

STATE OF MICHIGAN
IN THE SUPREME COURT

BANK OF AMERICA, N.A.,

Plaintiff/Appellant,

v

FIRST AMERICAN TITLE INSURANCE
COMPANY; PATRIOT TITLE AGENCY, LLC;
KIRK D. SCHIEB; WESTMINSTER ABSTRACT
COMPANY d/b/a WESTMINSTER TITLE
AGENCY, INC.; THE PRIME FINANCIAL
GROUP, INC.; VALENTINO M. TRABUCCHI;
PAMELA S. NOTTURNO, f/k/a PAMELA S.
SIIRA; DOUGLAS K. SMITH; JOSHUA J.
GRIGGS; NATHAN B. HOGAN; STATE VALUE
APPRAISALS LLC and CHRISTINE D. MAYS,

Defendants/Appellees,

And

149599
FRED MATSON, MICHAEL LYNETT, JO KAY
JAMES, and PAUL SMITH,

Third-Party Defendants.

Supreme Court Case No. _____

Court of Appeals Docket
No. 307756

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LARRY S. ROYSTER
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MICHIGAN SUPREME COURT

DEFENDANT/APPELLEE WESTMINSTER
ABSTRACT COMPANY d/b/a WESTMINSTER
TITLE AGENCY, INC.'S RESPONSE TO PLAINTIFF/
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Respectfully Submitted

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Did the Michigan Court of Appeals correctly apply the holding of New Freedom Mort Corp v Globe Mort Corp., 281 Mich App 63, 73-74; 761 NW2d 832 (2008) to the facts of this case?

Defendant/Appellee Westminster says the answer is "yes."

Defendant/Appellee First American will disagree with a portion of the opinion.

Plaintiff/Appellant may agree since it challenges the substance of New Freedom and really does not claim misapplication of its holding to these facts.

The Circuit Court says that answer is "yes."

The Court of Appeals says the answer is "yes."

- II. Does Bank of America, given its contribution to the defaults of the Enid Boulevard and Heron Ridge Mortgages, possess a strong enough equitable position to be granted leave in this case?

Defendant/Appellee Westminster says the answer is "no."

Defendant/Appellee First American says the answer is "no."

Plaintiff/Appellant says the answer is "yes."

The Circuit Court says that answer is "no."

The Court of Appeals says the answer is "no."

- III. Do the facts in this case justify granting leave to review the holding of New Freedom as it pertains to the duties or lack thereof based upon the terms of the Closing Protection Letters?

Defendant/Appellee Westminster says the answer is "no."

Defendant/Appellee First American says the answer is "no."

Plaintiff/Appellant says the answer is "yes."

The Circuit Court says that answer is “no.”

The Court of Appeals says the answer is “no.”

- IV. Do the facts in this case justify granting leave to review the holding of New Freedom as it pertains to the question of whether it creates a contract between Bank of America and Westminster?

Defendant/Appellee Westminster says the answer is “no.”

Defendant/Appellee First American says the answer is “no.”

Plaintiff/Appellant says the answer is “yes.”

The Circuit Court says that answer is “no.”

The Court of Appeals says the answer is “no.”

- V. Is there adequate evidence to show that Westminster engaged in dishonest conduct or fraud in the handling of funds or documents for Bank of America?

Defendant/Appellee Westminster says the answer is “no.”

Defendant/Appellee First American says the answer is “no.”

Plaintiff/Appellant says the answer is “yes.”

The Circuit Court says that answer is “no.”

The Court of Appeals says the answer is “no.”

- VI. Should the holding of New Freedom be reviewed regarding the question of whether a full credit bid should discharge the debt (potential or otherwise) of third parties who commit fraud or dishonesty?

Defendant/Appellee Westminster says the answer is “no.”

Defendant/Appellee First American says the answer is “no.”

Plaintiff/Appellant says the answer is "yes."

The Circuit Court says that answer is "no."

The Court of Appeals says the answer is "no."

COUNTER STATEMENT OF JUDGMENT APPEALED FROM

Westminster contests Bank of America's Application for Leave to Appeal to the Michigan Supreme Court taken from an unpublished decision of the Michigan Court of Appeals rendered March 27, 2014 in Docket No. 307631 and subsequent denial of Bank of America's Motion for Rehearing on May 22, 2014.

THE CLAIM AND WESTMINSTER TITLE

Introduction to the claim

The Complaint filed by Bank of America ("BOA") deals with four mortgages. They were fraudulently obtained. Two of them were closed by Patriot Title ("Patriot") and two by Westminster Title ("Westminster"). Westminster closed the properties known as Enid Boulevard and Heron Ridge. It had nothing to do with the properties closed by Patriot so the circumstances of those closings are the not subject of this presentation.

