STATE OF MICHIGAN

IN THE COURT OF APPEALS

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES AND ENERGY

Plaintiffs-Appellees,

and

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP

Intervenors-Appellees,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Court of Appeals Docket No._____

Washtenaw County Circuit
Court Case No. 88-034734-CE

DEFENDANT-APPELLANT GELMAN'S APPLICATION FOR LEAVE TO APPEAL

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DEFENDANT-APPELLANT GELMAN'S APPLICATION FOR LEAVE TO APPEAL

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ORDERS APPEALED FROM AND STATEMENT OF THE BASIS OF JURISDICTION

On April 12, 2021, Defendant-Appellant Gelman Sciences, Inc. ("Gelman") filed an Emergency Application for Leave to Appeal with this Court, seeking to prevent the presiding Washtenaw County Circuit Court judge from proceeding with a May 3 "Hearing on Modification of the Consent Judgment." This Court denied Gelman's Emergency Application in an Order dated April 29, 2021. In pertinent part, that Order stated:

> The application for leave to appeal is DENIED without prejudice to Defendant-Appellant reasserting its substantive claims after the Washtenaw Circuit Court enters an order or a judgment amending the existing consent judgment. Nothing in this order precludes an interlocutory appeal from any order entered during or subsequent to the evidentiary hearing. Appellant's Appendix 1002.

Thus, the April 29, 2021, Order denying Gelman's Emergency Application invited Gelman to resubmit its application for appeal should the trial court enter "an order or judgment amending the existing consent judgment."

The trial court has now done precisely that. On June 1, 2021, the trial court entered an Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria ("June 1, 2021 Order") that replaces the existing Consent Judgment and imposes additional remedial obligations to which the parties to the existing Consent Judgment did not consent and which the responsible State regulator did not seek, as they are not required to protect the public health or the environment. Moreover, the order puts in place a quarterly review process where the court will consider ordering Gelman to implement additional or modified response activities at the request of the non-party intervenors.[1]

[1] The trial court recognized that its extraordinary process and order should be afforded immediate appellate review, observing "I'm ordering the proposed Consent Judgment, and then I want to say on it every quarter, and the Court of Appeals, you know, can decide whether that's appropriate or not. ***And then I'd like the Court of Appeals to weigh in frankly before I take any***

Under these circumstances, and consistent with what this Court provided in its April 29, 2021 Order, Gelman respectfully seeks leave to appeal the *Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria* entered by the Honorable Timothy P. Connors on June 1, 2021, which is itself improper and is based on a procedurally and substantively invalid hearing.[2] Gelman respectfully requests an order of this Court vacating the trial court's June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria; reinstating the Third Amended Consent Judgment; and remanding this matter to the trial court with direction to, (consistent with the terms of the Consent Judgment as amended from time to time by the parties thereto), consider entry of any bilateral amended Consent Judgment as submitted jointly by EGLE and Gelman.

Jurisdiction is premised upon MCR 7.203(B)(1), which authorizes this Court of Appeals to grant leave to appeal from a "a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right." Gelman's application is timely filed within 21 days following entry of the June 1, 2021 Order in accordance with MCR 7.205(A)(1)(a) . This Court of Appeals has jurisdiction to grant leave to appeal from the June 1, 2021 Order.[3]

additional steps." See May 3, 2021 Evidentiary Hearing transcript, (hereinafter "5/3/21 Hrg Tr") p. 122:15-20 (emphasis added). Appendix 1215.

[2] This application is being filed in an abundance of caution. Because Gelman takes the position that the June 1, 2021 Order is a final, appealable order, as it is a "judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties," MCR 7.202(6)(a)(i). Gelman has also filed a claim of appeal of the June 1, 2021 Order.

[3] A copy of the June 1, 2021 Order is included in Appellant's Appendix at 1324-1715.

STATEMENT OF QUESTIONS PRESENTED

Gelman and the State of Michigan entered into a Consent Judgment in 1992 resolving then-pending litigation concerning groundwater contamination. That Consent Judgment set forth a comprehensive and exclusive mechanism for resolving disputes that might arise during implementation of the remediation activity required under the judgment, and preserved the parties' claims and defenses in litigation. More specifically, Gelman denied and reserved the right to contest any liability for causing or duty to remediate the contamination other than as agreed in the Consent Judgment. The parties and the Washtenaw County Circuit Court proceeded under the Consent Judgment, as amended, for decades until 2017, when – after Gelman and the State agreed on the terms of an amended bilateral Consent Judgment – the trial court improperly allowed the untimely intervention of six new parties for the limited purpose of giving them a "seat at the negotiating table" to shape that amended judgment, staying any statute of limitations that might apply to their filing of a complaint and ordering that they not file any complaints unless and until negotiations to amend the existing Consent Judgment failed. After four years of negotiations culminated in a settlement package recommended to Intervenors by their counsel and technical experts alike, Intervenors' political bodies nevertheless rejected the settlement. But rather than requiring Intervenors to file and litigate their complaints, as its orders granting Intervention directed, the court took matters into its own hands to try to salvage its failed intervention experiment. Without providing Gelman any opportunity to raise defenses or challenge the sufficiency of Intervenors' standing or claims; and barring any factual or expert discovery, depositions, or other standard indicia of due process, the trial court held an "evidentiary hearing" that lacked every procedural and substantive protection normally afforded to litigants under the applicable court rules. At the hearing's conclusion, the court entered an order replacing the existing Consent Judgment, as amended, with an entirely new remedial scheme requiring remediation activities well beyond what the administrative body authorized by Michigan law to administer and enforce the State's environmental laws agreed was needed and sufficient to protect the public health and environment, putting in place a quarterly review process where the court will consider imposing additional obligations to which Gelman never consented.

