STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Murphy, P.J., Sawyer and Beckering, JJ

HONIGMAN MILLER SCHWARTZ AND COHN LLP,[1]

Petitioner-Appellee,

v

CITY OF DETROIT,

Respondent-Appellant.
_____/

SC: 157522
COA: 336175
Tax Tribunal LC No.: 16-000202

PETITIONER-APPELLEE HONIGMAN LLP'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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[1] Effective January 1, 2019, Honigman Miller Schwartz and Cohn LLP changed its name to Honigman LLP.

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COUNTER-STATEMENT OF JURISDICTION

Honigman agrees that the City of Detroit timely filed its application for leave to appeal the January 18, 2018, judgment of the Court of Appeals to this Court, and that this Court has jurisdiction over this case pursuant to MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

On November 21, 2018, the Court ordered the parties to address the following question in its order granting Respondent-Appellant the City of Detroit's application for leave to appeal the January 18, 2018, judgment of the Court of Appeals:

1. Whether the Court of Appeals erred in its construction of the phrase "services rendered within the city" in the Uniform City Income Tax Ordinance, MCL 141.623?

   Honigman LLP answers: No.
   City of Detroit answers: Yes.

I. INTRODUCTION

This is a case of statutory interpretation in which the City of Detroit's argument is plausible only if the Court ignores the overall structure of a statute and reads a specific provision in splendid isolation and out of the context that gives it clear meaning. Of course, that is not how the Court interprets or applies statutes, and it should not be how the Court does so here.

Appellee Honigman LLP ("Honigman" or the "Firm") is a law firm with an office in Appellant the City of Detroit (the "City"). The Firm provides legal services to clients, some of which are located in the City and many of which are not. The City Income Tax Act ("CITA"), MCL 141.501 *et seq*.,[2] requires the Firm and other City taxpayers to calculate the taxes it owes based on its business activity in the City. Pursuant to CITA's "business allocation percentage method," taxpayers apply three equally-weighted factors, each of which captures revenue attributable to a different aspect of the taxpayer's business, to determine their taxable revenue:

1. The "***property factor***" captures the percentage of the taxpayer's real and personal property located in the City that allows the business to generate revenue there.

2. The "***payroll factor***" quantifies the extent to which a taxpayer's employees perform work in the City and generate revenue while physically located there.

3. The "***sales factor***" captures the percentage of revenue derived from the delivery of goods and services in the city.

At issue here is the interpretation and application of the sales factor.

From 2010-2014 (the "Subject Years"), the parties agreed with Honigman's calculation of the property and payroll factors, but disagreed on its calculation of the sales factor. The City contends that the sales factor should be calculated based on the location of the employee

[2] CITA allows home rule cities like Detroit to adopt a uniform income tax ordinance to the extent authorized by the Act. Because the City adopted CITA without material alteration, this brief quotes CITA's provisions throughout. The City's ordinance is Part III, Chapter 18, Article X of the Detroit City Code.

performing the work—effectively the same methodology as the payroll factor. That is, the City argues that "work performed" under the payroll factor has the same meaning as "services rendered" under the sales factor. The Tax Tribunal hastily concluded that the sales factor is ambiguous, agreed with the City's interpretation of it, granted the City's motion for partial summary disposition under MCR 2.116(C)(10), and denied Honigman's cross-motion for summary disposition.

The Court of Appeals reversed the Tax Tribunal's judgment in a published opinion. Applying longstanding canons of statutory interpretation, the Court of Appeals opined that the Legislature's use of different words in the payroll and sales factors suggests the factors are intended to capture different aspects of a taxpayer's business. The Court of Appeals held that the location of the Firm or its clients is not the relevant consideration under the sales factor; instead, that factor considers the destination of goods sold or services rendered. The Court of Appeals relied on dictionary definitions of "perform" and "render" in the payroll and sales factors, respectively, to support its conclusion that the factors have different meaning and application.

The Court of Appeals was correct. This Court should affirm its judgment for at least the following three reasons:

First, the City ignores fundamental rules of statutory interpretation in an attempt to avoid CITA's plain meaning and application. The language "work performed" in the payroll factor does not have the same meaning as the language "services rendered" in the sales factor. If the Legislature intended those factors to mean the same thing, it would have used the same language in each. That it did not is the best evidence that the factors have different meanings.

Second, context matters. The City ignores the Legislature's intent in enacting a three-factor test for calculating taxable revenue. Under the City's view, the payroll and sales factors

are one and the same and the location of Honigman's employees would be counted twice. The City's myopic construction would obliterate the sales factor and replace CITA's three-factor test with a two-factor test. This cannot be right.

