STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF DEARBORN,

Plaintiff/Counter-Defendant/Appellee,

v

BANK OF AMERICA, N.A., as successor-in-interest to STANDARD FEDERAL BANK, N.A.,

Defendant/Counter-Defendant/Appellee,

and

WEST DEARBORN PARTNERS, LLC,

Defendant/Counter-Plaintiff/Appellant.

SC No. _____
COA No. 339704
LC No. 15-012788-CH
(Wayne Circuit Court)

/

NOTICE OF FILING APPLICATION

APPLICATION FOR LEAVE TO APPEAL BY WEST DEARBORN PARTNERS, LLC

INDEX OF EXHIBITS

EXHIBITS A-DD

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

PLUNKETT COONEY

By: Robert G. Kamenec (P35283)
Karen E. Beach (P75172)
Attorneys for Appellant West Dearborn Partners, LLC
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(248) 901-4068

STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF DEARBORN,

Plaintiff/Counter-Defendant/Appellee,

v

BANK OF AMERICA, N.A., as successor-in-interest to STANDARD FEDERAL BANK, N.A.,

Defendant/Counter-Defendant/Appellee,

and

WEST DEARBORN PARTNERS, LLC,

Defendant/Counter-Plaintiff/Appellant.

SC No. _____
COA No. 339704
LC No. 15-012788-CH
(Wayne Circuit Court)

/

NOTICE OF FILING APPLICATION

TO:

Michigan Court of Appeals Clerk Via TrueFiling Electronic Filing	Wayne County Circuit Court Via M-File Electronic Filing

Defendant/Counter-Plaintiff/Appellant, LLC, West Dearborn Partners, LLC states that on May 31, 2019, its application for leave to appeal and accompanying documents were filed with the Michigan Supreme Court.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Robert G. Kamenec
Robert G. Kamenec (P35283)
Karen E. Beach (P75172)
Attorneys for Appellant West Dearborn Partners, LLC
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(248) 901-4068

Dated: May 31, 2019

STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF DEARBORN,

Plaintiff/Counter-Defendant/Appellee,

v

BANK OF AMERICA, N.A., as successor-in-interest to STANDARD FEDERAL BANK, N.A.,

Defendant/Counter-Defendant/Appellee,

and

WEST DEARBORN PARTNERS, LLC,

Defendant/Counter-Plaintiff/Appellant.

SC No. _____
COA No. 339704
LC No. 15-012788-CH
(Wayne Circuit Court)

/

APPLICATION FOR LEAVE TO APPEAL BY WEST DEARBORN PARTNERS, LLC

PLUNKETT COONEY

By: Robert G. Kamenec (P35283)
Karen E. Beach (P75172)
Attorneys for Appellant West Dearborn Partners, LLC
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(248) 901-4068

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

MICHIGAN CASES

FEDERAL CASES

OUT-OF-STATE CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS ERRED WHEN AFFIRMING SUMMARY DISPOSITION IN FAVOR OF THE CITY OF DEARBORN BY RULING THAT WEST DEARBORN'S RECORDED MORTGAGE INTEREST DID NOT SURVIVE THE BANKRUPTCY ORDER, PRESERVING "ALL LIENS, INTERESTS, RIGHTS AND OBLIGATIONS OF RECORD," WHEN THE MORTGAGE WAS PREVIOUSLY RECORDED SIX YEARS EARLIER?

City of Dearborn says "No."

West Dearborn Partners says "Yes."

The trial court presumably says "No."

The Michigan Court of Appeals says "No."

II.

WHETHER THE COURT OF APPEALS ERRED BY REJECTING WEST DEARBORN'S EQUITABLE ARGUMENTS, WHERE THE CITY REVERSED ITS POSITION IN THE BANKRUPTCY COURT REGARDING WEST DEARBORN'S INTEREST AND RECEIVED A WINDFALL AFTER PURCHASING PARCEL C FOR $1.00 WITH ACTUAL KNOWLEDGE OF WEST DEARBORN'S INTEREST?

City of Dearborn says "No."

West Dearborn Partners says "Yes."

The trial court presumably says "No."

The Michigan Court of Appeals says "No."

III.

WHETHER THE COURT OF APPEALS ERRED BY FINDING THAT THE MORTGAGE WAS EXTINGUISHED BY BANK OF AMERICA IN AUGUST 2015, WHEN BANK OF AMERICA HAD PREVIOUSLY ASSIGNED AND SOLD THE MORTGAGE AND UNDERLYING NOTE TO WEST DEARBORN IN 2011?

City of Dearborn says "No."

West Dearborn Partners says "Yes."

The trial court presumably says "No."

The Michigan Court of Appeals says "No."

STATEMENT IDENTIFYING ORDER APPEALED AND GROUNDS FOR SUPREME COURT REVIEW

Defendant/Counter-Plaintiff/Appellant West Dearborn Partners, LLC ("West Dearborn") appeal from the February 12, 2019 opinion and order of the Court of Appeals issued by Judges Stephens, K. F. Kelly and Tukel, affirming the trial court's grant of summary disposition against West Dearborn and in favor of Plaintiff/Counter-Defendant/Appellee City of Dearborn ("City") in this quiet title action (**Exhibit A**).

This application satisfies the criteria for Supreme Court review under MCR 7.305(B) because it raises issues of significance to the state's jurisprudence and because the Court of Appeals opinion is clearly erroneous, causes material prejudice to West Dearborn, and conflicts with published authority from that court and this Court. First, the Court of Appeals incorrectly finds that a validly recorded mortgage can disappear into thin air following entry of a bankruptcy order that explicitly preserves all "obligations of record." The Court of Appeals found that the unrecorded assignment of that mortgage to West Dearborn from Bank of America did not survive the bankruptcy order, but this ignores that the underlying note was sold by Bank of America to West Dearborn, making West Dearborn the holder of the mortgage regardless of whether the assignment was recorded. *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 257; 761 NW2d 694 (2008). The Court of Appeals acknowledged this argument (**Exhibit A**, pp 5-6), but then found that Bank of America had later discharged the mortgage which (a) it did not own, having sold the note to West Dearborn; and (b) had assigned to West Dearborn, with that assignment being effective regardless of whether it was recorded. The Court of Appeals opinion directly conflicts with its own published authority in *Prime Financial Services* and the decisions of this Court forming the basis for that decision.

The Court of Appeals opinion also conflicts with its published decision in *Coventry Park Homes Condo Ass'n v Federal Nat'l Mtg Ass'n*, 298 Mich App 252, 256-257; 827 NW2d 379 (2012), which provides that when a mortgage is assigned, the assignee becomes a party to the mortgage and stands in the shoes

of the mortgagee. While the Court attempts to distinguish *Coventry* by noting that *Coventry* involved a priority dispute under the Condominium Act, *Coventry* itself holds that "[w]hile the Condominium Act governs the parties' priority dispute, we note that the result reached today is consistent with the principle that an assignee stands in the place of an assignor, including for purposes of priority rights with respect to an assignment of a mortgage." *Id.* at 260-261. It is this latter principle upon which West Dearborn relies, and which the Court of Appeals erroneously disregarded based on the "unique" facts of this case (**Exhibit A**, p 5).