The frauds were pretty simple. An applicant with a good credit rating, preferably self-employed, was fed some line about buying real property and holding it for a short time and then selling it at a profit. This person signed a sales agreement for a property, the value of which was overstated thanks to a cooperative appraiser and submitted a mortgage Application to BOA for approval. The contents of the Application were pure fiction. BOA never checked it, sent it to the closing department who prepared the Closing Instructions and then shipped it to the closer.

Westminster and Patriot have nothing in common. Any attempt to relate them in act or deed is an exercise in futility though BOA is still trying. Randy Saylor and Jennifer Kojs, the operatives of Patriot went to prison for their admitted frauds. They personally garnered millions of illegal dollars at the expense of BOA. The Court will see that BOA initially came out of these fraudulent mortgages pretty well and it was the investors who bought these mortgages, bundled as negotiable securities

("Certificates"), that were the immediate victims. Westminster, on the other hand continues in business to this day with the same management. It remained BOA's primary closing agent well after BOA's investigation into these frauds and still does business with BOA today. Westminster charged standard fees for these closings. BOA cannot show any gain on the part of Westminster or its representatives to justify its claim of fraud or dishonesty. The facts show, and the Court of Appeals agreed that Westminster was wrongfully joined in this action and the claims made against it are baseless.

A real estate closing involves the participation of several persons but this lawsuit focuses on the relationship of the lender, BOA; the title company, First American and the closing agent, Westminster. We all know enough to understand that title insurance protects the buyer and the buyer's lender from defects in the title. The closing agent prepares the HUD-1 and other closing documents and attends the closing. The lender accepts applications from prospective real estate buyers, checks them to see if the applicant qualifies ("underwrites the loan") and funds the loan if all is well. Less known is the existence and function of the Closing Protection Letter ("CPL") which is the document that describes how these three parties deal with each other. The CPL for Enid Boulevard and Heron Ridge was given by Defendant/Appellee First American to BOA (a copy of the CPL for these properties is Exhibit 4 to BOA's Application for Leave to Appeal). The CPL provides security to the mortgagee for the dishonesty or fraud of the closing agent. If dishonesty or fraud was shown, BOA would sue First American for its losses and it would be First

American's prerogative to sue the closing agent for indemnity/contribution. BOA does not have a direct claim against a closing agent by virtue of the CPL. New Freedom Mortg Corp v Globe Mortg Corp, 281 Mich App 63, 73-74; 761 NW2d 832 (2008).

BOA disagrees with this and other holdings of New Freedom. It argues in its Application for Leave to Appeal that the Closing Instructions for both the Enid Boulevard and Heron Ridge properties created a contractual obligation between BOA and Westminster. Neither Westminster nor the Michigan Court of Appeals agreed with this contention, however.

The Court of Appeals based its Opinion on the language of the agreement. The CPL (the form was the same for both properties) requires First American to indemnify BOA for the following:

“[First American], subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closing when conducted by the Issuing Agent (an agent authorized to issue title insurance for the Company), reference herein and *when such loss arises out of*:

- (1) Failure of the Issuing Agent to comply with your written closing instructions to the extent they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you or,

(2) Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings.” (Emphasis provided)

BOA has no claim under (1) above. BOA has admitted its mortgage lien was first, there was no claim about obtaining documents and BOA was responsible for verifying the deposit. The deposit for both properties was confirmed by BOA and the closing file for both properties had a copy of the deposit check in the closing file. (See Deposition of Kwannah Clifton, BOA closing rep for these properties, attached as Exhibit “A”, pp. 21, 24 and 32) As a result, BOA’s claim was limited to paragraph (2). The Court of Appeals agreed with Westminster that even if there existed a theory which created a direct claim by BOA against Westminster, its legal responsibility could not exceed the obligations described in the CPL. The Court of Appeals summarized Westminster’s position as follows:

“Westminster argues that its duty to comply with plaintiff’s closing Instructions is limited by section 1(a) of the CPL to “the extent they relate to (a) the status of the title [to the property] or the validity, enforceability and priority of [plaintiff’s] mortgage....or (b) the obtaining of any other document, specifically required by [plaintiff]....or (c) the collection and payments of funds due [plaintiff]”.