Third, the parade of horribles that the City claims flows from the Court of Appeals judgment is not much of a parade and is far from horrible. To the contrary, CITA's three-factor test can be faithfully and sensibly applied to this case and to the next thousand cases. Indeed, the City achieves the absurdities it condemns only by disregarding the clear three-part structure that the Legislature explicitly created.

The Court should affirm the judgment of the Court of Appeals.

II. COUNTER-STATEMENT OF FACTUAL BACKGROUND

A. Honigman's Tax Filings and the City's Assessments

Honigman is a law firm organized as a Michigan limited liability partnership. (Weigel Aff ¶¶ 5-6; Appendix to the City's Br, Appx 13a.[3]) The Firm has offices in cities across the Midwest: Detroit, Ann Arbor, Bloomfield Hills, Lansing, Kalamazoo, Grand Rapids, and Chicago. (Weigel Aff ¶ 4; Indenbaum Aff ¶ 4; Appx 13a, 26a.) The Firm serves clients and provides legal services in Michigan, as well as throughout the United States and the world. (Weigel Aff ¶ 6; Indenbaum Aff ¶ 6; Appx 13a, 26a.) Because members of the Firm are subject to CITA, the Firm files a composite tax return on behalf of its individual partners. And, because the Firm conducts business both in and out of the City, it must determine its taxable revenue for purposes of Detroit's income tax based on application of the three-factor test comprised of the property factor, payroll factor, and sales factor. MCL 141.620. (See also Indenbaum Aff ¶ 13-17; Weigel Aff ¶ 17; Appx 27a, 14a-15a.)

[3] Appendix Citations from the City's Brief are cited as "Appx __a."

For the Subject Years, the City agreed with the Firm's calculation of the property and payroll factors, but disagreed with the Firm's calculation of the sales factor. Under MCL 141.623, the sales factor is a fraction comprised of the Firm's revenue from in-city clients divided by the Firm's revenue from all clients (in-city + out of city):

$$\frac{\text{Revenue from in-city clients}}{\text{Revenue from all clients}}$$

The Firm determined the numerator by summing the revenue collected from clients whose billing address is within the City, because that is where the Firm renders legal services to those clients. (Weigel Aff ¶¶ 18-19; Indenbaum Aff ¶¶ 16-17; Appx 15a, 27a.) The in-city figure is added to revenue collected from clients whose billing address is located outside the City to determine the denominator. The Firm used this method for calculating the sales factor for all previous tax years. (Weigel Aff ¶ 20; Indenbaum Aff ¶ 18; Appx 15a, 27a.) The City accepted each of the Firm's previous years' calculations and ***never challenged its methodology*** (Weigel Aff ¶ 21; Indenbaum Aff ¶ 19; Appx 15a, 28a.)

By contrast, for the Subject Years, the City modified the Firm's calculation of the sales factor by dividing the number of hours billed in the City multiplied by the appropriate hourly rate, by the number of hours billed in and out of the City multiplied by the appropriate hourly rate. In other words, the City considered the location of Honigman's employees and where they billed hours instead of the location of the client where the Firm rendered services:

$$\frac{\text{\# of hours worked in-city * hourly rate}}{\text{\# of hours worked in all locations * hourly rate}}$$

The City's calculation effectively creates a second payroll factor, which according to MCL 141.622, is calculated by dividing the total compensation paid to employees for services

performed in the city by the total compensation paid to employees for all services performed (in-city + out of city):

$$\frac{\text{Total compensation paid for in-city work}}{\text{Total compensation paid for all work}}$$

The City's computation of the sales factor does not at all account for where clients receive the benefits of legal services; it is determined solely based on the location of the Honigman employee. The difference between the City's computation of the sales factor is, not surprisingly, significantly higher than the Firm's computation of that factor, as circled and highlighted:

Honigman's Calculation of CITA Factors					
	The Subject Years				
Factor	**2010**	**2011**	**2012**	**2013**	**2014**
Property	56.5	59.7	61.5	58.8	56.3
Payroll	71.6	70.9	68.7	65.6	65.0
Sales	10.4	10.4	9.4	11.1	11.4

*All figures are expressed as percentages rounded to the nearest tenth

The City's Calculation of CITA Factors					
	The Subject Years				
Factor	**2010**	**2011**	**2012**	**2013**	**2014**
Property	56.5	59.7	61.5	58.8	56.3
Payroll	71.6	70.9	68.7	65.6	65.0
Sales	51.1	53.5	51.8	50.1	49.0

* All figures are expressed as percentages rounded to the nearest tenth

Following assessment of nearly $1.1 million in additional tax for the Subject Years based on the City's calculation of the sales factor, Honigman petitioned the Tax Tribunal for review.

