obligation was effectual, whether oral or in writing, at least in certain types of cases, to start the statute of limitations running anew.") The common law rule has been qualified by a statute that provides that, to take an action outside the operation of the statute of limitations, there must be "an acknowledgment [of the debt] or promise [to pay it] contained in a writing signed by the party to be charged." *General Obligations Law* §17-101 (West 2019); *see also, Ackerman v. Ackerman,* 2012 WL 407503 (S.D.N.Y. February 9, 2012) (applying New York state law). A second statutory provision, General Obligations Law §17-105, applies in actions to foreclose a mortgage.

At first blush, the case law developing the jurisprudence of an "acknowledgement" appears to be rather inconsistent. However, two themes predominate the jurisprudence: first, the question whether a purported acknowledgement is sufficient to restart the running of a

period of limitations depends on the circumstances of the individual case. *Estate of Vengroski v. Garden Inn,* 114 A.D.2d 927, at 928 (2d Dept. 1985). Second, whether an acknowledgement has occurred is a decision to be made without resort to "subtle or refined distinctions contrary to ordinary business understanding or rules of common sense." *Vengroski, supra,* 114 A.D.3d at 928; *Curtiss Wright Corp. v. Intercontinent Corp.,* 277 App. Div. 13, at 17 (1st Dept. 1950).

Under the circumstances of this case, this Court should rule in favor of the Churches because that result is the only one that is consistent with ordinary business understanding and rules of common sense. The parties' relationship as defined in the Partnership Agreement is manifest: the Apartments were a project to be undertaken and operated primarily by the Churches. Structuring the project as a limited partnership afforded the Churches to benefit from the comparatively modest investment made by Limited Partners, who realized the tax benefits arising from the project until the end of the parties' relationship. However, the WrapAround Note and Mortgage always was intended to serve as the mechanism that ensured the Limited Partners would receive no more than the tax benefits for which they bargained. It is the

WrapAround Note and Mortgage that permits the Churches to insist that the Apartments be returned to their ownership upon the dissolution of the Partnership.

Judge Walker's Decision and Order in this case must be reversed because it ignored those common sense business understandings, and misapprehended the interplay between General Obligations Law §17-101 and General Obligations Law §17-105. That interplay can be best understood through a recounting of the role each statutory section served in the evolution of New York's law regarding the reaffirmation of debt.

A.

New York's Common Law Recognized both Oral and Written Acknowledgements

Prior to any of the statutory enactments, New York common law extended and renewed the applicable statute of limitations where a creditor could show that the debtor had acknowledged a debt either orally or in writing. At common law, it was only necessary for the plaintiff to show an unconditional acknowledgment of the existence of the debt; and this could have been shown by proof of a direct acknowledgment, or by proof of facts from which it could be properly inferred. *Shapely v. Abbott,* 42 N.Y. 443 (1870), *citing Dean v. Hewitt,* 5 Wendell 257 (1830); *M'Crea*

v. Purmort, 16 Wendell 460 (1836); Henry v. Root, 33 N.Y. 526 (1865); Cocks v. Weeks, 7 Hill 45 (1844). In M'Crea v. Purmort, it was held: "The admission of a debt is available to take it out of the statute of limitations, whether that admission be express or tacit; whether made to the party or a stranger: and it may be implied from the conduct of the party." M'Crea, supra, 16 Wendell at 477 (emphasis added).

B.

Statutory Elimination of Oral Acknowledgements
General Obligation Law §17-101

Beginning with the adoption of the Field Codes in 1850, and again in 1865, the legislature adopted rules that eliminated the effectiveness of an oral acknowledgment to reaffirm debt. Originating in Section 395 of the New York Code of Civil Procedure, and now codified in General Obligations Law §17-101, New York's statutory law accommodates the promisee's forbearance, and extends the promisor's obligation, when a contractual debt is acknowledged in writing.

> An acknowledgement or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action

> for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

General Obligations Law, §17-101 (West 2019) (emphasis added).