The Court of Appeals opinion further disregarded well-settled principles of equity. First, the Court of Appeals misapplied the doctrine of judicial estoppel by comparing and finding similar two statements made by the City in the same bankruptcy proceeding, rather than statements made by the City in the bankruptcy proceeding and the separate quiet title proceeding (**Exhibit A**, pp 6-8). The requirements of estoppel are satisfied where the City claimed in the bankruptcy proceeding that the bankruptcy order would protect the interests of West Dearborn, but then asserted in the quiet title proceeding that the bankruptcy order extinguished West Dearborn's interest in the property due to the unrecorded assignment. The trial court and the Court of Appeals subverted the bankruptcy court's intent that West Dearborn's interest in the property be protected, causing material prejudice to West Dearborn.

Second, in weighing the equities, the Court of Appeals fixates on West Dearborn's admitted failure to record the assignment while ignoring that the City cannot be a bona fide purchaser for value under MCL 565.29 because it had actual knowledge of the sale of the note for $150,000 and the assignment of the mortgage from Bank of America to West Dearborn (Id., pp 8-9). Stated differently, the City's actual knowledge of the sale and assignment of the mortgage rendered superfluous any consideration of whether *the City* could purchase the property in good faith (for $1.00) simply because the rest of the world was not on notice of the unrecorded assignment. In West Dearborn's view, when the Court of Appeals considered the equitable arguments presented, it placed exclusive weight in the failure to record the assignment in

March 2011 and no apparent weight in the windfall now enjoyed by the City. Although it may not be the role of the Court of Appeals to "protect sophisticated parties and their counsel for mistakes," (**Exhibit A**, p 8), it is the role of the Court to balance the equities when it comes to real estate interests in a quiet title lawsuit. West Dearborn asks this Court to grant leave to appeal or otherwise issue relief to protect West Dearborn's interests in the property.

STATEMENT OF FACTS

A. Introduction.

This lawsuit reflects an effort by the Plaintiff/Counter-Defendant/Appellee City of Dearborn ("City") to sidestep a prior recorded mortgage ("Mortgage") later held by Defendant/Counter-Plaintiff/Appellant West Dearborn Partners, LLC ("West Dearborn"). In 2005, the City sold the property ("Subject Property" or "Parcel C"), along with other parcels, for approximately $2.8 million. It then acquired its interest in the Subject Property from the Bankruptcy Court in 2011 - for $1.00. The interest the City acquired from the Bankruptcy Trustee was subject to the Mortgage lien held by West Dearborn, which had acquired the existing 2005 Mortgage and related loan from Bank of America ("BOA") on March 31, 2011. The assignment of the Mortgage was not recorded when the Bankruptcy Trustee sold the Subject Property to the City for the proverbial $1.00. However, the Mortgage had been recorded years earlier, and was of record when the Bankruptcy Trustee sold the Subject Property. Yet, in this ensuing litigation, the Honorable Muriel D. Hughes of the Wayne County Circuit Court interpreted the Bankruptcy Order's express terms – providing abandonment of the property "shall not impair, and the property shall remain subject to, all claims, liens, interest, rights and obligations of record" – as inapplicable to the recorded Mortgage. The trial court reasoned that the *Assignment* of the Mortgage must also have been recorded, i.e., be "of record," for the Mortgage to qualify as a "lien" or "interest" "of record," even though there was no debate that the *Mortgage* itself was recorded at that time. The Court of Appeals doubled-down on this error, fixating on West Dearborn's failure to record the Assignment while ignoring West Dearborn's rights as assignee under the Mortgage itself. Under the Court of Appeals opinion, the Mortgage has simply vanished into thin air, leaving a windfall for the City, which had acknowledged West Dearborn's interest in the property in the bankruptcy court. This result is untenable and inequitable under Michigan law, and West Dearborn requests this Court grant leave to appeal or otherwise issue relief.

B. Statement of material facts.

The Subject Property is a vacant piece of property lying between two parking decks in the West Dearborn area, between Michigan Avenue and the railroad tracks, west of Oakwood Avenue. It is identified as "Parcel C" in many of the related documents and instruments.

On May 9, 2005, the City sold the Subject Property, along with other properties, to West Village Commons, LLC ("West Village") (Deed, **Exhibit B**). The City received around $2.8 million dollars. In part, the transaction appears to have been financed by the Mortgage given by West Village to Standard Federal Bank dated May 11, 2005, and recorded on June 7, 2005 (**Exhibit C**).[1] The project apparently stalled. In 2009, the City filed suit in the Wayne County Circuit Court to specifically enforce certain agreements and for damages against the owner and the related developer, Burton-Katzman (Wayne County Circuit Court Case No. 09-001342-CH). That case went back and forth from the Court of Appeals.[2]

In the meantime, Anmar Sarafa ("Sarafa"), the then-managing partner of West Dearborn, was looking for investment opportunities in 2010-2011, as the economy was still in recession. He was assisted by attorney Scott Lites. Sarafa (on behalf of an entity to-be-named – ultimately West Dearborn) completed a deal with BOA to purchase the subject mortgage loan for $150,000.00 (**Exhibit D**, the Note Sale, Assignment Agreement, and First and Second Amendments). The deal closed on March 31, 2011, with the related allonge, a type of assignment of note (**Exhibit E**), and assignment of mortgage ("Assignment") (**Exhibit F**) delivered by BOA. The Mortgage itself provided that "the Mortgagor hereby mortgages, warrants and grants a security interest to the Mortgagee, *its successors and assigns*, in and to the Premises" (**Exhibit C**, p 2) (emphasis added). Paragraph 19 of the Mortgage (page 10 of 15) states

[1] This mortgage, eventually acquired by West Dearborn from Bank of America ("BOA"), is the subject of the present lawsuit. Prior to its assignment to West Dearborn, it was originally given to Standard Federal Bank National Association and then held by LaSalle Bank and then BOA, by related mergers.

[2] It appears that the circuit court issued orders to enforce related agreements to develop the property, but the City was unable to obtain damages.

(emphasis added):

> Binding Effect: *All of the covenants and conditions hereof shall run with the land and shall be binding upon the successors and assignees of the Mortgagor and shall inure to the benefit of the successors and assigns of Mortgagee*; any reference herein to 'Mortgagee' *shall include the successors and assigns of Mortgagee*.

In August 2010, West Village went into bankruptcy. While a primary concern seemed to be West Village's attempts to shed its obligations related to certain restrictions and a related Development Agreement, the City sought to recover the Subject Property through the bankruptcy. The Bankruptcy Trustee filed a Motion to Sell Property and, with such, West Dearborn then appeared in the bankruptcy and filed Objections to a Motion for Order Approving Sale (which *included* a copy of the executed Assignment to West Dearborn) to ensure that West Dearborn's interests were protected (**Exhibit G**). Various other pleadings were filed, through which it became clear that the City had actual notice of the assignee interest of West Dearborn. On July 13, 2011, the City's bankruptcy counsel, Bob Gordon of Clark Hill, was advised by BOA's counsel that the BOA Mortgage and related loan had been sold to West Dearborn. He was further advised in the same e-mail of the contact information for Mr. Sarafa and his attorney, Scott Lites (**Exhibit H**).