The Court held:

“We conclude that to the extent a separate contract existed between Westminster and plaintiff that required Westminster to follow plaintiff’s closing instructions, the contract was modified and by the CPL to which the parties manifested their assent by proceeding with the closing. Plaintiff has explicitly abandoned any claim that Westminster violated the closing instructions within the limitations of paragraph (1) of the CPL. “

The Court of Appeals did not say “yes” such a contract existed or “no” it did not. It just said that the obligations of Westminster pertaining to the Closing

Instructions were clearly expressed in the CPL given by First American to BOA and nothing else in the record addresses them (or changes or contradicts them). The Appeals Court took its analysis one step further and found that even if a contract was deemed to exist, there were no contractual damage. They stated:

"The alleged breach did not affect whether plaintiff would have become a mortgage lender because plaintiff was the victim of mortgage fraud that was perpetrated by others before Westminster was even involved, and Westminster had nothing to do with the fraud. Westminster asserts plaintiff has only itself to blame by permitting the fraud to occur with loose underwriting standard of making "stated income" loans. Plaintiff simply presented no proof a different outcome would have ensued had Westminster disclosed payees that allegedly went undisclosed."
"(Court of Appeals Opinion, p. 15)

The fact that the frauds were a fait accompli at the time the file was first sent to Westminster was significant to the Appeals Court:

"Plaintiff did not provide evidentiary support for its claim that plaintiff would not have made the bad loans had Westminster handled the closing in a different fashion. Rather, the evidence indicates the opposite, especially with respect to the closing of the Enid Boulevard property where plaintiffs representative approved last-minute changes to the HUD-1 settlement statement. Thus, plaintiffs own deficient underwriting policies and fraud committed by others, not Westminster's actions as closing agent, caused plaintiffs losses." (Opinion, p. 16).

The Court made short work of the claim of fraud given the lack of credible evidence or motive. After discussing the Heron Ridge closing in which the Court observed that the buyer's testimony was contradicted by the clear language of the documents she signed and unworthy of consideration, the Court moved on to Enid Boulevard:

“There is even less evidence that Westminster was aware of any fraud with respect to the closing of 13232 Enid Boulevard. Indeed, the evidence shows that Westminster employees kept Plaintiff’s representative, Kwannah Clifton, informed of the changes on the HUD-1, and Clifton approved the transactional There is simply no evidence that Westminster was aware of or a knowing participant in the underlying fraud being perpetrated on Plaintiff. Thus there is no basis to impose liability on First American under paragraph 2 of the CPL because of “fraud or dishonesty” by Westminster in “handling [plaintiff’s] funds in connection with the closing.” *New Freedom, 281 Mich App 83-84.*

Finally the Court ruled that since BOA made a full credit bid for the Enid Boulevard property, it suffered no damage. (Court of Appeals Opinion p. 16)

Westminster believes the Court of Appeals was correct and encourages this Court to deny BOA's Application for Leave to Appeal. Westminster reminds the Court that the claims against it are separate and distinct from the claims made on the properties involving Patriot and separate consideration should be given.

BANK OF AMERICA IS THE SOURCE OF ITS OWN PROBLEM

The conduct of Bank of America during the years of 2006 and 2007 must be evaluated as part of the decision whether it should be granted leave to appeal in this case. The Michigan Court of Appeals correctly described Westminster’s argument on page 1:

“Also Westminster asserts that plaintiff’s loss is attributable to its own negligent underwriting practice of issuing ‘stated income’ loans, i.e. by failing to verify fraudulently overstated income and inflated appraisals in loan applications. In essence Westminster acknowledges the fraud occurred but that with respect to the two closings it handled, the deposition testimony and documentary records demonstrates that it complied with plaintiff’s closing instructions and properly distributed funds at closing. Westminster’s theory of the case is that the fraud that plaintiff alleges related to issues that were the fundamental

responsibility of plaintiff as mortgage lender; verifying the value of the underlying property and the qualifications of the mortgage-loan applicant. “

The loans written by BOA in the years 2006 and 2007 were bundled into negotiable security “Certificates” in 2008 and sold to the public. The mortgage loans were supposed to be underwritten by BOA but they were not. BOA represented in its security registration that these loans were good credit risks when the opposite was true.

Westminster’s Brief in the Michigan Court of Appeals referenced a civil complaint filed by AIG against BOA in which it was alleged that during the years mentioned, BOA failed to disclose that it was not following its published underwriting standards and misrepresented this fact causing AIG to invest in Certificates that contained substandard loans. The complaint is attached as Exhibit “B”. Exhibit “C” is a news story from the *Wall Street Journal* showing that BOA paid \$650 Million Dollars to settle this action. Paragraph 4 of that complaint is a good summary of the claims:

“4. The stated underwriting guidelines have been replaced by an undisclosed governing principle: Defendants [BOA] would originate or acquire any loan that could be sold to third-party investors like AIG through RMBS securitization, no matter how risky. To make matters worse, Defendants provided to the rating agencies the same false credit metrics that riddled the Offering Materials, thus allowing Defendants to engineer inflated credit ratings for the RMBS, which they also used to market the securities. AIG, which suffered more than 10 billion in losses as a result of Defendants misconduct, would not have purchased the securities if it had known the truth.” (emphasis supplied).