I. DOES THE TRIAL COURT HAVE AUTHORITY TO REPLACE THE CONSENT JUDGMENT WITHOUT THE CONSENT OF THE PARTIES TO THAT AGREEMENT?

Defendant-Appellant answers, "No."

Intervenors-Appellees answer, "Yes."

The trial court answered, "Yes."

II. DID THE TRIAL COURT HAVE AUTHORITY TO ALLOW SIX NEW ENTITIES TO INTERVENE IN A DECADES-OLD, SETTLED LAWSUIT AND TO ALLOW THOSE ENTITIES TO DEMAND MODIFICATIONS TO A CONSENT JUDGMENT TO WHICH THEY WERE NOT PARTIES WITHOUT FIRST FILING OR LITIGATING ANY CLAIMS AGAINST GELMAN?

Defendant-Appellant answers, "No."

Intervenors-Appellees answer, "Yes."

The trial court answered, "Yes."

III. WAS THE JUNE 1, 2021 ORDER CLEARLY ERRONEOUS, WHERE IT WAS BASED ON A PURPORTED "EVIDENTIARY HEARING" AT WHICH NO EVIDENCE WAS TAKEN AND WHERE THE ENTITIES SEEKING RELIEF HAD NOT YET FILED THEIR COMPLAINTS, LET ALONE DEMONSTRATED AN ENTITLEMENT TO RELIEF?

Defendant-Appellant answers, "Yes."

Intervenors-Appellees answer, "No."

The trial court would answer, "No."

IV. SHOULD THIS COURT EXERCISE ITS DISCRETION TO PERMIT INTERLOCUTORY APPEAL, WHERE THE TRIAL COURT ITSELF HAS INDICATED A DESIRE THAT ITS JUNE 1, 2021 ORDER BE SUBJECT TO APPELLATE REVIEW?

Defendant-Appellant answers, "Yes."

Intervenors-Appellees answer, "No."

The trial court answered, "Yes."

STATEMENT OF FACTS

I. INTRODUCTION

Plaintiff/Appellee Michigan Department of Natural Resources and Environment (now known as the Department of Environment, Great Lakes and Energy and referred to herein as "EGLE" or the "State") filed this lawsuit against Defendant/Appellant Gelman Sciences, Inc. ("Gelman") in 1988, seeking to require Gelman to clean up contamination of local groundwater caused by permitted 1,4-dioxane ("dioxane") discharges.[4] A "Final Judgment" – a Consent Judgment between Gelman and EGLE setting forth an agreed-upon remediation program – was entered on October 26, 1992. Pursuant to that Consent Judgment, there was no finding of liability on Gelman's part, which liability Gelman specifically denied. Thus, Gelman agreed to undertake the cleanup responsibilities specified by the terms of the Consent Judgment but reserved the right to defend itself against any attempt to impose expanded or modified cleanup duties. The Consent Judgment was amended by the Parties three times, most recently by stipulation of EGLE and Gelman on March 11, 2011, to reflect changing cleanup standards and the Parties' evolving understanding of the site geology and nature and extent of the contamination. By July 2014, all outstanding disputes between the Parties to the Consent Judgment had been resolved. No claim or matter was pending before the court after entry of that stipulation.

By September, 2016, EGLE and Gelman had reached agreement on the additional response actions needed to address long-anticipated changes in the applicable cleanup criteria and were in the process of finalizing the terms of what would have been a Fourth Amended Consent Judgment.[5]

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[4] EGLE and Gelman are from time to time referred as "the Parties."

[5] EGLE and Gelman negotiated the draft bilateral Fourth Amended and Restated Consent Judgment (hereinafter the "Bilateral Amendment") and reduced its terms to writing by early 2017. A copy of the Bilateral Amendment is included in the Appellant's Appendix at 1925-1989. At the

Consequently, EGLE had no reason to petition the trial court to amend the existing judgment (as required by the provisions of that judgment, as amended). Then, in January and February 2017, over Gelman's objections, the trial court allowed six non-parties to the lawsuit and Consent Judgment to "intervene" in the case[6] – and did so without even requiring those entities to file complaints against which Gelman had the right to defend itself. The trial court sought to justify its actions by allowing intervention for the limited purpose of giving the Intervenors a seat at the bargaining table for negotiations between EGLE and Gelman regarding an amended Consent Judgment. If those negotiations were unsuccessful, the trial court's Intervention Orders were clear: the Intervenors would have to file their complaints, and their claims would be subject to the standard Rules of Civil Procedure and Evidence applicable to all lawsuits brought in Michigan.[7]

Nearly 4½ years of negotiation resulted in a proposed three-part settlement, including a proposed Fourth Amended Consent Judgment that included significant additional response activities than what EGLE and Gelman had included in the Bilateral Amendment (which EGLE agreed was sufficient to protect the public health and environment). The settlement package featured concessions from all sides, with additional responsibilities for EGLE and Gelman set forth

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June 17, 2021 hearing regarding Gelman's motion to stay enforcement of the court's June 1, 2021 Order, EGLE confirmed that it would not have agreed to the terms of the Bilateral Amendment unless it was adequate to protect the public's safety and welfare, stating: "EGLE would not agree to enter into a consent decree that it did not believe was protective of public health and the environment, and that is the case with the 2017 draft that we have." See June 17, 2021 Hearing Transcript, (hereinafter "6/17/21 Hrg Tr"), pp. 19-20. Appendix 1997.