B. The Tax Tribunal Granted the City's Motion for Summary Disposition and Denied the Firm's Motion for Summary Disposition

Honigman and the City filed cross-motions for partial summary disposition pursuant to MCR 2.116(C)(10) based on their respective interpretations and applications of the sales factor. On October 20, 2016, the Tax Tribunal issued an Opinion and Order finding: (i) the sales factor is "neither clear nor unambiguous . . . [and] the statute is capable of being understood in two

different senses, and its correct application is somewhat uncertain"; (ii) "(t)he term 'performed' is used in [the payroll factor] because that section pertains to compensation paid to employees, and services are typically 'performed' for an employer, while in terms of generating revenue, they are 'rendered' to a client"; (iii) "services are intangibles, and they cannot be 'delivered' in the same manner as tangible items"; and (iv) there was no cogent reason to overrule the City's statutory construction. (Order, pp 4-6; Appx 38a-40a.)

Following entry of the Order, the parties stipulated to the Firm's tax liability except for the ultimate amount of interest due under the City's interpretation of the sales factor.

Honigman appealed the Tax Tribunal's Order to the Court of Appeals.

C. The Court of Appeals Reversed the Judgment of the Tax Tribunal

On January 18, 2018, the Court of Appeals issued a published opinion reversing the Tax Tribunal's grant of summary disposition in the City's favor. See *Honigman Miller Schwartz and Cohn LLP v City of Detroit*, 322 Mich App 667; 915 NW2d 383 (2018). The Court of Appeals held that the Tax Tribunal's interpretation of CITA equating "rendered" with "performed" was "dubious and unnecessarily convoluted" and rejected its conclusion that CITA is ambiguous. *Id.* at 674. Upholding longstanding rules of statutory construction, the Court of Appeals recognized that, "when the Legislature uses different words, the words are generally intended to connote different meanings" and held the payroll and sales factors have different meanings that capture different aspects of a taxpayer's business. *Id.* at 671. Further, the Court of Appeals held that the relevant consideration for the sales factor is the destination of the services rendered, and where services are rendered to a client located outside the City, they are considered out-of-city sales; services rendered to a client located inside the City are considered in-city sales. *Id.* at 675.

The City's application for leave to appeal to this Court ensued.

D. The Court Granted the City's Application for Leave to Appeal

On November 21, 2018, the Court issued an order granting the City's application for leave to appeal and directed the parties to address "whether the Court of Appeals erred in its construction of the phrase 'services rendered within the city' in the Uniform City Income Tax Ordinance, MCL 141.623."

III. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Bonner v City of Brighton*, 495 Mich 209, 220; 848 NW2d 380 (2014). Questions of statutory interpretation are also reviewed *de novo*. *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016).

IV. ARGUMENT

The Court of Appeals faithfully applied longstanding principles of statutory interpretation to arrive at the correct interpretation and application of CITA. This Court should affirm its judgment.

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). "The first step in that determination is to review the language of the statute itself." *Id.* "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed . . . ." *Id.* When determining the Legislature's intent, courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of the statute." *Jesperson*, 499 Mich at 34. "The rules governing the construction of statutes apply with equal force to the interpretation of municipal ordinances." *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998).

Of particular importance here, statutes must be construed as a whole. "It is a well-established rule of statutory construction that provisions of a statute must be construed in light of the other provisions of the statute to carry out the apparent purpose of the Legislature." *Farrington v Total Petroleum*, 442 Mich 201, 209; 501 NW2d 76 (1993). See also *Robinson v City of Lansing*, 486 Mich 1, 15-16; 782 NW2d 171 (2010), holding that statutes must not be read in isolation:

> [T]o discern the Legislature's intent, ***statutory provisions are not to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole***. *Apsey v Mem Hosp*, 477 Mich 120, 132 n 8, 730 NW2d 695 (2007) ("To discern the true intent of the Legislature, . . . statutes must be read together, and ***no one section should be taken in isolation***."); *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 533, 697 NW2d 895 (2005) ("'[T]he meaning of statutory language, plain or not, depends on context.'") (citation omitted); *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421, 662 NW2d 710 (2003) ("'[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole.'") (citation omitted). "***[A]ny attempt to segregate any portion or exclude any portion [of a statute] from consideration is almost certain to distort the legislative intent***." 2A Singer & Singer, Statutes and Statutory Construction (7th ed), § 47.2, p 282. [Emphasis added.]