BOA's settlement does not seem that bad in light of what AIG claimed it lost and it could argue that this suit is a complaint from a disgruntled investor. Westminster gets that. Since that time, however, more substantial and uglier allegations have been made in a case filed by the United States in a case filed by it in North Carolina on August 16, 2013 entitled United States of America v Bank of America, et al. A copy of the complaint is attached as Exhibit "D". This is not a suit by a disgruntled investor. It alleges the same type of misrepresentations contained in paragraph 4 of the AIG complaint, cited above, were made in BOA's 8-k security registrations. This case is serious even for an organization as large as BOA. Exhibit "E" is an article from the *Wall Street Journal* indicating that BOA has offered \$13 Billion Dollars to settle this case and the Government has refused to settle.

According to the complaint, Bank of America exercised corporate control over activities related to the issuance and sale of certificates. (Exhibit "D", ¶19). These RMBS certificates were bought by investors who are entitled to the payments made for the mortgages. Nonpayment by the borrower hurts the value of the investment. (¶27). BOA represented in its prospectus that it approved or rejected mortgage applicants based upon underwriting guidelines which included metrics including the borrower's debt, savings, income, credit score, credit history, etc. (¶31). The process of bundling these mortgages for sale began in the 1970's (¶33) and in the years 2006 and 2007 (the dates of the mortgages in this case) BOA placed between \$144 and \$162 Billion Dollars of mortgages into circulation (¶34). BOA had to comply with

securities law and an 8-K form was filed for this group of mortgages in early 2008. (¶38). BOA was required to provide full disclosure of the underwriting criteria used. (¶45). Investors had to rely on BOA's representations because they did not have access to the loan files. (¶51). BOA represented that each mortgage was written in accordance with BOA's Product and Policy Guides. (¶54). If this was not so underwritten BOA was required to disclose this. (¶56). The mortgages of this group performed terribly (¶12). The mortgages that performed the worst were those that were issued with serious exceptions from BOA's Underwriting Guidelines. (¶66, ¶67). BOA did not follow its Guidelines and did not disclose this to investors. (¶69, ¶70). BOA placed intense pressure on its employees to place more mortgages, basing compensation of volume. One employee is quoted as saying that she and her co-workers were instructed by her supervisors that it was not their job to look for fraud and stated that her job was "basically to validate the loans." (emphasis in text). They were to approve the loans as quickly as possible. (¶72). The most common variations from the Underwriting Guidelines were: [A] overstatement of income; [B] misrepresentation of intent to occupy; and [C] inflated appraisal. (¶74). BOA represented in the prospectus for one group of certificates that for the paper saver mortgages that it did not request verification of stated income and stated assets unless the applicant was self-employed. Although applicants were required to sign a form 4506-T for the purpose of collecting tax returns to verify income, the complaint says that BOA did not verify income and in many cases, did not even collect the form

which allowed borrowers to falsely claim large salaries. (§101, §102, §104). The paper saver mortgages had substantially greater risk which BOA had an affirmative obligation to disclose. (§106). BOA also failed in its obligation to audit the mortgages, called "Loan Level Diligence" in order to determine if the mortgages conformed with its Guidelines. (§111). BOA failed to do any fraud checks for these mortgages (§119).

This complaint describes these acts as security law violations. The facts described are "givens" secondary to other litigation and the various hearings concerning the bailout. BOA is accused in this suit of making "false and misleading" representations (§10) which is described in paragraph 9:

"9. As a result of the decision not to conduct any due diligence, BOA – Bank, BOA– Securities, and BOA – Mortgage knowingly and willfully provided investors with materially false information in the offering documents and preliminary marketing materials about the characteristics of the mortgages in the BOAMS 2008-A collateral pool. Moreover, this decision resulted in BOA – Bank, BOA– Securities, and BOA – Mortgage representing in the Offering Documents that BOA-Bank adhered to its underwriting standards when originating the mortgages in the BOAMS 2008-A collateral pool without sufficient basis for making such representations."