On October 4, 2011, a hearing was held in the bankruptcy court to abandon the Subject Property and for its ultimate conveyance by the Trustee to the City. The Order of Abandonment (**Exhibit I**) did not require the recording of the Assignment to West Dearborn prior to the Quit Claim Deed to the City (**Exhibit J**) in order to preserve West Dearborn's mortgagee interest. Instead, the Order stated that "[t]he Trustee is directed to promptly abandon the Debtor's real property... *Such abandonment shall not impair*, and the Property shall remain subject to, *all claims, liens, interests*, rights and obligations *of record*." Accordingly, the City's bankruptcy counsel told the bankruptcy court:

> The other thing I wanted to highlight, your Honor, is the proposed order here. Our proposed order states very clearly in paragraph 2, among other things, that the abandonment - - first of all, it contemplates a quit claim deed, and it says that such abandonment shall not impair and the property shall remain subject to all claims, liens,

> interests, rights, and obligations of record. The West Dearborn Partners, the Mortgagee - - the holder of the Mortgage and the note on the property, has indicated it wants to make sure that the property is subject to its rights and interests. This order already does that. So the rights of the holder of the Mortgage are not prejudiced in any way by the abandonment here, and no other party other than the trustee has objected to the abandonment. And the trustee has just indicated that there is no value to the property to the estate, so we would suggest that our motion is proper, and we would ask that it be granted. Thank you, your Honor.

(**Exhibit K**, Transcript, p. 35). After the City confirmed that West Dearborn was the mortgagee/holder of the Mortgage and the Note on the property, the bankruptcy judge herself noted ""I do believe under both 554 and 105 that there are grounds for this Court to require abandonment directly to the City of Dearborn. *The mortgagee in this case certainly can enforce its remedies. The order that was proposed and attached to the motion protects the rights of anybody else with an interest in the property*." (Id. at 37) (emphasis supplied). Under these stated expectations, the Order of Abandonment was entered and the Subject Property was then conveyed to the City by the Trustee by way of a quit claim deed on October 17, 2011.

In the instant action, West Dearborn's attorney, Scott Lites, testified in his deposition that because the Assignment (which had been prepared by BOA) lacked an acknowledgement page, he had to track down the signer of the Assignment, Mark Mokelke, and get his signature acknowledged in order to record the Assignment (Lites Deposition, **Exhibit L,** pp. 39-44, 59-60). Lites testified, and it was later corroborated by Mokelke, that Lites was unable to get the requisite acknowledgement page until approximately July 2014, because Mokelke had been transferred by BOA to California and had totally different contact information (**Exhibit M**, Mokelke Deposition, p. 54).

The Mortgage (**Exhibit C**) includes both the Subject Property and separate property containing condominium units. It was testified to by both Sarafa and West Dearborn's current principal, Doraid Elder, that West Dearborn decided to let the condominium units go down for unpaid property taxes (those units were not owned by the City) (Elder Deposition, **Exhibit N**, p. 82-84).

In late 2014, the related property tax foreclosure purchasers of those condominium units filed a

quiet title action in the Wayne County Circuit Court to clear the title as to any interest they had purchased as to those condominium units (see tax purchasers' Complaint, **Exhibit O**). BOA was named as a defendant, apparently because the Mortgage was still of record and West Dearborn's Assignment had not yet been recorded (and was not recorded until December 17, 2015). Eventually, the court in that case found that BOA had no interest in the property and ordered it to discharge the Mortgage (see Order, **Exhibit P** and Discharge, **Exhibit Q**). BOA's related representative, Sara Allen, testified that while the BOA loan and Mortgage had indeed been sold to West Dearborn, with the related Assignment done on March 31, 2011, she had forgotten about the Assignment when she drafted the discharge and the bank did not realize this when the tax purchaser lawsuit was pending. Nevertheless, she confirmed that BOA had no interest in the Subject Property, had nothing to discharge, and that its actual participation in the lawsuit was in error (Sara Allen transcript, **Exhibit R**, pages 58-60, 76, 79-80). Later, BOA's attorney recorded an Affidavit of Scrivener's Error excluding the Subject Property from that Discharge (**Exhibit S**).[3]

Deposition testimony reflects that sometime in late 2014 and into 2015, certain City officials were seemingly becoming pressured because nothing was happening with the development. Apparently, adjoining parking decks were costing the City money through bonds that had been sold, and with the lack of development, there was purported pressure to "get something going." Despite the prior communications from BOA's bankruptcy counsel to the City in July 2011 as to the interest of West Dearborn and information as to its primary contact, Sarafa, and his attorney, Scott Lites (**Exhibit H**), as well as the pleadings and declarations made in the bankruptcy case itself as to the assignee interest of West Dearborn, the City ran a title search as to recordings only related to the Subject Property.

[3] As demonstrated in Argument III, *infra*, here the City tries to latch on to this Discharge (with no other evidence to support same) in an attempt to create an impression that BOA somehow actually retained the Mortgage and then discharged any interest it had in the Subject Property through this Discharge. In reality, it had nothing to discharge.

In their depositions, the City's attorneys testified that since the West Dearborn Assignment was not yet of record, it filed this action against BOA on October 1, 2015, in an apparent effort to "get something going." However, on October 29, 2015 the City was reminded by BOA's counsel Miller Canfield that the Mortgage and related loan had previously been sold to West Dearborn. On December 7, 2015, the City added West Dearborn to the action (see First Amended Complaint, without Exhibits, **Exhibit T**).

In the lawsuit against West Dearborn (Count II), the City claims that as to the Subject Property, any interest of West Dearborn is subordinate to the interest of the City because the Assignment was not recorded prior to the City acquiring its interest through the Bankruptcy Trustee on October 17, 2011. Through its Second Supplemental Discovery Responses (**Exhibit U**), with a lot of "mays" and "mights," the City also argued that the Assignment was defective and therefore passed no interest to West Dearborn. The City also claimed in its discovery responses that since the Assignment itself was not recorded prior to the City acquiring its interest through the bankruptcy court, any interest was obtained free and clear of any interest of West Dearborn. The City also claimed that if the Mortgage itself remained and survived the bankruptcy, it was still held by BOA and since BOA later discharged the Mortgage in 2014 in the furtherance of the tax purchaser litigation (**Exhibits P, Q**), there is no longer any Mortgage (see **Exhibit U**).

While this action was pending, the bankruptcy court was asked to confirm the scope of its Bankruptcy Order. However, Bankruptcy Judge McIvor felt that the real estate issues raised were best resolved in the state court action. A copy of Judge McIvor's Order and related transcript is attached as **Exhibit V**.

C. Counter-motions for summary disposition and the trial court's ruling.

West Dearborn and the City filed counter-motions for summary disposition, which were opposed. With its reply brief, West Dearborn supplied the trial court the City's sur-reply brief in support of its objections, filed in the bankruptcy court (**Exhibit W**). West Dearborn also supplied the trial court with the

Affidavit of Doriad Elder, establishing that Schedule A filed in the bankruptcy court listed Parcel C (a vacant lot) as having a value of $800,000, subject to the BOA mortgage in excess of $2.1 million (**Exhibit X**). This was juxtaposed with the Quit Claim Deed from the Trustee to the City reciting consideration of $1.00 (**Exhibit B**). The numerous exhibits previously referenced in this application were attached to West Dearborn's motion for summary disposition dated February 23, 2017.

On May 26, 2017, the trial court entertained oral argument on the counter-motions for summary disposition (**Exhibit Y**, Transcript). The trial court ruled in favor of the City and against West Dearborn, finding "[a]ny interest West Dearborn Partners had in Parcel C was extinguished by the Bankruptcy Order and due to West Dearborn Partners' failure to record the assignment." (*Id*. at 46). The trial court quoted its understanding of the Bankruptcy Order, providing "such abandonment [to allow the trustee to quit claim the deed] shall not impair and the property shall remain subject to all claims, lien, interest rights and obligations of record." (*Id*. at 47). Apparently, the trial court did not consider the Mortgage "of record," instead keying in on the failure to file the Assignment. The trial court then stated that the bankruptcy court order "could have included language [which] protected WDP's unrecorded interest," but that the Bankruptcy Order "retained only those claims, liens, interest rights and obligations of record." (*Id*. at 47-48). The trial court further reasoned that its result was "not unjust" because West Dearborn failed to comply with and did not record the 2011 Assignment until 2015, after the Bankruptcy Order was filed (*Id*. at 48).