Seizing a statutory provision from its context and reading it in isolation violates the canons of interpretation, distorts the statute's meaning, and flouts the Legislature's intent. That is precisely the City's approach here.

A. Taxing Jurisdictions, Including the City, Consider Multiple Factors in Determining Taxable Revenue

1. Multi-Factor Tests Are Commonplace among Tax Statutes

Determining the appropriate tax for a company that conducts business both in and out of a taxing jurisdiction poses serious challenges. To address them, taxing statutes typically consider a variety of factors. A leading tax scholar has noted that jurisdictions historically

considered four methods to determine the amount of revenue subject to tax—the destination test, the origin test, the sales office negotiation test, and the sales activity test:

> Historically, the states used four different methods for attributing receipts to the numerator of a state's sales factor: (1) ***the destination test***, attribution to the state in which the goods are shipped to the customer, or in which they are delivered to the customer; (2) ***the origin test***, attribution to the state of the factory, warehouse, or office from which the goods are shipped; (3) ***the sales office negotiation test***, attribution to the state of the sales office from or through which the sale was principally negotiated; (4) ***the sales activity test***, attribution to the state in which the sales employees principally conducted selling activities.

Hellerstein & Hellerstein, State and Local Taxation (8th ed), pp 658-659. Each of these tests accounts for a different aspect of a taxpayer's business activity, such as the location at which customers receive goods or services, the location of the property from which goods are shipped, the location of where the sale negotiation or activity took place, and so on. Based on those locations and whether business activity was conducted in the jurisdiction, a city can determine the appropriate amount of revenue to tax.

The Legislature's approach in drafting CITA aligns with this convention. CITA considers multiple factors to calculate taxable revenue that take into account different ways of thinking about whether a business activity occurred in or out of the City. Particularly under these circumstances—where the legislative design incorporates multiple factors that work cumulatively and in conjunction to achieve the desired result—it is critical to consider the statute as a whole.

2. CITA Employs a Three-Factor Test

The primary method for calculating that portion of a taxpayer's revenue that is subject to city income tax is known as the "business allocation percentage method." See MCL 141.620. This method "shall be used" unless a taxpayer and the City agree to use a separate method of

allocation. *Id.*[4] Under the business allocation percentage method, the net profits of a taxpayer earned as a result of work done, services rendered, or other business conducted in the city is ascertained by determining the total in-city percentages of property, payroll, and sales. Thus, continuing historical practices like those recognized by Professor Hellerstein, each of these factors is separately computed and determined in accordance with MCL 141.621 through MCL 141.624. And each factor captures a different aspect of a company's business that is distinct from the other two factors.

a. The Property Factor: Where Is the Property?

The first factor is the property factor—MCL 141.621. This factor captures the percentage of the taxpayer's real and personal property located in the City. The factor attributes taxable revenue based on a company's assets that are located in the City and that allow the business to generate revenue.

b. The Payroll Factor: Where Is the Work Done?

The second factor is the payroll factor—MCL 141.622. This factor captures the percentage of "total compensation paid to employees for work done or for ***services performed*** within the City." MCL 141.622 (emphasis added). If an employee works both in and out of the City, the employee's compensation is allocated such that only the in-city portion is included in the factor's numerator. *Id.* In other words, the payroll factor quantifies the extent to which a taxpayer's employees are physically present in the City.

[4] The other two allocation methods are set forth in MCL 141.619 and MCL 141.625, under each of which a substitute method is used, subject to the City's approval. Neither of those methods is at issue in this case.

The payroll factor plays a significant role in this case because, as will be discussed, the City's theory would make this factor's consideration of employee's location redundant with the third factor, the sales factor.

c. The Sales Factor: Where Is the Benefit of the Work Received?

The third factor is the sales factor—MCL 141.623. This factor captures the percentage of revenue derived "from sales made and ***services rendered*** in the city." MCL 141.623 (emphasis added). In other words, the sales factor quantifies the extent to which a taxpayer's customers receive goods or services in the City:

> Third, the taxpayer shall ascertain ***the percentage which the gross revenue of the taxpayer derived from sales made and services rendered*** in the city is of the total gross revenue from sales and services wherever made or rendered during the period covered by the return.

Id.