It does not take a detective to correlate the allegations in the U.S. Government's complaint with the mortgages for Enid Boulevard and Heron Ridge for reasons in addition to the fact they were all written in 2006 and 2007. Several underwriters' depositions were taken and the testimony confirms the allegations pertaining to underwriting, or the lack of it, are true. The BOA Underwriting Guidelines were discovered and revealed that a two (2) year history was required

"unless specifically indicated in the product and/or program under which the loan was submitted." (See Underwriting Guidelines attached hereto as Exhibit "F"). The program "stated income" did not appear in the Guidelines. Vicky Olson, senior underwriter, testified at pages 23 and 25 of her deposition that income and assets were not checked for "stated income" products. (See deposition of Vicky Olson attached as Exhibit "G"). They took the word of the customer. Even though it was standard procedure to verify the income of the applicant through tax returns, that requirement was waived for "stated income" loans per Ms. Olson, (Exhibit "G", p. 24) and Levada Miller, another underwriter. (See Deposition of Levada Miller attached as Exhibit "H", p. 21). Katherine Gleiser, another employed underwriter at BOA said that the applicant would have to sign the form to allow BOA to collect his/her tax returns (4506-T) but in the "stated value" program the returns are not requested. (See Deposition of Katherine Gleiser attached as Exhibit "I", pp. 37-39). The problem with the Enid Boulevard and Heron Ridge Applications is that both of the applicants were "self-employed" which, according to the complaint in the case brought by the United States meant their income tax returns had to be obtained. Ms. Gleiser did not even know about this requirement, however. She testified the opposite was true: If the applicant was self-employed, BOA underwriters do not have to verify income. Exhibit "I", p. 30.

Katherine Gleiser's testimony put a bright light on the underwriting procedures of BOA. She testified that BOA took the word of the mortgage broker for the

accuracy of the information, without question. (Exhibit "I", p. 43). The broker was trusted to hire the appraiser. (Exhibit "I", p. 31). Any and all checking of the financial information of the applicant would be checked by the broker. (Exhibit "I", p. 35). The obvious problem was that the broker was the person defrauding BOA for the Heron Ridge property. Carol Walsh took the Application, presented it the Bank, obtained the phony appraisals and provided the phony financial information. She even attended the closing to make sure it went as smooth as glass.

Discovery revealed there was no such thing as "Loan Level Diligence." BOA was supposed to check the loans after they were made for possible irregularities. The Enid Boulevard residence, was, according to BOA records examined in audit by Lori Hostad. A complete address was contained on the BOA file document for this audit. Her file was requested with no result. Her deposition was requested and the response from BOA was "there was no record of her." A person with the same name was contacted but she would not cooperate. Westminster concludes that the audit never occurred and the person listed never worked for BOA. (See Hostad documents attached as Exhibit "J").

A. The transactions are examined.

Westminster was the closing agent. It did not underwrite. The Closing Instructions given to Westminster did not say Westminster was to check the underwriting or put it on notice that BOA was not checking anything so Westminster

should be extra vigilant of potential frauds. These loans come in, were closed and sent out in the same way, every day, for years. No one told Westminster that BOA's underwriting rules had changed.

Westminster received the Closing Instructions after the underwriting process is completed. The frauds in this case were already committed by the time that Westminster first saw the file. The Closing Statements are prepared by computer from information sent from BOA. The documents have specific purposes and are about the same for every closing. The Estoppel Certificate, signed by the buyer says the person taking out the mortgage was going to live in the house and it meant that for every closing. A copy of the deposit check in the closing file meant that BOA had verified the existence of the deposit and meant that for every closing. The closer must rely on the regularity of forms and process because the closings are a repetitive process performed with considerable speed.

1. Enid Boulevard.

The buyer for this property was Fred Matson. BOA gave him a \$3,850,000 loan. His Application to BOA dated December 2, 2005 (attached hereto as Exhibit "K") said he was making \$98,659 a month as a self-employed consultant for a company called Robinson's Technologies in Detroit, Michigan. The Application listed bank and investment assets totaling \$5.9 Million. The appraisal, attached hereto as Exhibit "L", was for over \$5.5 Million, far in excess of its actual value. BOA did not verify the applicant's income.

According to the underwriters who actually handled the Applications, the mortgages for both Enid Boulevard and Heron Ridge were "stated value" loans, meaning the Bank did not verify the numbers on the Application. They testified the Bank took the borrower's word regarding how much income he or she actually made. (Exhibit "G", p. 23). See also, Exhibit "H", p. 21. The false information was, therefore, never challenged and the loan was approved on December 29, 2005.

The seller of this property was Raji Zaher, the owner of record. (See Exhibit "M" attached hereto). The closing was scheduled for December 30, 2005 according to the initial HUD-1 which was approved by BOA. (See HUD-1 attached as Exhibit "N" attached). The Closing Instructions from BOA were sent in two (2) packets by fax. The Conditions arrived on December 29, 2005. (See Conditions attached as Exhibit "O"). The boiler plate Instructions were sent on December 30, 2005 at 7:12 a.m. (See Instructions attached as Exhibit "P").