As a result, the trial court did not reach the alternative argument regarding BOA's alleged discharge of the Mortgage in August 2015, and whether it was effective at extinguishing West Dearborn's Assignment (*Id*. at 49).

The trial court entered its conforming order on June 5, 2017, which provided *inter alia* that West Dearborn Partners, LLC did not have any interest in Parcel C, including but not limited to, any existing mortgage interest (**Exhibit Z**, Order, ¶ 4).

On June 26, 2017, West Dearborn filed its motion for reconsideration with the trial court. The trial

court did not entertain oral argument on that motion, but instead entered an order denying the motion on July 27, 2017 (**Exhibit AA**).

D. Court of Appeals opinion.

On appeal by West Dearborn, the Court of Appeals affirmed the trial court's grant of summary disposition to the City (**Exhibit A**). The Court rejected West Dearborn's position that the recorded Mortgage, and West Dearborn's interest in the Parcel C pursuant to its status as both assignee and holder of the Mortgage following the sale of the note, survived the bankruptcy order (Id. at 5-6). The Court found that West Dearborn's request that the Order of Sale be subject to West Dearborn's interest under the *Mortgage* was some sort of admission that the Order required the *Assignment* to be recorded in order for West Dearborn's interest to survive the sale. Although the Court admitted that "generally an assignment of the note includes a transfer of obligation under the mortgage," it sidestepped that law by finding that "the situation before us is particularly unique" (Id. at 5), and that the Order effectively extinguished West Dearborn's rights under the Assignment because it was unrecorded.

The Court then found that even if the Mortgage had been validly assigned to West Dearborn, Bank of America somehow retained the ability to discharge the Mortgage in the (admittedly erroneous) order resolving the quiet title proceeding involving Parcel A-3, different from the subject Parcel C, simply because West Dearborn had failed to put *others* on notice of the otherwise valid Assignment:

> Even if we accepted West Dearborn's position that it stood in BOA's shoes and had no obligation to record the assignment to protect its interest, then West Dearborn stood in BOA's shoes when BOA later discharged the mortgage in 2015 as a result of a separate quiet title proceeding regarding Parcel A-3. West Dearborn argues that the discharge was invalid because BOA, having no interest in Parcel C, had nothing to discharge. West Dearborn wants to be relieved of any obligation to notify the world of its interest in Parcel C and yet be protected when chaos ensues. West Dearborn provides no satisfactory explanation for why it failed to record the assignment for over 4 ½ years.

(**Exhibit A**, p 6).

Next, the Court rejected West Dearborn's equitable arguments (Id. at 6-8). In particular, the Court again cited to the "unique" facts of this case to dismiss the notion that the City could not be a bona fide purchaser for value under MCR 565.29 because it had actual knowledge of the Assignment and Mortgage prior to acquiring its interest (Id. at 8). The Court otherwise emphasized that West Dearborn had "inexplicab[ly] fail[ed]" to record the Assignment, which it found justified denying equitable relief (Id.).

West Dearborn timely filed a motion for reconsideration, which was denied on April 19, 2019 (**Exhibit BB**). This timely application for leave to appeal followed.

ARGUMENT I

THE COURT OF APPEALS ERRED WHEN AFFIRMING SUMMARY DISPOSITION IN FAVOR OF THE CITY OF DEARBORN BY RULING THAT WEST DEARBORN'S RECORDED MORTGAGE INTEREST DID NOT SURVIVE THE BANKRUPTCY ORDER, PRESERVING "ALL LIENS, INTERESTS, RIGHTS AND OBLIGATIONS OF RECORD," WHEN THE MORTGAGE WAS PREVIOUSLY RECORDED SIX YEARS EARLIER.

A. Standard of review and supporting authority.

This Court reviews *de novo* a trial court's ruling on a motion for summary disposition, including those brought under MCR 2.116(C)(8) and (10). *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Interpreting the meaning of an "order" involves questions of law that this Court reviews *de novo* on appeal. *Silverstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008); *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004). Questions involving the proper interpretation of a contract [here a mortgage] or the legal effect of a contractual clause are also reviewed *de novo*. *Rory v Continental Insurance Co*, 473 Mich 457, 464; 703 NW2d 23 (2005); *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). When ascertaining the meaning of a contract, the court gives the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. *Rory*, 473 Mich at 464; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Thus, when a written instrument is patently unambiguous, the courts must give effect to that objective expression of contractual intent. *Rory, supra*; 11 Williston on Contracts, § 30:6 (4th ed 2012).

B. Introduction – summary.

While acknowledging the validity of the assignment of the Mortgage from BOA to West Dearborn, the trial court erred when finding the Mortgage recorded in 2005 did not survive the October 5, 2011 Bankruptcy Order, which specifically allowed the trustee to abandon the Subject Property, but that "[s]uch abandonment shall not impair, and the property shall remain subject to, all claims, liens, interest, rights and

obligations of record." (**Exhibit I**). It is uncontested that BOA recorded the Mortgage, that the Mortgage had not been extinguished as of October 5, 2011, and that the Mortgage constitutes a "lien" or "interest" which was "of record" by reason of its filing on June 7, 2005 – six years before entry of the Bankruptcy Order. It is further undisputed that the recorded Mortgage provides that all references to the "mortgagee" shall include successors and assigns of the mortgagee. In turn, when West Dearborn purchased the Mortgage and the Note prior to the Bankruptcy Order, it stepped into the protected shoes of BOA regardless of whether the Assignment was recorded. The trial court simply misread and then misapplied the Bankruptcy Order, and in doing so erroneously extinguished West Dearborn's mortgage interest. The Court of Appeals further erred by adopting this misapplication and then disregarding its own precedent and precedent from this Court holding that an assignment of the note includes a transfer of the obligation under the mortgage. No case law stands for the novel proposition that the interest in a mortgage evaporates upon assignment if that assignment is not recorded.

The practical effect of the Court of Appeals opinion on mortgage law is substantial: a valid mortgage, properly recorded, is eviscerated even though the bankruptcy court provides that abandonment of the property shall not apply to such an indebtedness. Under the trial court's ruling, the City has obtained a massive windfall by "purchase" of the property free and clear for the nominal $1.00, when the property was valued at $800,000 under the bankruptcy schedule.

C. Argument.

1. The Bankruptcy Order did not vitiate the earlier recorded Mortgage, which was held by West Dearborn when the Note and Mortgage were sold and transferred.

The October 5, 2011 Bankruptcy Order states:

> 2. "The Trustee is directed to promptly abandon the Debtor's real property located at 221171 W. Village Drive, Dearborn, Michigan, Tax Parcel ID No. 82-09-223-07-074 (the '*Property*') via quitclaim deed to the City of Dearborn, in a form reasonably satisfactory to the City of Dearborn and consistent with this Order, pursuant to sections 105(a) and 554(b)

> of the Bankruptcy Code. *Such abandonment shall not impair*, and the Property shall remain subject to, *all claims, liens, interests*, rights and obligations *of record*."