The Legislature went out of its way to dispose of any doubt about what this factor seeks to capture. The statute provides several examples of what constitutes sales made "in the city" and clarifies that the location of the customer who receives goods or services (and not the location of the taxpayer's employees performing the work) is dispositive to whether sales are deemed in-city:

> (1) For the purposes of this section, ***"sales made in the city" means all sales where the goods, merchandise or property is received in the city by the purchaser***, or a person or firm designated by him. In the case of delivery of goods in the city to a common or private carrier or by other means of transportation, the place at which the delivery has been completed is considered as the place at which the goods are received by the purchaser.
>
> The following examples are not all inclusive but may serve as a guide for determining sales made in the city:

> (a) ***Sales to a customer in the city with shipments to a destination within the city from a location in the city or an out-of-city location are considered sales made in the city***.
>
> (b) Sales to a customer in the city with shipments to a destination within the city directly from the taxpayer's in-city supplier or out-of-city supplier are considered sales made in the city.
>
> (c) ***Sales to a customer in the city with shipments directly to the customer at his regularly maintained and established out-of-city location are considered out-of-city sales***.
>
> (d) Sales to an out-of-city customer with shipments or deliveries to the customer's location within the city are considered sales made in the city.
>
> (e) ***Sales to an out-of-city customer with shipments to an out-of-city destination are considered out-of-city sales***.
>
> (2) In the case of public utilities, or businesses furnishing transportation services, "gross revenue" for the purposes of this section may be measured by such means as operating revenues, vehicle miles, revenue miles, passenger miles, ton miles, tonnage, or such other method as shall reasonably measure the proportion of gross revenue obtained in the city by such business.
>
> (3) ***In case the business of the taxpayer involves substantial business activities other than sales of goods and services such other method or methods of allocation shall be employed as shall reasonably measure the proportion of gross revenue obtained in the city by such business***.

Id. (emphasis added). Thus, while the payroll factor seeks to account for where work performed ***originates***, the sales factor seeks to account for where the fruits of that activity are ***received*** by the end-customer or client.

Once each of these three factors has been computed, the taxpayer adds the property, payroll, and sales percentages together, then divides that sum by three to determine its business allocation percentage. MCL 141.624. Notably, if one of the three factors does not apply to a business (e.g., because it does not have any property), the sum of the percentages is divided by the number of factors actually used. *Id*.

B. The Court of Appeals Gave Proper Meaning to CITA's Three-Factor Test

Against this statutory backdrop, the core of this dispute is whether work performed by the Firm in the City, on behalf of a client located outside the City, is "rendered" in-city or out-of-city for purposes ***of the sales factor***—MCL 141.623. The Court of Appeals held that the relevant consideration is where the client receives services. In other words, the client's location determines whether the revenue attributable to the services rendered is in-city or out-of-city. The Court of Appeals applied a common sense reading of the sales factor and its supporting examples, along with basic principles of statutory interpretation to reach this correct conclusion.

1. CITA Is Not Ambiguous

The Tax Tribunal concluded that the sales factor is ambiguous because it does not address how services are to be allocated. But, in reaching this conclusion, the Tax Tribunal did not engage in any actual statutory interpretation and failed to consider CITA's overall structure in any depth. Instead, it simply opined that the sales factor is a restatement of the payroll factor in that it considers where services are "performed"—as used in the payroll factor—instead of where they are "rendered"—as required by the express language of the sales factor:

> (1) "Reading CITA in context, the Tribunal finds that the difference reflects nothing more than the syntax of the English language. The term "performed" is used in MCL 141.622 because that section pertains to compensation paid to employees, and services are typically "performed" for an employer, while in terms of generating revenue, they are "rendered" to a client….";
>
> (2) "[S]ervices are intangible, and they cannot be 'delivered' in the same manner as tangible items";
>
> (3) There is a definition of render that is synonymous with perform; and
>
> (4) There was no cogent reason to overrule the City's construction.

(Order, pp 4-6; Appx 38a-40a.) The Tax Tribunal cited no authority for this syntax analysis, nor does such authority exist.

In any event, there was no need to embark on any such analysis. Granted, if one provision of a statute irreconcilably conflicts with another, or if a statutory term is equally susceptible to multiple meanings, this may give rise to ambiguity that requires resolution. *Mayor of the City of Lansing v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) ("[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision . . . or when it is equally susceptible to more than a single meaning."), superseded by statute on other grounds by *South Dearborn Environmental Improvement Assoc, Inc v Dep't of Environmental Quality*, 502 Mich 349; 917 NW2d 603 (2018). But here, there is no conflict between the payroll factor and the sales factor—to the contrary, by design they target different business activity. Nor is the sales factor susceptible to multiple interpretations—to the contrary, read in the context of CITA's overall scheme, its meaning is plain.