With the exception of actions for the recovery of real property, General Obligations Law 17-101 effectively revives, or tolls, a time-barred contract claim when the debtor has signed a writing which validly acknowledges the debt. *Lynford v. Williams,* 34 A.D.3d 761 at 762 (2d Dept. 2006). To constitute an acknowledgment of a debt, the writing must recognize an existing debt and contain nothing inconsistent with an unconditional intention on behalf of the debtor to pay it. *Lew Morris Demolition Co. v. Board of Education,* 40 N.Y.2d 516, at 521 (1976); *Knoll v. Datek Securities Corp.,* 2 A.D.3d 594, at 595 (2d Dept. 2003). The writing must also be communicated to the promisee, such that the promisee can be presumed to have relied upon the reaffirmation. *See, e.g., Essex Real Estate Corp. v. Piluso,* 68 A.D. 2d 923 (2d Dept. 1979) (acknowledgement must be shown to have influenced the creditor); *In re Brill,* 318 B.R. 49, at 59 – 60 (Bankr. S.D.N.Y. 2004) (collecting cases interpreting New York state law).

Importantly, even after the statutory enactment, an acknowledgement need not be an express promise. Instead, the writing

need only contain nothing inconsistent with an unconditional intention to pay. *Knoll v. Datek Securities Corp,* 2 A.D.3d 594, at 595 (2d Dept. 2003). The applicable precedent makes clear that an appropriate acknowledgement serves as a "promise" because the law infers a "promise" to repay when there is nothing inconsistent with such an intent. *Henry v. Root,* 33 N.Y. 447 (1955); *George Tsunis Real Estate, Inc., v. Benedict,* 116 A.D.3d 1002 (2d Dept 2014) (purported acknowledgment is sufficient to restart the running of a period of limitations when it demonstrated defendant's intent to pay); *see also* *Calltrol Corp. v. DialConnection, LLC,* 51 Misc.3d 1221(A), 2016 WL 2860753 (Sup. Court Westchester County 2016) ("The critical question is whether the acknowledgment imports an intention to pay"); *Celia v. Shah,* 94 Misc 2d. 932, at 935 (Dist. Ct. Nassau County, 1978) (absence of anything inconsistent with intent to pay infers promise to pay); *Connecticut Trust & Safe Deposit Co. v. Wead,* 172 N.Y. 497 (1902) (under Section 395 of the Code of Civil Procedure, reviewing document to determine whether it is "an acknowledgment of a subsisting debt that a promise to pay may fairly be implied from that acknowledgment …").

The rationale behind all these decisions is that the acknowledgment is made in terms and under circumstances consistent with a new promise to pay the debt, whether or not that promise is made expressly. However, "actions to recover real property" are expressly excluded from Section 17-101's scope, in apparent recognition of the reality that a mortgage is not just a promise, but is also the conveyance of an interest in real property. See, e.g. 1961 Legislative Document Number 65(F) (hereafter the "Legislative Document"), reprinted in *McKinney's 1961 Session Laws of New York* 1873, at 1873 - 74 (rationale is "clearly inapplicable to an acknowledgment of a mortgage lien: a mortgage is not a promise, but an executed transaction; the mortgage lien is an interest in real property requiring for its creation a written instrument which is a conveyance within the real property recording statutes").

C.

Statutory Acknowledgments Clarified for Mortgages
General Obligations Laws §17-105

General Obligations Law §17-105 was adopted in 1961. At the time, decisional law throughout the state wrestled with acknowledgments in the context of real property conveyances, with confusing outcomes. *See,*

e.g., *Shohfi v. Shohfi,* 303 N.Y. 370 (1952) (leaving undecided the question whether written acknowledgement of mortgage is effective under 17-101); *Tortora v. Malve Realty & Construction Co.,* 96 N.Y.S.2d 388 (Sup. Court, New York County, 1950), *aff'd*., 283 App. Div. 769 (1st Dept. 1954) (refusing to decide whether deed to grantee "subject to a first mortgage" was an acknowledgement that revived statute of limitation); *Mintz v. Greenberg*, 5 A.D.2d 744 (2d Dept. 1958), aff'd., 5 N.Y.2d 909 (1959) (deed "subject to all tax liens, unpaid assessments and incumbrances of record" was acknowledgement sufficient to extend limitations period).