(**Exhibit I**) (footnote omitted) (emphasis supplied).

It is undisputed that on March 31, 2011, West Dearborn purchased the BOA loan and Mortgage that were previously recorded on June 7, 2005. (**Exhibits C-F**). Thus, that lien was "of record" at the time of entry of the Bankruptcy Order, six years later. Specifically, since the Mortgage was recorded in 2005, it survived the Bankruptcy Order because it constituted a "lien, interest… of record" on the property. The Mortgage, as a secured lien, survived bankruptcy. *Johnson v Home State Bank*, 501 US 78, 111 S Ct 2150 (1991). A mortgage can be both a lien and an interest. A mortgage is a lien on real estate securing the payment or performance of an obligation. *McKeighan v Citizens Commercial & Savings Bank*, 302 Mich 666; 5 NW2d 524 (1942); *Equitable Trust Co v Milton Realty C*., 263 Mich 673; 249 NW 30 (1933). A mortgage is also described in *Black's Law Dictionary Rev. Fourth Ed.* as: "An estate created by a conveyance absolute in its form, but intended to secure the performance of some act . . . ." As to real property, an "interest" is further defined in *Black's* as:

> The most general term that can be employed to denote a property in lands or chattels. In its application to lands and things real, it is frequently used in connection with the terms 'estate,' 'right,' and 'title,' and according to Lord Coke, it property includes them all.

Thus, "interest" as set forth both in the Order and Deed can clearly be construed to relate to the Mortgage itself and not as to *who* happens to hold the interest at any particular point in time.

In turn, West Dearborn's interest in the Mortgage as purchaser, successor and assign likewise survived the bankruptcy because the transfer or assignment of the obligation (here, the Note) "operates as an assignment of the mortgage." *Equitable Trust Co*, 263 Mich at 676. See also *Jones v Titus*, 208 Mich 392; 175 NW 257 (1919); *Prime Financial Services*, 279 Mich App at 257 ("[a] mortgage is a mere security interest incident to an underlying obligation, and the transfer of a note necessarily includes a transfer of the mortgage with it"), quoting *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942);

Ladue v Detroit & M R Co, 13 Mich 380; 1865 WL 842 (1865). The Court of Appeals' ruling that West Dearborn lost its interest in the Mortgage because it did not record the accompanying Assignment is contrary to this precedent, and contrary to the terms of the Mortgage itself providing that that "a security interest" is given to the "Mortgagee, its successors and assigns." (**Exhibit C**, page 2 of 15).

Both the trial court and the Court of Appeals disregarded the ruling in *Coventry* that "an assignee stands in the shoes of an assignor, acquiring the same rights and being subject to the same defenses as the assignor" and "[w]hen a mortgage is assigned, the assignee, for all beneficial purposes claimed under it by him, becomes a party to the mortgage, and stands in the place of the mortgagee." *Coventry*, 298 Mich App at 256-257, citing *Wilson v Campbell*, 110 Mich. at 588-589. In *Coventry*, a mortgage was given by the condominium owner and then recorded. Afterwards, the condominium association recorded a lien for non-payment of assessments. Then, the mortgage was assigned to FNMA. The condominium association then claimed priority of its lien under MCL 559.208(1), which affords a type of "super priority" to condominium liens, except as to . . . "a first Mortgage of record." The association claimed that since an assignment is not a mortgage, the condominium lien should have priority. The Court of Appeals disagreed, holding that because "the assignee stands in the place of the assignor, including for purposes of priority rights with respect to the assignment of the mortgage," "a record of the Assignment from Chase to FNMA 'is not necessary to its validity nor as a protection against the purchaser of the property mortgaged or any other person other than the purchaser of the Mortgage itself, or the Note or debt secured by it.'" *Coventry,* 298 Mich App at 261, citing *Wilson,* 110 Mich at 589. If this was otherwise, a mortgagee could lose its priority every time a mortgage was assigned. Again, the Court of Appeals' attempt to distinguish *Coventry* because it involved condominium liens fails because the holding in *Coventry* applies equally to assignment of mortgages as it does to condominium liens. 298 Mich App at 260-261. The priority of West Dearborn as assignee was therefore set as a matter of law at the time the Mortgage was recorded.

There is no indication that the Bankruptcy Order required the Assignment, in addition to the

Mortgage, to be recorded. To the contrary, the Bankruptcy Order states without qualification:

> "Such abandonment *shall not impair*… *all* claims, liens, interests, rights … of record."

(**Exhibit I**) (emphasis supplied). "Shall" is properly interpreted to mean mandatory. *State Hwy Comm v Vanderkloot*, 392 Mich 159, 180; 220 NW2d 416 (1974) (popular and common understanding of the word "shall" denotes "mandatoriness"). "All" is defined to mean "every component of the whole." Webster's Ninth New Collegiate Dictionary, pp 70-71 (1983).

This interpretation as to the language of both the Order and the Deed is consistent with Michigan law. When dealing with real estate, bankruptcy courts follow the law of the state in which the real estate is located. *Butner v United States*, 440 US 48; 99 S Ct 914; 59 L Ed 2d 136 (1979). The City took this property subject to the Mortgage. It also took the property with West Dearborn as the holder thereof for several reasons. First, under MCL 565.29, the City had *actual notice* of the Assignment to West Dearborn. Second, the City admitted to the Bankruptcy Court that "West Dearborn Partners *was the mortgagee and was the holder of the Note and Mortgage* of the Property" (**Exhibit K**, p. 35). Third, at the end of the same hearing, Bankruptcy Judge McIvor herself said:

> "The mortgagee in this case certainly can enforce its remedies. The order that was proposed and attached to the motion protects the rights of anybody else with an interest in the property."

(**Exhibit K**, p. 37). Therefore, the notion that West Dearborn's mortgagee interest was somehow vitiated by the Bankruptcy Order cannot be supported under Michigan law.

2. The trial court and Court of Appeals' interpretation of the Bankruptcy Order is contrary to Michigan law.

Since the Mortgage, as assigned to West Dearborn, already had priority over any interest of the City under Michigan law, the Bankruptcy Order cannot be interpreted to require the Assignment itself be recorded to secure such priority. The assignment is a different and distinct instrument from the Mortgage, which is inextricably connected to the corresponding Note, only. As explained, the Mortgage itself was of

record. Thus, the trial court and Court of Appeals' interpretation of the Bankruptcy Order is contrary to Michigan law.

In *Butner*, *supra*, a receiver tried to argue that his second mortgage and prior receivership were sufficient to perfect a creditor's assignment as to certain lease proceeds, even though the applicable state law required a sequestration process that was never followed. In ruling that state law as to real estate controls in bankruptcy, the United States Supreme Court reasoned:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of happenstance of bankruptcy.' *Lewis v. Manufactures National Bank* 364 U.S. 603, 609.

Butner, 440 US at 55.

As previously stated, in *Equitable Trust Co*, 263 Mich at 676, this Court held that a real estate mortgage in the state is "in the nature of a specific lien," and also that the transfer or assignment of the obligation "operates as an assignment of the mortgage." See also *Jones*, *supra*. Under the *Butner* case, the Bankruptcy Order cannot be interpreted to vitiate this state law. Accordingly, on March 31, 2011, when the Note and the related Mortgage were sold and transferred to West Dearborn (**Exhibit D, E**, and **F**), the Mortgage also was automatically held by West Dearborn, prior to the entry of the Bankruptcy Order and the Trustee Deed to the City. The Court of Appeals' attempt to disregard the legal effect of the sale of the Note by reference to the circumstances surrounding the sale (i.e., that the bankruptcy was pending and the Assignment was not recorded) fails under this precedent.