[6] Appendix 189-191 and 192-194. These entities (The City of Ann Arbor, Washtenaw County, The Washtenaw County Health Department, Washtenaw County Health Officer, The Huron River Watershed Council, and Scio Township) are referred to herein as the "Intervenors."

[7] For its part, Gelman opposed intervention, and sought this Court's leave to appeal the trial court's decision – a request for interlocutory review which this Court denied on July 14, 2017. As a result, despite its serious misgivings about the prospects for success of the court's negotiation process, Gelman participated in those court-supervised negotiations in good faith for the better part of 4 years.

in the proposed consent judgment, and concessions obtained from the Intervenors in exchange for the expanded cleanup responsibilities set forth in a separate-but-linked Settlement Agreement and a Stipulated Order dismissing the Intervenors from the lawsuit.[8]

In November 2020, though, the court-ordered negotiation process failed when elected officials representing the Intervenors, ignoring the advice of their counsel and experts, rejected the proposed Fourth Amended Consent Judgment and related settlement documents. When the Parties and Intervenors so notified the court, rather than requiring Intervenors to file their complaints and litigate the merits of their claims (as required by the Intervention Orders), the court *sua sponte* announced that all of the entities would proceed straight to a mini-trial, where the trial court would hear from both the Parties' and the Intervenors' technical consultants and then decide what modifications would be made to the Consent Judgment between Gelman and EGLE.

Gelman sought this Honorable Court's intervention on an emergency basis, seeking to prevent the trial court's ill-conceived and entirely improper "evidentiary hearing" from taking place as scheduled on May 3. In an Opinion dated April 29, 2021, this Court denied Gelman's *Emergency Application* in an Order that explicitly left the appellate door open if the trial court proceeded as Gelman predicted it would, stating (in pertinent part):

> The application for leave to appeal is DENIED without prejudice to Defendant-Appellant reasserting its substantive claims after the Washtenaw Circuit Court enters an order or a judgment amending the existing consent judgment. Nothing in

[8] *See* City of Ann Arbor, "Gelman Proposed Settlement Documents," https://www.a2gov.org/Pages/Gelman-Proposed-Settlement-Documents.aspx (last visited June 22, 2021) (listing "repository of proposed settlement documents" under consideration, including Proposed Fourth Amended and Restated Consent Judgment, Stipulated Order, and Proposed Settlement Agreements); Fred Dindoffer, "Legal Issues in Public Comments/Questions" Presentation (Sept. 24, 2020), https://www.a2gov.org/departments/water-treatment/PublishingImages/Pages/Gelman-1,4-Dioxane-Litigation/DindofferGelmanPresentation09242020.pdf at 2, last visited June 22, 2021, (listing "three proposed documents" as comprising settlement and stating ***"[t]hese documents should not be viewed in isolation***"). (Emphasis added).

> this order precludes an interlocutory appeal from any order entered during or subsequent to the evidentiary hearing. Appendix 1002.

After this Court denied Gelman's emergency appeal, the trial court carried through with its announced plan to unilaterally replace the existing consent judgment in a manner entirely unencumbered by even rudimentary due process considerations,[9] ordering the parties to prepare for a May 3, 2021 "evidentiary hearing." As it turned out, the "evidentiary hearing" was not an "evidentiary hearing" at all. The trial court heard no sworn testimony from any witnesses. It admitted no documents into evidence. After hearing less than 20 minutes of opening statements from the only parties to the case and to the Consent Judgment (Gelman and EGLE) and roughly one hour of a partial opening statement from the Intervenors, the court halted the proceedings to announce that it intended to order only one aspect of the integrated, three-part global settlement package that the parties had negotiated before the Intervenors' political entities rejected that deal. More specifically, the court proposed to order implementation of the proposed Fourth Amended Consent Judgment, but neither of the other two documents that comprised the settlement package and which contained material concessions and compromise positions by the Intervenors, including dismissal of the intervention and broad liability releases.[10] Then – after taking nearly an hour of

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[9] Prior to this hearing, there were no expert witness designations and the Parties had no opportunity to depose any expert who would be called to testify. Moreover, the Court adopted a briefing schedule that required all parties to submit their briefs and technical reports concerning how to properly remediate a dioxane plume on Friday, April 30 (less than 72 hours before the hearing was scheduled to begin at 9:00 a.m. on Monday, May 3). The parties complied with the Court's briefing schedule, submitting nearly 1,300 pages of legal argument, technical reports and exhibits on Friday, April 30, in preparation for the "evidentiary hearing" set to begin just three days later. *The Court admitted that it had not even had time to read all of the submissions before the hearing began,* despite reading all weekend. 5/3/21 Hrg Tr, p. 134. Appendix 1227.

[10] The fact that the court replaced the existing Consent Judgment with a document that was one part of a settlement package Gelman supported does not mitigate the lower court's miscarriage of justice. The Proposed Fourth Amended and Restated "Consent" Judgment that the court excised from the settlement package and imposed on Gelman and EGLE via its June 1, 2021 Order requires

public comments from members of the community in virtual attendance before ***and while*** it formulated its order on the record – the court finally ordered that it was unilaterally replacing the existing Consent Judgment and ordering new and additional cleanup criteria different than what had been agreed to by the parties to that agreement.[11]