The Legislative Revision Commission explained that the varying judicial treatment of the rule led to "serious impairment of titles to land and hindrance of real property financing" and required legislative action. *Legislative Document,* at 1875. The result was General Obligations Law §17-105.

In its explanation regarding the intent behind the adoption of General Obligations Law §17-105, the Legislative Revision Commission wrote:

> In determining whether a transaction should be given effect by statute either to toll the statute applicable to a mortgage

> foreclosure or to revive a mortgage where the time limited for foreclosure has run, two factors should be controlling: first, whether the transaction manifested an intention to waive the statute or not plead it, and second whether the transaction expressing such intent is sufficiently evidenced.

Legislative Document, at 1876.

The Legislative Revision Commission continued:

> An express waiver of the bar of the statute, or of the time that has expired, and a promise not to plead the statute or not to plead the time that has expired, clearly meet the first requirement. An intention to waive the bar of the statute … is also reasonably to be inferred by an express promise to pay the mortgage debt. Such an intention may be similarly inferred from a formal assumption of the mortgage debt by a grantee of the mortgaged premises, unless such intention is expressly disclaimed.

Legislative Document, at 1876 (emphasis added).

As can be seen, therefore, at the time General Obligations Law §17-105 was enacted, the Legislative Revision Commission made clear that the intent was not to eliminate the possibility that an intention to pay a mortgage debt could be inferred by something other than an express promise. Rather, as under case law existing at the time it was adopted, the intent of Section 17-105 was to permit a writing to acknowledge a mortgage debt so long as the intent to pay could be fairly inferred, and the writing contained nothing that expressly disclaimed the intent to pay.

Indeed, by its express terms, General Obligation Law §17-105 contemplates that an obligor can express an intent to pay a debt through an "acknowledgment," in contrast to a "promise." General Obligation Law §17-105(4) reads:

> Except as provided in subdivision five, no acknowledgment, waiver or promise has any effect to extend the time limited for commencement of an action to foreclose or *(sic)* mortgage for any greater time or in any other manner than that provided in this section, nor unless it is made as provided in this section.

General Obligations Law §17-105(4) (West 2019) (emphasis added). If an acknowledgement were legally insufficient to extend the foreclosure limitations period, there would be no reason for subsection (4) to express the limitations on its effectiveness. *A fortiori*, an acknowledgement must have some effectiveness to extend timeliness under Section 17-105.

This is confirmed by the cases interpreting Section 17-105. Those cases are not limited to an evaluation of written "promises," they also evaluate writings characterized as "acknowledgements." *See, Comerica Bank, N.A. v. Benedict*, 39 A.D.3d 456 (2d Dept. 2007) (in mortgage foreclosure case analyzing GOL §17-105, court examined whether writing qualified as an "acknowledgment" of the debt so as to extend the Statute of Limitations); *McQueen v. Bank of New York,* 57 Misc.3d 481, at 483 -

84 (Sup. Court Kings County, 2017) (in a mortgage foreclosure context, court searches the record for an "unconditional acknowledgement" of a debt).

The leading secondary authority agrees. Professor Bergman observes that the provisions of Section 17-105 "are controlling" in mortgage foreclosure actions, but even the punctilious Professor Bergman recognizes that makes little difference, due to the reality that the case law he recites with respect to acknowledgements "is and remains" "vital" after the enactment of Section 17-105. *BERGMAN ON NEW YORK MORTGAGE FORECLOSURES*, §5.11[7] (Bender 2019). Indeed, earlier in his study of the relevant jurisprudence, Professor Bergman states that Section 17-105 is merely a codification of "the authority under which an effective written acknowledgement of a mortgage obligation serves as a revival of the statute of limitations time period." *BERGMAN*, supra., at §5.11[6][a] (emphasis added).[4]

[4] General Obligations Law §17-105 only applies in an action to recover real property. This action involves the Limited Partners' effort to invalidate the WrapAround Note and Mortgage, and the Churches' request that the obligation be declared valid and enforceable. There is no request for foreclosure.