ARGUMENT II

THE COURT OF APPEALS ERRED BY REJECTING WEST DEARBORN'S EQUITABLE ARGUMENTS, WHERE THE CITY REVERSED ITS POSITION IN THE BANKRUPTCY COURT REGARDING WEST DEARBORN'S INTEREST AND RECEIVED A WINDFALL AFTER PURCHASING PARCEL C FOR $1.00 WITH ACTUAL KNOWLEDGE OF WEST DEARBORN'S INTEREST.

A. Standard of review and supporting authority.

West Dearborn refers this Court to the corresponding section of Argument I, *supra*. This Court reviews a trial court's decision regarding equitable issues de novo, although its findings of fact supporting the decision are reviewed for clear error. *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 571; 83 NW2d 242 (2004).

B. Introduction – summary.

Equity bars the City from purchasing the Subject Property for $1.00 without acknowledging West Dearborn's superior interest based on the Mortgage and the Assignment of that Mortgage. First, the Court of Appeals erred by misapplying the doctrines of judicial estoppel to statements made by the City through its attorneys regarding West Dearborn's interest and whether it survived or would survive the bankruptcy sale. Instead of comparing statements made in the bankruptcy proceeding and the separate quiet title proceeding, the Court compared the City's statements at different hearings in the bankruptcy proceeding, which does not satisfy the requirements of judicial estoppel. Second, the City is otherwise estopped from taking a position contrary to its position in the bankruptcy court regarding the survival of an unrecorded Development Agreement. Third, it is not equitable to find that the City has a superior interest to that of West Dearborn, because the City was not a bona fide purchaser for value. Fourth, the City's position as adopted by the trial court and the Court of Appeals is inequitable because it creates a massive windfall for the City, to the detriment of West Dearborn.

C. Argument.

1. The City admitted that West Dearborn was protected by the Bankruptcy Order.

The Court of Appeals erred by rejecting West Dearborn's argument that the City was estopped to take a contrary position in this litigation than it had in the bankruptcy court regarding West Dearborn's interest. "Judicial estoppel prevents a party from taking a position in a later proceeding that is inconsistent with a position that party took successfully in a prior proceeding." *Dykema Gossett, PLLC v Ajluni*, 273 Mich App 1, 16; 730 NW2d 29 (2006), *aff'd in part, vacated in part on other grounds* 480 Mich 913 (2007). However, "the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true." *Id*., quoting *Paschke v Retool Industries*, 445 Mich 502, 509–510; 519 NW2d 441 (1994). "The estoppel does not depend upon the question whether justice was done in the first suit, but upon the merits having once been considered and passed upon. … The estoppel does not depend upon technicalities, but rests on broad principles of justice." *Mertz v Mertz*, 311 Mich 46, 55; 18 NW2d 271 (1945). See also *Washburn v Peck*, 245 Mich 351, 352; 222 NW 768 (1929) ("[o]ne may not take contradictory positions in asserting a right in court, if the assertion of Plaintiff's right in the first case involves a negation of the right claimed in the second case.").

Finding that there is no inconsistency between the City's position taken in the bankruptcy court and the result here, the Court of Appeals refused to apply estoppel (**Exhibit A**, pp 6-7). When reaching this result, however, the Court of Appeals compared the City's position in bankruptcy (its August 16, 2011 objections to the Trustee's proposal to sell the property) to the City's position in bankruptcy (its comments at the October 4, 2011 hearing), rather than the City's position in bankruptcy and the City's position <u>*in this action*</u>. In the bankruptcy court, both the objections filed by the City and the statements made by the City's counsel recognized West Dearborn's interest in the property, and acknowledged that West Dearborn was

the mortgagee. This culminated in the statements of the City's attorney that West Dearborn was "the holder of the mortgage and the note on the property," that West Dearborn "wants to make sure that the property is subject to *its* [West Dearborn's] rights and interests (emphasis supplied)," and that the bankruptcy court order proffered "already does that." (**Exhibit A**, p 7). Yet, in this case the City argues that the bankruptcy court order extinguished the interest of West Dearborn. In fact, the City's position in the bankruptcy court and the City's position here are 180 degrees diametrically opposed, whether or not "considered in context." (Id.). The Court of Appeals fundamentally erred in step one of its estoppel analysis.

The Court also fundamentally erred in step two of the estoppel analysis by finding the bankruptcy court did not rely on or accept any alleged statements of the City as true before effectuating its order of abandonment (Id). This is inaccurate. Based on the statements made by the City, including that West Dearborn was the mortgagee, the bankruptcy judge stated:

> The mortgagee in this case certainly can enforce its remedies. The order that was proposed and attached to the motion protects the rights of anybody else with an interest in the property.

(**Exhibit K**, p 37). This statement appears exactly two pages after the City represented that West Dearborn's interests were protected through the proposed order of abandonment. Clearly, the statement made by the City influenced the bankruptcy court's order. Why else would the bankruptcy judge make the statements previously quoted?

The City's version of what was required by the Bankruptcy Order is thus invalidated by its admission before the bankruptcy court, in addition to being contrary to state law.

2. The City's position is contrary to its position in the Bankruptcy Court regarding the unrecorded Development Agreement.

The disingenuousness of the City's position taken in the trial court is magnified by the position it took as to a similar issue that arose in the bankruptcy. In its Amended Complaint brought in this case, the

City sets forth that successors/assigns as to Parcel C are subject to an [unrecorded] Development Agreement (**Exhibit T**, paragraph 13). In the bankruptcy proceeding, the Trustee argued to the court that any sale of Parcel C should be free and clear of that unrecorded Development Agreement because it was not recorded. The City argued that because the unrecorded Development Agreement was referenced in the 2005 Covenant Deed and also referenced in the recorded 2005 Declarations of Covenants and Restrictions, under Michigan law, notice of the Development Agreement to the Trustee was implied, whether the Development Agreement was specifically recorded or not. Moreover, the City argued that the bankruptcy could not serve to usurp Michigan law as to real estate (See the City's Sur-Reply, **Exhibit W**). So, how is it that, according to the City, its unrecorded Development Agreement passed through the Bankruptcy, but not the "unrecorded" Assignment to West Dearborn?

The Court of Appeals dismissed this argument by observing that the mortgage documents "expressly referenced the development agreement whereas the mortgage could not specifically mention and refer to an assignment that did not yet exist" (**Exhibit A**, p 8). But this ignores that the Mortgage *does* expressly reference the mortgagee's "successors and assigns," and that everyone involved—including the Trustee—knew that there was an unrecorded Assignment in favor of West Dearborn. The Court of Appeals otherwise dismissed West Dearborn's analogy to the Development Agreement as "irrelevant," but these inconsistences in the City's position cannot be ignored when it comes to estoppel.