This Honorable Court has twice rejected Gelman's pleas to intercede to prevent the travesty that this matter has become as a result of the trial court's mishandling. But during the course of the May 3, 2021 hearing, *even the trial court* made clear that it desired this Court's review of its handling of this matter, stating "***I'd like the Court of Appeals to weigh in frankly before I take any additional steps***." 5/3/21 Hrg Tr at 122 (Emphasis added), Appendix 1215. As a result, and in the wake of an order replacing and expanding the existing remedial regime and judgments (and reserving the right to make more changes at each quarterly meeting), Gelman respectfully requests that this Court exercise its discretion to hear Gelman's case on an interlocutory basis, and that this

Gelman to implement significant additional remedial work that goes well beyond what EGLE and Gelman have agreed is sufficient to appropriately address the new cleanup criteria and a protective remedy. Gelman only offered to implement this additional tangentially beneficial remedial work in exchange for correspondingly significant concessions from the Intervenors, which were included in the other two documents of the settlement package that Intervenors rejected – documents that were not before the court or included in the June 1, 2021 Order. Appendix, p. 122. In particular, each intervening local units of government ("LUGs") was to enter into a settlement agreement that provided Gelman with broad releases of future claims, obligated each LUG to cooperate with Gelman's institutional control-based cleanup (including by providing cost-free access to property and records), and other valuable consideration, including their commitment not to seek to have the United States Environmental Protection Agency ("USEPA") take over the site (something that Intervenors have since done). Notably, the third part of the settlement package – the Order of Dismissal – would have dismissed the intervention, with prejudice, ensuring that Gelman's cleanup efforts would be supervised by EGLE and not a committee of Intervenors motivated by local politics, in accordance with state law.

[11] There is no dispute that the trial court's order replaced in full the prior Consent Judgment, as amended. 5/27/21 Hrg Tr at 26 ("[A]ll you need to do is look at the terms in the proposed Fourth [Consent Judgment]. It's an all-inclusive document."). Appendix 1317.

Court reverse the trials court's unsupported and unsupportable decision to unilaterally replace the Consent Judgment to conform to the whims of non-parties and local politics.

II. BACKGROUND

In 1966, Gelman began utilizing 1,4-dioxane ("dioxane") in its production of medical-grade filters in Scio Township. This process generated wastewater containing dioxane.

Pursuant to a series of State-issued wastewater discharge permits, Gelman disposed of its wastewater in treatment ponds which – by design and with the relevant authorities' permission – allowed treated wastewater to seep into the ground. These discharges were legal and authorized. However, unbeknownst to Gelman and the State, the treatment systems could not successfully treat dioxane due to its unique resistance to biodegradation. Unfortunately, Gelman's *permitted and legal* waste disposal practices resulted in the unintended release of dioxane into the groundwater.

A. IN 1991, THE TRIAL COURT DISMISSED MOST CLAIMS IN THE UNDERLYING LAWSUIT, MAKING NO FINDING OF LIABILITY AGAINST GELMAN

The State filed this case in 1988 to require Gelman to clean up the dioxane contamination. Trial of the case against Gelman began in 1990 and lasted almost a year. At the close of the State's evidentiary proofs, the trial court **granted** Gelman's Motion for Involuntary Dismissal, holding that Gelman's disposal of dioxane was authorized by discharge permits issued by the State. *See* the July 25, 1991 *Opinion and Order* (Circuit Judge Patrick Conlin), pp 19-27. Appendix 019-027. The only portion of the State's case allowed to proceed were claims arising from minor overflows from Gelman's treatment ponds – but that portion of the trial was never completed. Thus, Gelman was never found liable to the State under state law.[12]

[12] Therefore, the trial court's statement at page 45 of the March 22, 2021 hearing transcript – that "… [W]e're already in the remedial stage. … We're decades beyond litigation of whether or not

B. THE 1992 CONSENT JUDGMENT IDENTIFIED THE RESPONSE ACTIVITIES GELMAN AGREED TO IMPLEMENT TO REMEDIATE THE CONTAMINATION BUT SPECIFICALLY DENIED GELMAN'S FAULT OR LIABILITY

The State and Gelman subsequently negotiated an extensive and detailed 63-page Consent Judgment dated October 26, 1992. Appendix 030-092. The Consent Judgment, which explicitly states at page 2 that Gelman "does not admit any fault or liability under any statutory or common law," sets forth the environmental response actions required to address the contamination. The Consent Judgment provides that it can be modified only in writing signed by the parties and entered by the court. *Id.*, Section XXIV.[13] Section XVI.D. of the Consent Judgment provides a detailed, exclusive dispute resolution process that must be initiated by one of the Parties (EGLE or Gelman) that is the sole method of resolving disputes regarding enforcement of the Consent Judgment's terms. Section XVIII of the Consent Judgment restricts the State's right to sue or take any administrative action against Gelman except in limited circumstances. *Id.*, Section XVIII. This section has been referred to by the Parties as the "reopener" section, as it lists the circumstances in which EGLE would be able to "reopen" the litigation – and Gelman would be able to "reopen" its defenses thereto.

Since then, the State and Gelman have successfully negotiated four amendments to the Consent Judgment to address changing cleanup standards and to reflect the parties' evolving understanding of the nature and extent of the contamination at this geologically complex site. The agreed-upon response actions Gelman has undertaken pursuant to the Consent Judgments have

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Gelman polluted the water," so the court could proceed directly to adjudication of remedies and responsibility for cleaning up the dioxane plumes – is just wrong. Appendix 947.

[13] Appendix 88. ("This Consent Judgment may not be modified unless such modification is in writing, signed by all Parties, and approved and entered by the Court.")

dramatically reduced the contaminant mass present in the environment and successfully protected the public from any unacceptable exposures.