2. The Payroll and Sales Factors Capture Different Aspects of a Taxpayer's Business

Honigman complied with both the letter and spirit of MCL 141.623 in calculating the sales factor for the Subject Years by properly considering where its services are rendered, as determined by the location of its clients. The City's argument to the contrary is based on its unsupportable claim that "services ***rendered*** in the city" in the sales factor means the same thing as "services ***performed*** in the city" in the payroll factor. Not so. Those factors account for different aspects of a taxpayer's business: where employees are physically located when they perform work, and where goods or services are delivered to a customer or client. The City's analysis eradicates a distinction that CITA took pains to create.

In defining the payroll factor, MCL 141.622 uses the phrase "services performed within the city" as the test for whether compensation is considered in-city or out-of-city:

> Second, the taxpayer shall ascertain the percentage which the total compensation paid to employees for work done or for ***services performed within the city*** is of the total compensation paid to all the taxpayer's employees within and without the city during the period covered by the return . . . .

MCL 141.622 (emphasis added). The statute provides examples of what types of compensation are for "services ***performed*** in the city." The examples clarify the Legislature's intent to apportion tax based on work done in the City:

> If an employee performs services within and without the city, the following examples are not all inclusive but may serve as a guide for determining the amount to be treated as compensation for ***services performed within the city***:
>
> (a) In the case of an employee compensated on a time basis, the proportion of ***the total amount received by him which his working time within the city is of his total working time***.
>
> (b) In the case of an employee compensated directly on the volume of business secured by him, such as a salesman on a commission basis, the amount received by him for ***business attributable to his efforts in the city***.
>
> (c) In the case of an employee compensated on other results achieved, ***the proportion of the total compensation received which the value of his services within the city bears to the value of all his services***.

Id. (emphasis added). Indeed, "perform" means "1. To adhere to the terms of; 2. ***Carry out, do***; 3. To do in a formal manner or according to prescribed ritual, to give a rendition of." *Merriam-Webster Online Dictionary*, 2019 <https://www.merriam-webster.com/dictionary/perform> (emphasis added) (accessed February 18, 2019).[5] Put simply, the payroll factor accounts for that

[5] As described below, it is appropriate to consider dictionary definitions here.

portion of an employee's pay that is based on revenue generated from work physically done, or performed, in the City.

By contrast, the Legislature determined that the sales factor must be calculated based on revenue derived from "services ***rendered*** in the city." This factor recognizes that goods may be delivered, or a service may be rendered, inside or outside the City, regardless of where the seller or service provider is physically located. To be sure, the Legislature could have required that taxpayers calculate taxable revenue based on services "performed" in the City and written the sales factor as a functional equivalent to the payroll factor. But doing so would not have made any sense: it would have double-counted the location where work is performed as captured by the payroll factor and defeated the purpose of having three equally weighted and distinct factors, each of which captures a different aspect of business activity. For this reason, the sales factor uses the phrase "services rendered in the city." "Render" means "1. To melt down; 2. ***To transmit to another: deliver***; 3. To give in return or retribution; 4. To cause to be or become . . . . *Merriam-Webster Online Dictionary*, 2019 <https://www.merriam-webster.com/dictionary/render> (emphasis added) (accessed February 18, 2019).

The Legislature went one step further to clarify its intent that the destination of goods or services is the target of the sales factor. The statutory examples applying the sales factor confirm that the location at which goods or services are delivered to a client is paramount:

> (1) For the purposes of this section, "sales made in the city" means all sales ***where the goods, merchandise or property is received in the city by the purchaser***, or a person or firm designated by him. In the case of ***delivery of goods in the city*** to a common or private carrier or by other means of transportation***, the place at which the delivery has been completed is considered as the place at which the goods are received by the purchaser***.
>
> The following examples are not all inclusive but may serve as a guide for determining sales made in the city:

> (a) ***Sales to a customer in the city with shipments to a destination within the city from a location in the city or an out-of-city location are considered sales made in the city***.
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> (b) Sales to a customer in the city with shipments to a destination within the city directly from the taxpayer's in-city supplier or out-of-city supplier are considered sales made in the city.
>
> (c) Sales to a customer in the city with shipments directly to the customer at his regularly maintained and established out-of-city location are considered out-of-city sales.
>
> (d) Sales to an out-of-city customer with shipments or deliveries to the customer's location within the city are considered sales made in the city.
>
> (e) ***Sales to an out-of-city customer with shipments to an out-of-city destination are considered out-of-city sales***.
>
> ***
>
> (3) In case the business of the taxpayer involves substantial business activities other than sales of goods and services such other method or methods of allocation shall be employed as shall reasonably measure the proportion of gross revenue obtained in the city by such business.