Confronted with a property owner's request to invalidate a mortgage debt due to the alleged expiration of the Statute of Limitation, some New York courts analyze the timeliness issue under General Obligations Law §17-101. *See, e.g.,*

Thus, the enactment of General Obligation Law §17-105 did not alter the general themes of the existing jurisprudence regarding the reaffirmation of debt, it merely extended those rules to actions to recover real property, where they had not earlier applied. Through the extension of the rules to actions to recover real property, reaffirmation of mortgage debt will occur when an intent to pay can be reasonably inferred, as measured under "ordinary business understandings" and everyday "rules of common sense."

Applying ordinary business understanding and rules of common sense, the Partnership's financial reporting to the Churches unquestionably expresses an intent to repay the WrapAround Note and Mortgage.

Petito v. Piffath, 85 N.Y.2d 1, at 7 - 8 (1994) (in mortgagor's action to declare mortgage unenforceable as untimely, purported "acknowledgement" evaluated under both 17-101 and 17-105); Karpa Realty Group, LLC, v. Deutsche Bank National Trust Company, 164 A.D.3d 886 (2d Dept. 2018) (court applies GOL §17-101 in mortgagor's action to declare mortgage unenforceable as untimely); US Bank NA v. Martin, 144 A.D.3d 891 (2d Dept. 2016) (same); Yadegar v. Duetsche Bank National Trust Company, 164 A.D.3d 945 (2d Dept. 2018) (same); Sharova v. Wells Fargo Bank, 62 Misc.3d 925, at 937 (Sup. Court Kings County, 2019) (same).

II.

THE PARTNERSHIP'S ANNUAL FINANCIAL REPORTING REAFFIRMED THE OBLIGATIONS OF THE WRAPAROUND NOTE AND MORTGAGE

In the ordinary course of its business, on an annual basis, the Partnership rendered to all its partners – the Churches and the Limited Partners – a variety of financial reports. Included within these financial reports were audited financial statements and copies of the Partnership's income tax returns. The reports both unambiguously disclosed the WrapAround Note and Mortgage as a current liability of the Partnership, and contained nothing inconsistent with an intent to pay. As such, both types of annual financial reports were adequate to reaffirm the Partnership's obligations under the WrapAround Note and Mortgage, and to extend the limitations period in which the Churches could enforce it.

A.

The Partnership's Annual Audited Financial Statements

Here, the Partnership has reaffirmed the obligation of the WrapAround Note and Mortgage every year since 2000. In financial statements audited by the Partnership's certified public accountants, the debt memorialized by the WrapAround Note and Mortgage has been

reflected as a liability of the Partnership, changing only as the accrued interest on the principal obligation has grown. The statements expressly refer to the WrapAround Note and Mortgage as a "Note and mortgage payable." (*See, R. 74 – 75, 129 – 212).* Naturally, these financial statements – signed by the accountants who were directed by the Partnership to prepare them - were delivered each year, promptly upon their completion, to the Churches and to the Limited Partners. *(R. 74 at ¶27).*

Where doing so is consistent with ordinary business understanding and rules of common sense, the courts routinely accept that a debtor's financial statements, prepared and signed by a person authorized to do so by the debtor, will serve as an acknowledgement that revives a debt under the statute. *See, e.g.,* *Chase Manhattan Bank v. Polimeni,* 258 A.D.2d 361 (1st Dept. 1999) (personal financial statement); *In re Meyrowitz' Estate,* 114 N.Y.S.2d 541 (Surrogate's Court, New York County, 1952) (corporate balance sheet); *Clarkson Company, Ltd., v. Shaheen,* 533 F.Supp. 905, at 931 – 32 (S.D.N.Y. 1982) (interpreting state law, and determining that audited financials revived debt under NYGOL §17-101).

B.