C. THE PARTIES TO THE CONSENT JUDGMENT ANTICIPATED AND PROVIDED FOR MODIFICATIONS TO THE CONSENT JUDGMENT BASED ON ADOPTION OF MORE STRINGENT DIOXANE STANDARDS, AND MODIFIED THE "REOPENER" SECTION ACCORDINGLY

The Consent Judgment was amended by stipulation of the Parties and Order of the trial court on September 23, 1996 and again on October 20, 1999, to reflect changed cleanup standards and the Parties' evolving understanding of the site conditions.

In 2010, the United States Environmental Protection Agency ("EPA") reevaluated dioxane's toxicity, issuing a Toxicological Review in August of that year. During subsequent discussions, EGLE notified Gelman that it anticipated adopting more restrictive dioxane criteria based on the EPA's reevaluation. Thus, when Gelman and EGLE negotiated new amendments to the Consent Judgment in 2011, they included new language addressing this anticipated circumstance in the Third Amended Consent Judgment's "reopener" provision.

The most recent amended agreement (the Third Amended Consent Judgment) was entered in March 2011. Appendix 152-188. Subsection XVIII.E identifies the *only* circumstances in which the State can initiate further litigation against Gelman outside of enforcing the existing Consent Judgment terms. Specifically, Section XVIII.E.1 (concerning EGLE's rights to institute proceedings requiring Gelman to perform or pay for additional remediation activities for proceedings prior to certification of completion of the Remedial Action concerning the Site) apply if the following conditions are met:

> a. (i) conditions at the Site, previously unknown to the Plaintiffs, are discovered after entry of this Consent Judgment, (ii) new information previously unknown to Plaintiffs is received after entry of the Consent Judgment, or (iii) ***[EGLE] adopts one or more new, more restrictive cleanup criteria for 1,4-dioxane pursuant to Part 201 of the Natural Resources and Environmental***

Protection Act (NREPA), MCL 324.20101 et seq., after entry of the Consent Judgment; and

b. these previously unknown conditions, new information, and/or change in criteria indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment. Appendix 180-181. [Emphasis added.]

Thus, the Parties specifically recognized and addressed what would happen if EGLE adopted more stringent dioxane cleanup criteria: either they would negotiate new protocols addressing how to meet the new standards and modify the Consent judgment by stipulation pursuant to Section XXIV, or EGLE could "re-open" its lawsuit against Gelman (subject to the same rules and procedures applicable to any other lawsuit filed in the State of Michigan, including Gelman's assertion of any applicable defenses).

Nothing in the Consent Judgment, as amended by the parties and approved by the court, allows anyone other than the Parties to re-open the Consent Judgment or institute proceedings to amend or replace its terms.

D. THE INTERVENORS ARE ALLOWED A SEAT AT THE TABLE TO NEGOTIATE A FOURTH AMENDED CONSENT JUDGMENT

Gelman and EGLE began negotiating an amendment to the Consent Judgment in 2015 in anticipation of the adoption of new, more stringent dioxane cleanup standards. In October 2016, EGLE utilized an emergency administrative rule to adopt the long-anticipated new standards. Significantly, EGLE did *not* petition the court to reopen the Consent Judgment in this matter. Because it and Gelman had anticipated the new criteria, the parties by that time had already agreed on the additional actions needed to address that change and were already far along in negotiating a fourth amendment to its terms. Therefore, EGLE and Gelman continued to work together to develop an amendment that would address the more stringent cleanup levels.

Gelman and EGLE agreed in principle on a Fourth Amended Consent Judgment (the "Bilateral Amendment") and reduced that amendment to writing. *See*, Appendix 1925-1889.

EGLE confirmed at a hearing regarding entry of the Court's June 1, 2021 Order that it would not have agreed to the terms set forth in that amended Consent Judgment if it was not satisfied that it adequately protected the public health and environment. *See*, 6/17/21 Hrg Tr, pp. 19-20. Appendix 1997.

Just as those negotiations were nearly complete and the Parties were ready to seek entry of the fourth amendment to their Consent Judgment, but before either Gelman or EGLE had petitioned the court to allow entry of the proposed Bilateral Amendment, the trial court granted motions to intervene filed by the Intervenors by Orders dated January 18 and February 6, 2017 ("Intervention Orders"). The Intervention Orders were unusual – the Intervenors were not required to bring suit against Gelman and Gelman was not allowed to defend against any of their claims.[14] Without proving that they even had standing – or how, in the City's case, its claims were not precluded by the City's prior Settlement[15] – the Intervention Orders allowed the new entities to participate in the nearly-concluded negotiations between Gelman and EGLE regarding the terms of the proposed Fourth Amended Consent Judgment. However, the Intervention Orders provided that "Should any of the Intervenors, after participating in negotiations on a proposed Fourth Amended Consent Judgement, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, they may file their complaint(s) after providing notice to the other parties." January 18, 2017 Order Granting Intervention, ¶ 1.a., Appendix 189-190.

Importantly, under the Intervention Orders, the Intervenors were not granted party status: they were permitted to have a "seat at the table" for the Consent Judgment negotiations, but to this

[14] The January 18, 2017 order is included in the Appendix at 189-191 and the February 6, 2017 order is included in the Appendix at 192-194.

[15] *See* footnote 20, below.

day they have not filed complaints and have not joined the underlying litigation itself. Otherwise, it would not have been necessary for the Intervention Orders to toll the statute of limitations until such time as their complaints were filed.[16]

Thus, the procedure that the trial court adopted was to allow entities that had no prior involvement in the decades old lawsuit and were not parties to the Consent Judgment to nevertheless participate in the negotiations to modify the agreement between Gelman and the State. But at least Gelman knew that if the negotiations failed, the Intervenors would have to file their proposed complaints and Gelman would be able to defend itself against their claims before being ordered to accede to their demands.