MCL 141.623 (emphasis added). This language conclusively shows that the Legislature intended the sales factor to account for sales based on where goods or services are delivered, as opposed to where goods or services are made.

3. The City Ignores Fundamental Principles of Statutory Interpretation

"A statutory provision should be read in its entirety and in connection with the rest of the statute. The provision should not be construed so as to render another part of the statute superfluous or nugatory." *Danto v Michigan Bd of Medicine*, 168 Mich App 438, 442; 425 NW2d 171 (1988), citing *Wyandotte Savings Bank v State Banking Comm'r*, 347 Mich 33; 78 NW2d 612 (1956). Additionally, "although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." *Sweatt v*

Dep't of Corrections, 468 Mich 172, 179-80; 661 NW2d 201 (2003). See also *Farrington*, 422 Mich at 209; *Robinson* 486 Mich at 15.

Here, the City argues that the Court should (i) myopically focus solely on the sales factor and the City's belief that "perform" means the same thing as "render," and (ii) ignore the sales factor's place and meaning among the other two factors. The Court should do neither.

The City's interpretive gymnastics would write the sales factor out of existence and replace it with a duplicative payroll factor that would twice count the location of an employee as dispositive of taxable revenue. This is most readily apparent from heading III of the City's brief, captioned "'Services Rendered in the City' is Synonymous with Services Performed in the City." (City's Br, p 13.) As this heading and the argument under it make clear, the City asks the Court to declare two statutory provisions "synonymous" even though they use different language and consider different aspects of a taxpayer's business to compute taxable revenue.

The City's "interpretation" is anything but a meaningful attempt to give effect to each of the words used in the sales and payroll factors. It gives no credence whatsoever to the Legislature's use of three factors, each of which has equal weight and each of which captures a different aspect of a taxpayer's business. It disdains the statutory examples clarifying the application of each factor. And it ignores the Court's fundamental obligation to ensure that a provision should not be construed so as to render another provision superfluous or nugatory. *Danto*, 168 Mich App at 442.

Compounding its error, the City ignores the Legislature's use of the different verbs in the payroll and sales factors. Because neither "performed" nor "rendered" are defined in the statute, it is appropriate to consult a dictionary to define them. *Macomb County Prosecuting Attorney v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001) (undefined terms are construed according to

their common meaning and dictionary definitions). "When the Legislature uses different words, the words are generally intended to connote different meanings." *United States Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009). Of course, statutory language should "be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . ." *GC Timmis & Co*, 468 Mich 416, 421-22; 662 NW2d 710 (2003) (citation and quotation marks omitted).

When the sales factor is read in the context of the property and payroll factors, its meaning is clear. The sales factor has an independent application separate and distinct from the payroll factor. It explicitly captures revenue derived from sales made or services rendered in the City. The City's attempt to excise the sales factor from CITA's three-factor analysis and replace that analysis with a two-factor, double-weighted payroll factor analysis cannot be correct. But that is exactly what would result if the Court were to adopt the City's position. This runs contrary to yet another interpretive maxim: "the interpretation to be given to a particular word in one section [is] arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Macomb Co Prosecuting Attorney*, 464 Mich at 160. The Court should heed that maxim here.

Finally, the City boldly asserts that it "makes no sense" to treat sales of goods in a similar manner to the rendering of services. (City's Br, p 20.) In addition to lacking a legal foundation, the City's argument lacks a basis in the sales factor itself. First, the sales factor includes sales of goods and services in the same sentence: the factor is calculated based on revenue derived "from sales made ***and*** services rendered in the city." MCL 141.623 (emphasis added). There is no statutory language suggesting that sales of goods and sales of services should receive disparate

treatment—to the contrary, the structure of the provision makes clear that the Legislature saw them as identical for these purposes. Second, there is a common thread among the examples listed in MCL 141.623(1) for what constitutes "sales made in the city." As the Court of Appeals properly recognized, what is relevant is not the location of the taxpayer or customer or client, but the destination of the goods or services: "If the destination is within the city, then it is a sale made in the city. If the destination is outside the city, then it is not a sale within the city. This employs a 'destination test' for the sales factor." *Honigman*, 322 Mich App at 673-74.

4. CITA Should Be Construed in Favor of Taxpayers

The Court should affirm the judgment of the Court of Appeals for yet another reason: tax statutes must be strictly construed in favor of taxpayers. As the Court has recognized for nearly a century, "[t]he scope of tax laws may not be extended by implication or forced construction . . . and the language thereof, if dubious, is not resolved against the taxpayer." *City of Wyandotte v State Bd of Tax Admin*, 278 Mich 47, 51; 270 NW 211 (1936). The Court must also "give effect to 'the rule which requires taxing acts . . . to be construed liberally in favor of the tax payer.'" *RC Mahon Co v Dep't of Revenue*, 306 Mich 660, 666; 11 NW2d 280 (1943).