The Partnership's Annual Tax Returns

The Partnership's tax returns were also adequate under controlling precedent to reaffirm the obligations memorialized in the WrapAround Note and Mortgage. Each year, the returns reflected the exact amount of the WrapAround Note and Mortgage as an "outstanding non-recourse loan," a reference that, under all the circumstances of this case, is sufficient the reaffirm the WrapAround Note and Mortgage. *See, Estate of Vengroski v. Garden Inn,* 114 A.D.2d 927, at 928 (2d Dept. 1985).

C.

Both Types of the Partnership's Annual Financial Reports Were Independently Adequate to Acknowledge and Reaffirm the WrapAround Note and Mortgage

In this case, the Partnership's annual delivery of the audited financial statements to the Churches, and its delivery of its tax returns, tolled the applicable statute of limitations for any action on the WrapAround Note and Mortgage. (The audited financial statements and annual tax returns are hereafter referred to collectively as the "*Financial Reports*.") The Financial Reports reaffirmed the obligation of the WrapAround Note and Mortgage, they expressly characterized the amounts due as "payable," and they were delivered to the Churches

annually. Thus, without regard to the date that a claim may have accrued for the Partnership's non-payment of the WrapAround Note and Mortgage, the annual delivery of the Financial Reports tolled the limitations period each year. As the limitations period has been tolled each year, year after year, it has never expired, and need not be revived.

1. The Financial Reports are Writings Signed by an Authorized Representative of the Partnership

"[A] written acknowledgement of a debt signed by the agent of the party to be charged may be sufficient to invoke (GOL §17-101)." *Nelux Holdings International v. Dweck,* 160 A.D.3d 520, at 520 (1st Dept. 2018), *citing Hakim v. Hakim,* 99 A.D.3d 498 (1st Dept. 2012); *Chase Manhattan Bank v. Polimeni,* 258 A.D.2d 361 (1st Dept. 1999) (signature of obligor's secretary on transmittal of financial information), *lv. dismissed,* 93 NY2d 952 (1999), *Sullivan v. Troser Management, Inc.,* 15 A.D.3d 1011 (4th Dept 2005) (signature of obligor's attorney); *Park Associates v. Crescent Park Associates,* 159 A.D.2d 460 (2d Dept. 1990) (signature of corporate officer). *Cf., Leising v. Multiple R. Development,* 249 A.D.2d 920 (4th Dept. 1998) (corporation's printed name on letterhead is adequate to constitute "signature" under GOL §17-101).

The audited financial statements that set forth the mortgage liability were not separately signed by the Partnership's accountants, but every one of those reports was accompanied by a standard accountant's transmittal letter, and the auditing accountants signed each of those letters. *(R. 131 – 32, 145 – 46, 159 – 160,173 – 74, 187 – 88, 201 – 02*).

"Ordinary business understanding" and "rules of common sense" dictate that the financial statements and the signed accountants' letters should be read together. Indeed, it has been suggested that an acknowledgement can consist of two separate writings that "have reference the same subject matter and are so connected with each other that they may fairly be said to constitute one paper." *See, Talarico v. Thomas Timmins Contracting Co., Inc.,* 1995 WL 422034 (S.D.N.Y. 1995), *citing, Victory Investment Corp. v. Muskogee Electric Traction Co.,* 150 F.2d 889, 891 (10th Cir.), *cert. den.* 326 U.S. 774 (1945).

Each year, the Partnership's tax returns reflected the mortgage obligation, *(see, e.g., R. 274 [line 18], R. 288 [line 18])*, and were signed by the Partnership's executive director, Barbara Greenbaum. (*R. 271- 72, R. 285).*