E. AFTER MORE THAN FOUR YEARS OF NEGOTIATIONS, THE INTERVENORS REJECTED A SETTLEMENT RECOMMENDED BY THEIR ATTORNEYS AND RETAINED EXPERTS

Over the course of the next four years, Gelman, EGLE and the Intervenors held a series of meetings involving the parties, their attorneys and experts to discuss how to structure a revised Consent Judgment in a manner satisfactory to everyone involved. Eventually, in late summer 2020, all of the various constituencies, and all of their attorneys and experts, reached consensus on a settlement. The settlement consisted of a series of negotiated compromises and bargained-for exchanges, including concessions and agreements by the Intervenors beyond the scope of the proposed amended Consent Judgment between EGLE and Gelman, which was only one part of the three-part settlement package.

Gelman, EGLE and the Intervenors fully supported the settlement when it was made public. The City's Mayor publicly endorsed the settlement, as did the Chair of the County Board of

[16] *Id.*, ¶ 1.e, Appendix 190; February 6, 2017 order, ¶ 1.d, Appendix 193. See also, MCL 600.5856 (tolling statute of limitations when copy of summons and complaint are filed and served on defendant); MCL 600.1901 (civil action is commenced by filing a complaint with the court).

Commissioners.[17] Intervenors and EGLE solicited and responded to public comment, endorsed the settlement and corrected misinformation fueling public concern about the proposed resolution.[18]

But then, bowing to the pressure of a small but vocal band of their constituents, the elected officials representing the local units of government among the Intervenors defied the recommendations of their attorneys and experts and rejected the proposed modifications to the Consent Judgment. In so doing, the Intervenors scuttled the years-long process that had already delayed entry of the 2017 Bilateral Amendment that Gelman and EGLE had negotiated, reduced to writing, and which EGLE agreed would provide a protective and reliable remedy.[19]

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[17] The City's Mayor publicly endorsed the settlement, as did the Chairperson of the County Board of Commissioners. *See, e.g.*, Ryan Stanton, MLive, *A closer look at the proposed Gelman plume cleanup plan. Is it enough?*, https://www.mlive.com/news/ann-arbor/2020/09/a-closer-look-at-the-proposed-gelman-plume-cleanup-plan-is-it-enough.html; Ryan Stanton, MLive, *Landmark cleanup agreement announced for Ann Arbor's Gelman dioxane plume*, https://www.mlive.com/news/ann-arbor/2020/08/landmark-cleanup-agreement-announced-for-ann-arbors-gelman-dioxane-plume.html. The Intervenors' technical experts and staff also embraced the terms of the proposed Fourth Amended Consent Judgment: the City's Water Treatment Manager – responsible for keeping the City's water supply safe – promoted the settlement, and the Intervenors' technical expert issued a series of explanatory videos supporting the settlement package. David Fair, WEMU, *Issues of the Environment: Consent Judgment Reached to Better Remediate Gelman 1,4 Dioxane Plume*, https://www.wemu.org/post/issues-environment-consent-judgment-reached-better-remediate-gelman-14-dioxane-plume; City of Ann Arbor, Gelman Proposed Settlement Documents, https://www.a2gov.org/Pages/Gelman-Proposed-Settlement-Documents.aspx.

[18] Intervenor Response to Comments, https://www.washtenaw.org/1789/14-Dioxane; EGLE Responsiveness Summary, https://www.michigan.gov/egle/0,9429,7-135-3311_4109_9846-71595--,00.html.

[19] Gelman's continued implementation of the remedial work required by Third Amended Consent Judgment has continued to protect public health and the environment while the intervention-related machinations played out, even under the revised cleanup standards. However, Gelman agrees with EGLE that Gelman's implementation of the response activities provided for in the 2017 Bilateral Amendment is appropriate and will increase the long-term reliability of the cleanup. As a result, Gelman has not sought to stay those activities even while seeking appellate review of the court's June 1, 2021 Order.

F. THE TRIAL COURT ABANDONED ITS INTERVENTION ORDERS AND ORDERED AN "EVIDENTIARY HEARING" WITHOUT REQUIRING INTERVENORS TO FILE THEIR COMPLAINTS OR ALLOWING GELMAN TO DEFEND AGAINST THEIR CLAIMS

On November 19, 2020,[20] Intervenors' counsel notified the trial court that the Intervenors had rejected the recommended settlement and suggested further negotiations in the form of facilitated mediation utilizing a court-appointed "environmental mediation expert." Appendix 201. Recognizing that further negotiation would be fruitless, Gelman asked the trial court to set a date for the Intervenors to file their complaints, as expressly provided in the Intervention Orders. According to those orders, the next step was clear: if the Intervenors felt that the negotiations had stalled or failed, they could file their lawsuits.

The trial court rejected this request by counsel and the terms of its own Intervention Orders, instead fashioning an unprecedented type of "remedy hearing." The court would hear evidence and argument from each of the entities' attorneys and experts, and then issue an Order announcing what remediation efforts would be required under the new "consent" judgment, explaining "If we don't have an agreement, I have to make a decision." Appendix 220. The trial court thus erroneously believed it could act as a "factfinder" and unilaterally impose terms other than those to which the Parties had agreed.

The trial court clearly understood that the Intervenors had not filed any complaints and Gelman had not been given the opportunity to defend against those complaints.[21] The trial court

[20] The transcript of the November 19, 2020 Status Conference is included in the Appendix at 200-264.