The City's strained interpretation of the sales factor, coupled with its attempt to write that factor out of existence in favor of a two-factor test, cannot stand. To the extent there exists any doubt about the proper interpretation or application of CITA, the Court should decline the City's attempt to extend its taxing reach beyond the confines of the relevant statutes.

C. The City's Parade of Horribles Is Neither Horrible Nor Relevant

The City's Brief offers the proverbial "parade of horribles" that it claims follows if the Court endorses the interpretation of CITA embraced by the Court of Appeals. It is completely unsurprising that the City can concoct some facially counterintuitive examples. Nonsensical

results naturally follow if the reader narrowly focuses on the sales factor and ignores the payroll factor and the three-factor analysis generally, as the City does throughout its argument.

Indeed, the same "horrible" results can be achieved by doing the inverse of what the City proposes in this case and by ignoring the ***sales*** factor—just as the City wants the Court to ignore the ***payroll*** factor. If we ignore the sales factor and focus exclusively on the payroll factor, odd results follow then as well. For example, if the property and payroll factors are viewed in isolation without regard for the sales factor, an accountant in Ferndale who prepares a tax return for a Detroit client, and who mails that tax return to the client's Detroit address, would not be subject to Detroit tax at all even though the services were rendered there. That is because the accountant was engaged in Ferndale, prepared the return in her Ferndale office, and placed the return in a mailbox in Ferndale. It would not matter that CITA's scheme intends to treat as taxable any revenue derived from services rendered in the City.

In essence, the City makes a mess of the three-factor statutory scheme through artificial hypotheticals, stands back, and declares: "Look at the mess!" But on closer inspection of several of the horribles in the City's parade, they are not so scary after all and are easily disposed of:

- The City suggests that, if Honigman's Detroit attorneys draft documents for a transaction for a Southfield-based client but the transaction falls apart, there is no "delivery" of anything and thus the services must have been rendered in Detroit. (City's Br, p 22.)
    - ***False***. Honigman's attorneys rendered services to the client in Southfield by sending the client the documents. The client reviews, edits, and approves or disapproves of those documents. The transaction could fall apart for countless reasons, but the deal's success or failure does not

change that Honigman rendered services to the client in Southfield by delivering the transaction documents there. And even if Honigman sent the Southfield client no physical documents (e.g., by email), the benefit of its services would still have been received there. That an attorney located in Detroit prepared the documents is captured by the payroll factor.

- The City suggests that, under the same hypothetical as above, the Southfield client terminates Honigman's services before the transaction closes. Because the deal never closed, there is no "delivery" and services were rendered in Detroit. (*Id.*, p 23.)
    - ***False***. The client engaged Honigman to render it services in Southfield. Again, that is the location at which the client engaged the Firm to render services. Whether the transaction ultimately closed or the client terminated the engagement is immaterial to the location at which services were rendered and where the client received the benefit of those services.
- The City suggests that an attorney in Detroit speaking on the phone with a client in Ann Arbor equates to rendering services in Detroit. (*Id.*)
    - ***False***. The payroll factor accounts for the attorney's physical location, but as explained above, the sales factor captures where goods and services are delivered. For purposes of the sales factor, the attorney's advice is rendered in Ann Arbor.
- The City suggests that attorneys must track the location of every person they speak with every day, which is "absurd." (*Id.*)

- ***Agreed that tracking would be absurd***. Not only is it impractical for attorneys to track their client's every move, but nothing in CITA, the payroll factor, the property factor, or the sales factor requires such tracking.

In sum, the City's contrived hypotheticals reinforce the need for all three factors to be considered with equal force as CITA requires. MCL 141.623. It is only when one factor is written out of existence or another is viewed in isolation that CITA's application produces anomalous results. The Court should not indulge the City's attempt to pervert the meaning of a clear and unambiguous statute.

V. CONCLUSION

For the foregoing reasons, and the reasons set forth in its opposition to the City's application for leave to appeal, Honigman respectfully requests that the Court (i) affirm the judgment of the Court of Appeals or, in the alternative, vacate its order granting the City's application for leave to appeal and deny the City's application; and (ii) grant such further relief to Honigman as the Court deems just and proper.

Date: February 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I electronically filed the foregoing using the TrueFiling System which will send notification of such filing to all registered counsel of record.

Date: February 19, 2019

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