3. The Assignee interest of West Dearborn has priority over the fee interest of the City of Dearborn.

In its Complaint (**Exhibit T**), the City alleged pursuant to MCL 565.29 that its interest was superior to that of West Dearborn because the Quit Claim Deed was recorded before the Assignment was recorded. This is incorrect for several reasons. MCL 565.29 says:

565.29. Unrecorded conveyance; validity against subsequent purchaser; relation of quit claim deed to good faith.

> Every conveyance of real estate within the state hereinafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

First, it is doubtful that the City is a valid "Purchaser" under MCL 565.29. MCL 565.34 defines "purchaser" as one who has paid a valuable consideration. The deed to the City recites a consideration of $1.00 (**Exhibit J**) which is not a valuable consideration under MCL 565.29 and 34. Without paying a valuable consideration, the City is not a purchaser. See also, *Boydson v Goodrich*, 49 Mich 65; 12 NW 913 (1882), *Meade v Robinson*, 234 Mich 322; 208 NW 41 (1926). If West Dearborn paid $150,000 for a mortgage interest on March 31, 2011, $1.00 hardly seems to be "valuable consideration" six months later. Hence, since it is not a valid Purchaser, the City cannot otherwise have priority under MCL 565.29 despite any prior recording.

Second, well before it acquired the Subject Property on October 17, 2011, the City was advised, by *actual notice*, of the Assignment of the Mortgage to West Dearborn (**Exhibit H**). In addition, through the various pleadings filed in the Bankruptcy Court, including West Dearborn's objections (**Exhibit G**) and related references by the City's counsel, including same at the bankruptcy hearing on October 14, 2011 (see Hearing Transcript, **Exhibit K**, Page 35), the City had actual knowledge of the Assignment to West Dearborn. Since the Assignment to West Dearborn predates the subsequent conveyance from the Trustee to the City by nearly six months, it matters not when the Assignment was recorded. Because the City had actual knowledge of the Assignment to West Dearborn, the City cannot be a "good faith" purchaser under MCL 565.29. *Kastle v Clemons,* 330 Mich 28; 46 NW2d 450 (1951); also see *Michigan National Bank & Trust v Morren*, 194 Mich App 407; 487 NW2d 784 (1992); *Wilcox v Hill*, 11 Mich 256; 1863 WL 1184

(1863); *Oliver v Sandborn*, 60 Mich 346; 27 NW 527 (1886); *Dennis v Dennis*, 119 Mich 380; 78 NW 333 (1899); *Oliver v Olmstead*, 112 Mich 483; 70 NW 1036 (1897); *Oakland Hills Dev Corp v Leuders Drainage Dist*, 212 Mich App 284; 537 NW2d 258 (1995); *Shotwell v Harrison*, 30 Mich 179; 1874 WL 6413 (1874).

The Court of Appeals dismissed this argument on appeal, stating that "this case is unique" because it involves the effect of a bankruptcy order, and is not a priority dispute between the City and West Dearborn (**Exhibit A**, p 8). But this ignores the statements of the bankruptcy court and counsel for the City that the intent of the bankruptcy order was to protect West Dearborn's interest, of which the City had notice prior to purchasing Parcel C. If both West Dearborn and the City have an interest in the Subject Property, then it is necessary to determine whose interest takes priority.

4. The City's position is inequitable because it creates a massive windfall for the City, to the detriment of West Dearborn.

It does not take a math genius to figure out the numbers here and the effect of the trial court's ruling. West Dearborn purchased the 2005 Mortgage and related Note for $150,000, which remains unpaid. The City paid $1.00 for its interest in the property (subordinate to the rights of West Dearborn) through the Bankruptcy Court and is now essentially trying to steal this property without ever paying off the Mortgage and Note to the entity (West Dearborn) it knew held the Mortgage when it acquired its interest.

In the transcript of the bankruptcy proceedings, **Exhibit K**, page 35, Mr. Gordon asserts the Trustee's prior reference that the property has "no value." He doubles down on this assertion on page 31 when he asserts that "[t]he Mortgage on the property is $2.1 million." At that time, the bankruptcy schedules also had the property valued at $800,000.00. There was no evidence produced by the City that the loan has ever been paid off or paid down. Thus, the City is trying to skirt around the Mortgage held by West Dearborn. In essence, the City seeks an unjustified windfall. Equity abhors a windfall. *Ollig v Eagles,* 347 Mich 49, 53; 78 NW2d 553 (1956); *In re Forfeiture of Thirty-Thousand Six Hundred Thirty Two and 41/100 ($30632.41) Dollars*, 184 Mich App 677, 679; 459 NW2d 99 (1990); *In re Anson,* 457 BR 130,

137 (2011). See also *Butner*, 449 US at 55 ("[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of happenstance of bankruptcy"). Contrary to *Butner*, the effect of the trial court and Court of Appeals' misinterpretation of the Bankruptcy Order is an impermissible windfall to the City: it is permitted to keep Parcel C free and clear of and without paying off the Mortgage of record held by West Dearborn.

At pages 8-9 of its opinion, the Court of Appeals rejected West Dearborn's windfall arguments under the reasoning that West Dearborn "fails to account for its own inexplicable failure to record the assignment for more than 4½ years, after receiving it in March 2011" (**Exhibit A**, pp 8-9) But the equity argument already takes into account that an assignment was not recorded and that, according to the trial court, the interest of West Dearborn – it paid $150,000 to purchase the Note and the Mortgage - was wiped out by the Bankruptcy Order. Throughout the bankruptcy, the City knew of the Assignment and failed to inquire of West Dearborn or advise anyone of that fact during the taxpayer lawsuit. The City paid $1.00 for the property. The City had *actual* knowledge of the mortgage of West Dearborn's interest,[4] and therefore cannot be considered a bona fide purchaser under MCL 565.29.

This is not a case where the assignor was paid after making an assignment (because the assignment was not recorded), rather than payment being made to the true holder of the loan. Restated, the City was not a victim of an unrecorded assignment because it had paid nothing for the property. Therefore, any failure by West Dearborn to put the world on notice of the Assignment caused no prejudice to the City, and should not prevent the court's exercise of its equitable powers to do justice and prevent a windfall.

[4] The lack of a "timely" recorded assignment deals only with constructive notice through the real estate records.

ARGUMENT III

THE COURT OF APPEALS ERRED BY FINDING THAT THE MORTGAGE WAS EXTINGUISHED BY BANK OF AMERICA IN AUGUST 2015, WHEN BANK OF AMERICA HAD PREVIOUSLY ASSIGNED AND SOLD THE MORTGAGE AND UNDERLYING NOTE TO WEST DEARBORN IN 2011.

A. Standard of review and supporting authority.

The Court is referred to the corresponding section in Argument I, *supra*.

B. Introduction – summary.

The Court of Appeals glossed over West Dearborn's argument that the Assignment need not have been recorded in order to validly transfer the interest in the Mortgage to West Dearborn, and the resulting conclusion that the Mortgage was not discharged in August 2015 by Bank of America because Bank of America no longer had an interest in the Mortgage (**Exhibit A**, p 6). Instead, the Court of Appeals reiterated its rhetoric about West Dearborn failing to provide the world with notice of the Assignment. The Court of Appeals' erroneous and inadequate analysis of this issue was contrary to established law and manifestly prejudicial to West Dearborn.

C. Argument.

1. There is no requirement that an assignment be recorded to be valid.

Both the trial court and the Court of Appeals treated the Assignment as invalid because it was not recorded, despite there being no known requirement that an Assignment must be recorded in order to be valid. Under *Equitable Trust*, *supra*, and *Jones*, *supra*, an assignment to the purchase of a Mortgage *attaches immediately* by operation of law upon the purchase of its related Note and not any later recording. Therefore, recording of an Assignment is not necessary to vest the interest in the security to the holder of the Note. The only requirement that a mortgage assignment be recorded in Michigan is as a prerequisite to foreclosing any such mortgage by advertisement, as only the record-holder of the Mortgage can do so.