[21] Appendix 230-231. ("I don't want them filing a complaint. I don't want an answer to a complaint. I don't want discovery. I don't want all that.") Thus, by way of example, Gelman was barred from challenging the City of Ann Arbor's right to bring *any* claims against Gelman in light of the settlement in prior litigation. More specifically, after it found dioxane in one of its little-used municipal wells in 2001, the City filed three separate but related actions against Gelman in

also understood that it had unilaterally decided to allow the Intervenors to participate in negotiations to change the terms and conditions of a contract to which they were not parties, and as a result of that action, now purported to have the authority to impose new terms on EGLE and Gelman arising out of the Consent Judgment.[22] And the trial court incorrectly assumed or presumed that its decision to move directly to the remedy hearing (without giving Gelman any opportunity to defend itself against the Intervenors' claims) was appropriate based on its mistaken belief that Gelman had already been found legally liable for the remediation, finding "… ***[W]e're already in the remedial stage***. We're past all that. ***We're decades beyond litigation of whether or not Gelman polluted the water***."[23]

The court found that, in the absence of an agreement between Gelman, EGLE and the Intervenors, it would proceed with the previously scheduled hearing, hear Intervenors' demands,

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2004 and 2005 seeking to force Gelman to undertake more rigorous (and technically infeasible) cleanup efforts. On November 20, 2006, Ann Arbor and Gelman settled all of those claims through a Release of Claims and Settlement Agreement (the "City's Settlement"). Appendix 112-151. Under the City Settlement, the City released the very claims for additional response activity it now asserts, rendering those claims substantively and procedurally invalid. The City also agreed to cooperate with Gelman's implementation of the institutional control-based cleanup remedy that it has sought to challenge. The City Settlement thus forbids the City from challenging remediation protocols approved by EGLE and set forth in the Consent Judgment – which is exactly what the City is doing with its intervention.

[22] Appendix 230-231. ("So, from my process, I've opened up a consent judgment, I've legally been saying I can have the Intervenors give me your voice of what you think and why, and I'll make the call. Then you have an appellate record. * * * Now I think it's time that I do my job and simply say, give me the science, give me the proposal, give me your legal reasons what you think I should do and why, and I'll make a call.")

[23] 3/22/21 Hrg Tr, p. 45; Appendix 947. (Emphasis added). As noted above, the original trial court judge found that Gelman was not liable for any significant releases of hazardous substances, which were all determined to have been "permitted releases" authorized by State-issued discharge permits. To resolve its case with the State, Gelman assumed financial responsibility to pay for the remediation, while denying being legal liable for the pollution; indeed, the Consent Judgment expressly denies liability. Thus, Gelman has *not* been found liable to the State in this case, let alone to the Intervenors, who have yet to even file their complaints.

and "make the finding of fact given [the] change of acceptable levels of what the cleanup program will be." (3/22/2021 Hr. Tr., p 46) Appendix 947. The court noted: "The purpose of the hearing is to hear what is the proposal for the cleanup; why; how I can do it; why; and then I'm going to order it. And it will be an evidentiary hearing." (*Id.*, pp. 46, 48-49) Appendix 947-948. Thus, the court asserted the authority and expertise to devise a remedy for this complex environmental contamination site, with no suggestion from EGLE that the Bilateral Amendment that it negotiated with Gelman prior to the unprecedented decision to grant the Intervenors negotiator status was not sufficient to protect public health and the environment.

G. GELMAN SOUGHT EMERGENCY LEAVE TO APPEAL THE TRIAL COURT'S ANNOUNCED PLANS TO REOPEN AND AMEND THE CONSENT JUDGMENT

The trial court's abandonment of the process outlined in its Intervention Orders, clear disregard for the requirements of due process and civil procedure, and manifest intent to issue an order amending the existing Consent Judgment without the consent of the parties thereto prompted Gelman to file an *Emergency Application for Leave to Appeal* with this Court. In short, Gelman sought to prevent enforcement of the trial court's scheduling orders that, combined with what the court had explained that it was looking for in that "evidentiary hearing," would improperly open EGLE and Gelman's Consent Judgment (as amended) to changes to which they – the only parties thereto and to the underlying case – did not consent.

In opposition to Gelman's application, on April 23, 2021, Intervenors assured this Court that Gelman was overreacting, and requested the imposition of sanctions against Gelman's counsel because "[c]ollectively, the orders [Gelman] seeks to appeal constitute nothing beyond a scheduling order," going so far as to claim that Gelman's argument that its application arose from the trial court's decision to judicially modify a consent judgment was "base advocacy and judicial

dishonesty." Intervenors' Answer in Opposition to Defendant's Application for Leave to Appeal, p. 11-12.

In an Opinion dated April 29, 2021, this Court denied Gelman's *Emergency Application* in an Order that stated (in pertinent part):

> The application for leave to appeal is DENIED without prejudice to Defendant-Appellant reasserting its substantive claims after the Washtenaw Circuit Court enters an order or a judgment amending the existing consent judgment. Nothing in this order precludes an interlocutory appeal from any order entered during or subsequent to the evidentiary hearing.