Linda Dolan attended the closing for Westminster. The seller listed on the HUD-1 was Raji Zaher. When Ms. Dolan started the closing, she was told the name of the seller was different and the information on the HUD-1 was incorrect. There was an unrecorded vendee's interest in a land contract that was not accounted for in the documents. She stopped the closing and instructed her associate Shelley Maxwell to contact BOA and get its permission to make the necessary changes to close. (See Deposition of Linda Dolan attached as Exhibit "Q", pp. 22, 25). Shelly Maxwell then called Kwannah Clifton, BOA's closing representative, and explained the issues. Ms. Clifton told her to send her the documents. (See Deposition of Shelly Maxwell

attached as Exhibit "R", pp. 14 and 15). Ms. Clifton told her to use a Quit Claim Deed to straighten out the title. (Exhibit "A", p. 42). Ms. Clifton acknowledged that a new HUD-1 was done. (Exhibit "A", p. 43). She did not recall if there were changes made from the prior statement. (Exhibit "A", p. 44). A revised HUD-1 was in Ms. Clifton's possession by 11:31 or 11:38 a.m. on December 30, 2005. (See revised HUD-1 attached as Exhibit "S"). By 11:40 a.m. on December 30, 2005, BOA had wired the money to Westminster. (See wire transfer attached as Exhibit "T"). At 11:57 a.m., BOA wired the boiler plate Closing Instructions to Westminster showing Michigan Land Development as seller and not Raji Zaher. (See Instructions attached as Exhibit "U"). Ms. Clifton authorized the loan to close dependent on the execution of a Quit Claim and Warranty Deed. (Exhibit "A", p. 43). She called and confirmed this orally to Jodie Berbas, an employee of Westminster. (See Deposition of Jodie Berbas attached as Exhibit "V", p. 9).

The Deeds were prepared and executed per her instructions at the closing of December 30, 2005. (See Deeds attached as Exhibit "W"). The closing documents reveal that Fred Matson, who was identified by his driver's license (attached as Exhibit "X"), appeared and attested that he was going to live in the residence by signing a statement saying the same and signing the Estoppel Certificate (attached as Exhibit "Y") in which he specifically warranted the same. The deposit check (attached as Exhibit "Z") was produced verifying payment of the same. It was not Westminster's obligation to confirm payment of the deposit. It was the responsibility

of the underwriting department of BOA. (Exhibit "H", p. 21). BOA had plenty of time to object if it thought it had reason because the payment checks were not made until January 4, 2006. (See disbursement advice attached as Exhibit "1"). The executed papers were returned to Ms. Clifton and nothing more was ever said about it. (Exhibit "A" pp. 50, 51, 65, 66.). Ms. Clifton testified she had handled situations like this before (Exhibit "A" p. 77) and was comfortable with the time period in which the problems were adjusted. (Exhibit "A" p. 76). Every decision made in this closing came from BOA with full knowledge of the facts. BOA was notified of what it claims to be an illegal "flip" and did nothing. In fact, it did more than nothing. Ms. Clifton waived the closing requirement of a written appraisal which is never done for new construction.

2. Heron Ridge.

This transaction was traditional except for the applicant's fraud. Jo Kay James was loaned \$2.8 Million. Her Application said she made \$71,328 a month as an owner of Great Lakes Glove and Safety in Commerce, Michigan. The Application lists bank assets and stocks in the amount of \$5.4 Million. Both numbers were fiction. See loan Application attached as Exhibit "2". The Application was signed by Jo Kay James on December 19, 2005, about a month and a half before closing, and the first page clearly says she was buying the "Heron Ridge property." Again, BOA did not check the representations about earning and assets on the Application.

(Exhibit "2). Jo Kay James did take out a home equity loan with GE Home Equity to meet the down payment. (Exhibit "2"). The file reveals that the HUD-1 was provided and approved before the closing by BOA. (See HUD-1 attached as Exhibit "3"). The Closing Instructions were provided by BOA for the closing. (See Closing Instructions attached as Exhibit "4"). There is no prohibition about second mortgages contained in them. A bank check (attached hereto as Exhibit "5") for the deposit was produced. The mortgages were closed and the funds distributed on January 31, 2006.

Jo Kay James testified she was paid \$20,000 for her participation. (See Deposition of Jo Kay James attached as Exhibit "6" p. 57). She testified she thought she was buying another property and did not know about Heron Ridge until the closing. (Exhibit "6" p. 31). She acknowledged she signed a lot of papers but said she did not know what they were. She signed her life away without knowing what she signed. (Exhibit "6" p. 48). She saw her financial information but said that they must have had problems getting her financials because the information indicated she had millions and she did not. (Exhibit "6" p. 47).