Arnold v DMR Financial Services, 448 Mich 671, 676-78; 532 NW2d 852 (1995).

Where recording is required under Michigan law, the sole purpose of recording is to protect subsequent purchasers. Cameron: Michigan Real Property, 2d Ed. § 11.14. Yet, MCL 565.29 and well-established Michigan law provide that other means of notice can suffice. Here, along with its outright admissions made before Judge McIvor in the bankruptcy court that West Dearborn was the mortgagee, the City had *actual notice* of the Assignment of the Mortgage to West Dearborn. The assignment was attached to West Dearborn's objection in the bankruptcy court (**Exhibit G**). Therefore, even if the Bankruptcy Order can be read as requiring recordation of the Assignment, West Dearborn's status as the holder of the Mortgage is unaffected by the unrecorded status of the Assignment, and West Dearborn has priority over the interest of the City as acquired through the Quit Claim Deed.

2. The August 2015 "discharge" by BOA did not eliminate the Mortgage assigned to West Dearborn.

As set forth in the Statement of Facts, the August 2015 Discharge by BOA arose out of a lawsuit brought by certain taxpayers, who had acquired certain condominium units (and not Parcel C) from a property tax foreclosure sale and sought to quiet title as to those units. The 2005 Mortgage acquired by West Dearborn also included, as collateral, both Parcel C and those units. In the taxpayer lawsuit, when the Wayne County Circuit Court ordered the discharge of the BOA Mortgage, the Order specifically related to those units (see **Exhibit O**) when it ordered the discharge of the BOA Mortgage.

Since BOA sold the Loan and the Note and assigned the Mortgage as to the Subject Property as of March 31, 2011, BOA therefore had nothing to discharge in 2015. It is elementary in real estate law that one cannot convey or release something it does not have. "*Nemo dat quod non habet*." See *Mitchell v Hanley*, 83 US 544, 549; 21 L Ed 322 (1872); *Salewske v Citibank, NA,* No. 12-CV-12580, 2012 WL 6840572 (ED Mich October 9, 2012), report and recommendation adopted, No. 12-12580, 2013 WL 142081 (ED Mich January 11, 2013). See also *McCormick v. Digby,* 8 Black 99, 1846 WL 2667 (Ind 1846)

("After a mortgagee has assigned a mortgage, it cannot discharge any part of the premises from the mortgage."); *Reeves v Hayes*, 95 Ind 521; 1884 WL 5312 (1884) (same); *Pellerito v Weber*, 22 Mich App 242, 245; 177 NW2d 236 (1970) ("It is axiomatic that a person cannot convey greater title than he possesses."). The subsequent "discharge" by BOA through the taxpayer lawsuit therefore had no effect on the Subject Property.

BOA's lack of interest in the Subject Property was also confirmed by the deposition testimony of BOA representative Sara Allen, who testified that one portion of the Bank did not know what the other was doing (Sara Allen Transcript, **Exhibit R**, pp. 58-60; 79-80). When BOA realized its error in executing and recording the Discharge, BOA's attorneys chose to execute and record an Affidavit of Scrivener's Error (**Exhibit S**) purportedly to remove from the record title the "Discharge" that BOA never had the ability to record in the first place.[5]

3. The Assignment to West Dearborn is not fatally defective and/or, to the extent of any defect, does not serve to defeat any assignee interest of West Dearborn.[6]

Neither the trial court nor the Court of Appeals addressed the City's argument that the Assignment was substantively defective (**Exhibit A**, p 8). In its Discovery Responses and in City Attorney Walling's deposition testimony (**Exhibit CC**), the City asserted that the Assignment was fatally defective because, on Page 2 thereof, over the signature of Amnar Sarafa, it says "West Village Partners, LLC" instead of "West Dearborn Partners, LLC" (see Plaintiff's Second Supplemental Discovery Responses, **Exhibit U**).

[5] In the trial court, the City questioned why there has been no action by BOA or West Dearborn as to the other parcel (A-3) that was the actual subject of Judge Sullivan's Order (**Exhibit P**) to set aside the Discharge as to that Parcel. That property was lost for non-payment of taxes and was thus the real subject of the taxpayer lawsuit and Order – West Dearborn had no interest in moving to set aside the Discharge as to Parcel (A-3) and, therefore, had no reason to do so. As to Parcel C, same was not the subject of the taxpayer lawsuit.

[6] See previous discussion of *Butner*, *Equitable Trust* and *Jones* in Argument 1, establishing that the Assignment automatically accompanies the Note, irrespective of the instrument itself.

However, "West Dearborn Partners, LLC" is specifically set forth as the Assignee on page 1 of the Assignment.

Deposition testimony and discovery revealed that the insertion of "West Village Partners, LLC" in the signature block was made in error when the Assignment was prepared by BOA (Sarafa Deposition, **Exhibit DD,** p. 101 and Lites Deposition, **Exhibit L**, p. 57). Moreover, Sarafa was the principal of West Dearborn at the time of the Assignment and had no relationship whatsoever to West Village Commons (Sarafa Deposition, **Exhibit DD**, p. 101). Notwithstanding, even if there is an "inconsistency," no one from the City ever contacted Sarafa or West Dearborn to make inquiry if there ever even was any real "uncertainty" regarding the Assignment and/or the "proper" Assignee. Under such circumstances, a good faith purchaser is required to make inquiry as to a party's potential interest in property. *Kastle*, *supra*; *Federman v Van Antwerp*, 276 Mich 344; 267 NW 856 (1936). In *Federman*, a party was advised orally as to another possible holder of an interest in real estate in which the party was interested. The party there hired an attorney, searched the phone records, tax records, and the record title, and found nothing. The Court found that the party had properly exercised its due diligence and was a good faith purchaser. Here the City was *fully aware* of the interest of West Dearborn, and if it had any "confusion" over the Assignment or named Assignee, it could have contacted Sarafa and/or Scott Lites, the attorney for West Dearborn itself. However, the City never did so and therefore was not acting in good faith. Notwithstanding the City's actual knowledge of the Assignment to West Dearborn, the City is otherwise held to notice as to the interest of West Dearborn because the City never bothered to follow up with West Dearborn and/or its representatives.

Substantively, there is no known requirement that an assignment be signed by the assignee. To the contrary, Michigan's Statute of Frauds only requires execution by the assignor. MCL 566.106. Even if an assignment was required to be signed by the assignee as well, MCL 565.604 otherwise serves to "save" the instrument. It states, in relevant part:

> "No conveyance of land or instrument intended to operate as a conveyance, made in good faith and upon valuable consideration … shall be wholly void by reason of any defect in any statutory requisite in the signing, sealing, attestation, acknowledgment … thereof …".

An assignment is a conveyance under MCL 565.35. Therefore, the Assignment in this case was not defective and should not prevent this Court from granting the requested relief to West Dearborn.

RELIEF REQUESTED

WHEREFORE, Defendant/Counter-Plaintiff/Appellant West Dearborn Partners, LLC requests this Court grant leave to appeal or oral argument on the application and reverse and vacate the trial court's June 5, 2017 Order, remand to the trial court with instructions that summary disposition be entered in favor of West Dearborn and against the City of Dearborn, and enter any other relief this Court deems appropriate, together with an award of costs and attorney fees so wrongfully sustained.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Robert G. Kamenec
Robert G. Kamenec (P35283)
Karen E. Beach (P75172)
Attorneys for Appellant West Dearborn Partners, LLC
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(248) 901-4068

Dated: May 31, 2019