Justice Walker utterly failed to address the tax returns in his consideration of the parties' cross-motions. Apparently, this is because he considered the tax returns to have been submitted for the first time as Exhibits to the July 21, 2019 Supplemental Affidavit of Joseph Flynn, which Justice Walker characterized – too narrowly - as the Churches' "reply papers." (*See, e.g., R. 35 [line 11 – 13], R. 49 [line 10 – 16]).* It was substantial and material error for Justice Walker to disregard the tax returns: Mr. Flynn's Supplemental Affidavit was submitted in opposition to the Limited Partners' cross-motion for summary judgment, and – in its contention that the tax returns were signed by Ms. Greenbaum – the Supplemental Affidavit was directly responsive to the argument in the Limited Partners' motion that no acknowledgement was signed by an authorized representative of the Partnership. *See, Tsadilas v. Providian National Bank,* 13 A.D.3d 190, at 192 (1st Dept. 2004), *lv. denied,* 5 N.Y.3d 702 (2005) (court should consider affidavits first submitted in "reply" where they are directly responsive to opponent's opposition argument).

For all the foregoing reasons, the signatures on the documents acknowledging the Partnership's obligation to the Churches satisfy the requirements of applicable law.

2. The Financial Reports Show Nothing Inconsistent with an Intent to Honor the Obligation

The mortgage obligation has been reflected consistently as an obligation of the Partnership, changing only as the accrued interest relating to the principal obligation has grown. The Financial Statements expressly refer to the mortgage obligation as a "Note and mortgage payable," *(see, R. 134; R. 148; R. 162; R. 176; R. 190; R. 204)* and the tax returns refer to the obligation as a "nonrecourse loan." (*R. 274 [line 18]; R. 288 [line 18]).*

Nothing in any of the Financial Reports is inconsistent with the Partnership's intent to honor the mortgage obligation. Nothing whatsoever in the audited financial statements can be interpreted as a condition precedent or other caveat regarding the obligation.

The Partnership's tax returns appropriately reflect that its mortgage obligation to the Churches is "nonrecourse," such that the Churches' remedy is limited thereby and its "only recourse in connection with the underlying loan was the mortgaged property." *See, e.g.* *Wells Fargo Bank. N.A. v. Alessi,* 133 A.D.3d 1216 (4th Dept. 2015). This does not affect the validity of the acknowledgement, but only recognizes the limitations upon the available remedy. *See generally,* *General Obligation*

Law §17-105(1) (acknowledgement "by the express terms of a writing signed by the party to be charged is effective subject to conditions expressed in the writing").

3. **The Financial Reports Were Delivered Annually to the Churches and to the Limited Partners**

There is no serious question in this case that the Partnership annually transmitted its audited financial statements and tax returns to the Churches (and to the Limited Partners). *(R. 74 - 75, ¶¶ 26 – 30; R. 233 - 34, ¶¶ 12 – 14).*

After they were transmitted to the Churches, the financial reports from the Partnership were considered, reviewed and approved by the Churches' Board of Directors. *(R. 233, ¶11; R. 262 – 63).*

For all the foregoing reasons, the writings that the Partnership sent to the Churches and to the Limited Partners were sufficient to constitute an acknowledgement of the Partnership's obligation to the Churches, and that acknowledgement extended the limitations period for the Churches to enforce that obligation according to its terms.

III.

THE PARTNERSHIP'S PART PAYMENTS ACKNOWLEDGE AND REAFFIRM THE WRAPAROUND NOTE AND MORTGAGE

Justice Walker ruled that the partial payments made on account of the mortgage obligation, which started in February 2019, should not extend the limitations period because the payments are made in breach of the Churches' fiduciary duty, such that they are *void ab initio*. *(R. 14)*. Applicable District of Columbia law does not consider the payments a fiduciary breach.[5]

Under District of Columbia law, the duties of each partner to each other and to the Partnership are established by statute, but may be modified by the terms of a partnership agreement. *See, D.C. Code* §29-701.07(a) (West 2019). Among the modifications that can be made by the partnership agreement is a specification of the types or categories of activities that do not violate a fiduciary's duty of loyalty, if not manifestly unreasonable. *D.C. Code* §29-701.07(b)(5)(E) (West 2019).

[5] The Partnership Agreement dictates that the general partner's and limited partners' relationship is to be defined by reference to District of Columbia law. *(R. 104, Section 16.10)*.