Carol Walsh of the broker Prime Financial attended the closing and assured her the house would soon be purchased by another buyer. (Exhibit "6" p. 45). She acknowledged she owned the property but thought she was the owner of the property for a few months. (Exhibit "6" pp. 59 and 52). The person who paid her the \$20,000 had her handwrite a note that she was purchasing the property for more than it

appraised for. (See handwritten note attached as Exhibit "7"; Exhibit "6" p.74). She thought the investment group was legitimate and thought everyone in the group knew about it. (Exhibit "6" p. 71). She signed the Estoppel Certificate warranting she was going to live in the house. (See Estoppel Certificate attached as Exhibit "8"; Exhibit 6" p. 67). There is a written statement with her signature saying the same thing. (See written statement attached as Exhibit "9"). Jennifer Maier-Brigmon, the person who attended for Westminster believed she was going to live in the house. (See Deposition of Jennifer Maier-Brigmon attached as Exhibit "10" p. 45). Jennifer Brigmon had never met Ms. James before and only saw Ms. James for the duration of the closing so there was no way she was going to have any knowledge of special circumstances.

ARGUMENT

I.

THERE IS NO LEGITIMATE REASON TO REVIEW THE HOLDING OF NEW FREEDOM BASED ON THE FACTS OF THIS CASE.

BOA offers policy arguments suggesting that BOA was not provided enough protection by present case law to prevent frauds such as those committed by Patriot Title and Carol Walsh but there is a question whether BOA is a party that needs protection or a party the public needs protection from? BOA has no evidence to support its claims against Westminster in the Trial Court. BOA will succeed against the obvious wrongdoers without any change in the law, but they are financial goners. There is no justification for granting leave in this case based on the arguments BOA presents against Westminster.

There is some catchy phrasing concerning “same day flips” (Enid Boulevard) and “second generation flips” (Heron Ridge) but this is just lingo. There are several suppositions underlying its arguments that BOA asks this Court to accept but the Court really should not because they are invalid. For example, BOA presumes in its argument that the buying and selling of real estate on the same day is bad. Actually the buying and selling of property on the same day is not illegal nor does it suggest illegality has occurred. (See Deposition of Kimberly O’Connor (First American) attached as Exhibit “11”, p. 26) BOA suggests that “flipping” the property is tantamount to fraud. This is not so because it is not the flipping that is the fraud.

The actual fraud were the lies on an Application and the submission of false appraisals. BOA was not verifying the applicant's financials, and when that fact became known, bad people took advantage. BOA had to do very little to discover the frauds. All that was required was a phone call or a request for tax returns. If it followed its published Underwriting Guidelines, it would have discovered all of these frauds. BOA also contends that if Westminster had been vigilant and notified BOA of the unspecified irregularities, it would have sent it back to underwriting. This is patently false based upon actual experience. BOA was specifically informed of what it calls the "same day flip" for the Enid Boulevard closing and did nothing about it but waive more conditions. It was notified the identity of the seller was incorrect and Kwannah Clifton (BOA's closing representative) told Westminster to prepare a Quit Claim Deed to correct it. This means the grantor of the Quit Claim Deed was the first sale of the "flip" and the grantee of the first sale became the grantor of the second sale of the "flip." The direction of BOA to use the Quit Claim Deed was the instrument that accomplished the "same day flip" it now complains about. Lastly, BOA implies that Westminster had something to do with the first sale of the Heron Ridge property. The first sale occurred the prior May and was accomplished by someone else. Westminster did not participate. Westminster's closing was as ordinary as the papers that were signed and there is no proof the closer even knew about the prior closing.

A. THE CPL IS AND IS INTENDED TO BE A CONTRACT BETWEEN FIRST AMERICAN AND BOA.

1. Contracts are interpreted as written.

The rights and duties of parties to a contract are derived from the terms of the agreement. *Wilkie v Auto Owners*, 469 Mich 41, 62, 664 NW2d 776(2003) Unambiguous terms are to be strictly enforced. *DeFrain v State Farm Mutual*, 491 Mich 359, 376 (2012). The CPL is an indemnity agreement and is interpreted in accordance with the rules for construction of contracts generally. *Pritts v J.I. Case*, 108 Mich App 22, 28; 310 NW2d 261 (1981).

2. BOA and First American are the parties to the CPL agreement.

“A Closing Protection Letter is typically issued by a title insurance Underwriter ‘[t]o verify the agent’s authority to issue the underwriters policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agents errors and dishonesty with escrow or closing funds. [citations omitted] These letters are issued incidentally to title insurance, and they are ‘to persuade customers to trust their agents, so that their policies can be sold.’” (Emphasis supplied) *New Freedom, supra* pp. 80, 81.

There is no direct claim available to BOA against Westminster on account of the CPL.