The Partnership Agreement that governs these litigants' relationship includes Section 8.3, which expressly defines the scope of the general partner's liability to the limited partners. It reads:

> The General Partners shall not be liable, responsible, or accountable in damages or otherwise to the Partnership (or to the Limited Partners) for any loss suffered by the Partnership which arises out of any action or inaction of the General Partners, if the General Partners, in good faith, determine that such course of conduct was in the best interests of the Partnership, and such course of conduct did not constitute negligence of the General Partners.

(R. 93, Section 8.3).

District of Columbia law does not preclude a fiduciary partner from benefitting as a result of its transactions with the partnership, so long as those transactions are not to the detriment of the partnership. *Beckman v. Farmer,* 579 A.2d 618 (D.C. Court of Appeals, 1990) (allegations of breach of fiduciary duty "not actionable unless injury accrues to the beneficiary"); *Day v. Avery*, 548 F.2d 1018, at 1029 n.56 (D.C. Cir. 1976), *cert den.,* 431 U.S. 908 (1977) (applying D.C. law).

In February, 2019, when the Partnership began the payments of monthly interest to the Churches, there had been no allegation by Plaintiffs or any other person that the mortgage obligation was

unenforceable. Given that the mortgage obligation had been reflected as a liability of the Partnership from its inception – and indeed, for years the Limited Partners accepted the benefit of the tax losses that arose from that liability – the Churches' election to commence those payments cannot be seen as arising from bad faith or negligence.[6] The partial payment of a long existing obligation was viewed as a prudent course, as it did not involve any detriment to the Partnership (but rather paid an existing obligation), while permitting the Partnership to address other funding needs. (*See, e.g., R 228 - 230,* ¶¶ *4, 6, 7* [explaining the need for cash reserves and decision to pay interest]*).*

As a consequence, because the Limited Partners have not demonstrated any bad faith or negligence by the Churches - and indeed they cannot - they cannot establish that the partial payments were a violation of fiduciary duty, and those payments cannot be avoided. Beckman, *supra.*

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6 Indeed, in a separate lawsuit, the Limited Partners alleged that the Churches breached their fiduciary duty to the Parntership by not paying down the mortgage obligation and "effectively siphoned the equity interest of the limited partners." (*See R. 234 - 35,* ¶¶ *15 – 17; R. 325 – 27,* ¶¶ *8 – 10).*

In order for a partial payment to extend or renew the Statute of Limitations, the creditor must show that there was payment by the debtor or the debtor's agent of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgement by the debtor of more being due, from which a promise may be inferred to pay the [remaining balance].' *Saini v. Cinelli Enterprises,* 289 A.D.2d 770, at 771 (3d Dept 2001) (collecting cases).

Under all the circumstances here, there can be no question that the Partnership's payment of the interest installments reflects its ultimate intention to honor the entire mortgage obligation. Those payments were intended to satisfy the monthly interest accruing on the mortgage obligation. They serve no purpose other than to partially satisfy the mortgage obligation. *(R. 230, ¶ 7).*

Accordingly, the partial payments extend the limitation period for enforcement of the mortgage obligation.

CONCLUSION:

The Partnership has reaffirmed the mortgage obligation to the Churches, through both signed writings and partial payments. Under all

of the circumstances present in this matter, and utilizing ordinary business understandings and rules of common sense, the signed writings and partial payments toll or extend the limitation period in which the Churches may enforce its rights as a mortgage creditor.

Justice Walker's Decision to the contrary is mistaken because it did not fully understand the interplay between General Obligations Law 17-101 and 17-105, because it failed to consider all the evidence properly presented in support of the Churches' Motion, and because it is based upon precisely the subtle and refined distinctions that applicable law prohibits. Justice Walker's Decision and Order should be reversed, and this Court should grant declaratory judgment that the WrapAround Note and Mortgage are valid, enforceable and binding obligations of the Partnership.

Respectfully submitted,

Dated: October 15, 2019
Rochester, New York

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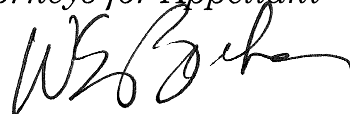

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