“ [First American], subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closing when conducted by the Issuing Agent (an agent authorized to issue title insurance for the Company), reference herein and *when such loss arises out of:*

(1) Failure of the Issuing Agent to comply with your written closing instructions to the extent they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you or,

(2) Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings.” (Emphasis provided)

The CPL clearly says that First American, not Westminster owes the indemnity for the limited, specified acts by Westminster, who is its agent. Michigan law is clear that there is no separate claim available to a third party against the agent for a disclosed principal. *Hall v Encyclopedia Britannica, Inc.*, 325 Mich 35, 38; 37 NW2d 702 (1949). *Riddle v Lacey & Jones*, 135 Mich App 241, 247; 351 NW2d 915 (1984). The fact of an agency does not create rights in third parties against the agent. *Uniprop, Inc v Morganroth*, 260 Mich App. 442, 446; 678 NW2d 638 (2004). First American can recover what it pays from Westminster under the terms of the agreement between them. *Hawkeye Cas Co v Frisbee*, 316 Mich 540; 25 N W2d 521 (1947). The order of claims in this case is BOA v First American v Westminster, not BOA v Westminster. There is consistent with the provision in the CPL which provides subrogation rights in favor of First American against Westminster in the event of payment.

B. BANK OF AMERICA'S CLAIM FOR BREACH OF CONTRACT IS INVALID.

BOA's Application for Leave to Appeal states on page 18 with reference to its claim for breach of contract against Westminster:

"The majority [of the court of appeals] in a mystifying conflation of concepts, only gave these key agreements scant attention, concluding that the closing instructions were "modified and limited" by the separate CPL contracts between the Bank and First American."

Actually the Court of Appeals gave BOA a break. The only allegation concerning breach of contract was paragraph 122 of the Complaint alleging that certain payees were not identified in the Enid Boulevard HUD-1. No breach of contract allegation was made about the Heron Ridge closing. Further, there was no requirement in the Closing Instructions that these payees be identified in advance. Further still, there was a one week delay between the date of the closing and date of funding so if BOA really had a problem, it could have easily corrected it. Nothing was ever said.

New Freedom, supra, correctly addresses the relationship of the parties to the CPL. It is an indemnity agreement which is independent of the title insurance policy. Id. 843. The document is an assurance that comes from First American, in this case, to BOA concerning the performance of the closing agent. Id. 842. It is to be interpreted in accordance with its plain language. Id. 832. Clearly section (1) of the CPL (language cited on p. 22 of this Brief) is to assure that BOA is first in line of priority and BOA was so situated satisfying section (1) per the New Freedom court.

Id. 844. Insofar as the allegation of fraud is concerned, the *New Freedom* court correctly reasoned the fraud had to follow the language and was limited to handling funds or documents that belonged to plaintiff. *Id.* 844. There is no evidence of that in this case.

This Court has demonstrated a reluctance to rewrite contracts and interprets them as they are written unless the contract is ambiguous. That's what the court in *New Freedom* did.

C. THE CLAIM FOR THE ENID BOULEVARD PROPERTY IS BARRED BECAUSE BOA MADE A FULL CREDIT BID.

BOA made a full credit bid on the Enid Boulevard property. BOA offers the question "Should this Court overrule *New Freedom* because it wrongly extended the statutory protections of MCL 600.3280 to relieve third parties from liability arising from their fraud or misconduct?" (BOA's Application for Leave to Appeal, p. viii). This argument can only have traction against Westminster if it is shown it engaged in fraud or misconduct; it cannot.

The ruling that a full credit bid discharges claims against third parties is not unique to *New Freedom*. The case of *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 551; 444 NW2d 217 (1989) extended the discharge to guarantors. The case of *Chrysler Realty v Grella*, 942 F.2d 160, 161,162 (CA 6, 1991) extended the discharge to parties against whom fraud was alleged. It is logical to apply a

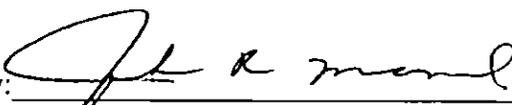
discharge of a debt to everyone and not make distinctions that would create endless litigation. After the full credit bid is made, the bank either is paid or has the property. In the case of Enid Boulevard and Heron Ridge, the appraisals were phony and BOA did not have them checked. Is BOA in a position where it is supported by equities compelling enough to induce this Court to grant leave or is it one of the usual suspects?

Westminster expects First American will make a compelling argument on this issue and disinclined to ask the Court to read further.

RELIEF REQUESTED

Defendants/Appellees request this Honorable Court affirm the ruling of the Court of Appeals.

OTTENWESS, TAWHEEL & SCHENK, PLC

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