The very next day, on April 30, 2021, Intervenors submitted their brief to the trial court setting forth their position on the issues to be addressed in the May 3, 2021 "evidentiary hearing." The same Intervenors who assured this Honorable Court of Appeals that Gelman was overreacting to a simple scheduling order and misrepresenting what was at stake if the May 3, 2021 "evidentiary hearing" was allowed to proceed summarized what was to occur in that hearing as follows:

> The Intervenors jointly request entry of a new Gelman Response Activities Order ("2021 Order") which would implement revised cleanup criteria set by the State of Michigan and ***which would modify and largely replace the existing orders and judgments in the case*** that govern response activities, actions, obligations and duties related to 1,4 dioxane that continues to spread from defendant's … facility located on Wagner Road in Scio Township.[24]

Thus, the very same parties that had advised this Court on April 23, 2021 that there was no need to intervene because the trial court had simply issued scheduling orders and urged the imposition of sanctions against Gelman for engaging in "judicial dishonesty" admitted just one week later that the sole purpose of the May 3, 2021 hearing was to replace the existing Consent Judgment to which

[24] Intervening Plaintiffs' Joint Brief in Support of an Additional Response Activities Order ("2021 Order") to Implement Revised Cleanup Criteria and to Modify Existing Response Activity Orders and Judgments, at p. 1 (Appendix 1009). (Emphasis added.)

they were not parties in a lawsuit in which they had never filed complaints. This outcome is *exactly* what Gelman had asked this Court to prevent.

H. THE MAY 3, 2021 "EVIDENTIARY HEARING" WAS ENTIRELY IMPROPER

After this Court denied Gelman's emergency application for leave to appeal, the trial court proceeded with a May 3, 2021 "evidentiary hearing" that in fact considered no evidence, exhibits, or sworn fact or expert witness testimony. After brief opening statements from Gelman and EGLE regarding the lack of precedent or legal basis to proceed with the hearing,[25] Intervenors began to offer not an opening statement but a detailed, lengthy summary of the purported basis for their remedial demands as outlined in their prehearing briefing. But after just over an hour, the trial court interrupted Intervenors' counsel to offer a suggestion for what it might consider in lieu of completing the scheduled three-day "evidentiary hearing":

> THE COURT: … I apologize for interrupting, but this is something I've been thinking about. … [T]ell me, you know, in terms of your lawyers, and you know what the Court of Appeals may or may not do, but tell me if I was, if I were to go and say, "Okay, at least the people who know what we're talking about came to this, and we could move forward where there's agreement on it," so we start to have that, and I continue to have like a yearly review, what would be wrong with that proposal?

(*Id.*, pp. 68-69. Appendix 1161-1162). Thus, the court indicated that it was considering simply ordering into effect a portion of the settlement that the parties had reached before the Intervenors

[25] 5/3/21 Hrg Tr, pp. 14-22. Gelman's attorney noted the absence of any dispute between EGLE and Gelman (the only parties to the Consent Judgment), which was a prerequisite to the court's exercise of power to interpret the Consent Judgment. *Id.*, p. 15. He further noted that while EGLE had the right to seek additional response activities beyond the Third Amended Consent Judgment – but had not done so. *Id.*, pp. 15-16. And he noted that while the court had the ability to enforce its own orders, the evidentiary hearing was not concerning "enforcement" of the existing Consent Judgment, but "is a hearing to either create a new or modify an existing order." *Id.*, at p. 16. Appendix 1109.

rejected it. The court twice stated it would finish the evidentiary hearing if its proposal was unacceptable to the parties.[26]

After seeking to consult with their clients at the court's direction, all of the attorneys expressed doubt about the court's proposed "solution." Gelman explained that it had not been able to speak to its client in the short break, but indicated that it might be able to consent to the court's proposal as long as the court ordered enforcement of all of the elements of the settlement, rather than just those parts that increased Gelman's responsibilities without providing for the concessions that Gelman had negotiated from the Intervenors in exchange for that increased responsibility.[27] EGLE's counsel likewise explained that it had not spoken to its client, and supported Gelman's assertion that it would be unfair to simply impose the proposed changes to the Consent Judgment without similarly imposing the other parts of the negotiated settlement package. (*Id.*, p. 78). Counsel for the Intervenors agreed that "none of the Intervenor attorneys has had an opportunity to talk to our clients about this," and would have to comply with the Open Meetings Act's requirements of public meetings, comment and votes before they would be able to accept the court's proposed settlement. (*Id.*, p. 79).

Based only on this manifestly incomplete record – two brief opening statements expressing doubt as to the validity of the hearing and one longer-but-incomplete opening statement, and absolutely no evidence admitted into the record – the court then announced its intention to "order the consent agreement with review, and the Intervenors will still be there, and so, you know, we can so all that appellate review, but at least we take one step forward." (*Id.*, p. 82).

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[26] *See* 5/3/21 Hrg. Tr, at pages 70-71 ("Yeah, I mean I'm happy to try the case, and I'll give you as many days as you need, but as I listen here, that would be one idea.") and p. 74 ("I had the attorneys just talk about an idea, and if it does not work, I'm happy to try the case.")

[27] *Id.*; see also, *Id.*, at p. 76 ("[W]e believe it's fundamentally unfair to enter just the Fourth Amended CJ.")

In granting intervention and throughout the case, the court has prioritized accommodating local voices over compliance with this state's environmental laws, which give EGLE primary authority to develop, implement and administer remedial decisions. The court doubled down on that approach before announcing its final decision: after polling counsel and hearing that they all had objections to his proposal, the judge announced that he wanted to "hear from the people who are in the waiting room."[28] The trial court was fully aware that it was not conducting the "evidentiary hearing" as the rules of civil procedure and norms of judicial practice would dictate, in fact boasting that it did not care if this Court disagreed with its consideration of public comment without sworn testimony:

> And I do want to acknowledge, we're still on the record, and the Court of Appeals is going to think I'm crazy for listening to all of you, and they could all object, but I'm just going to do it.

(*Id*., p. 110). All told, the trial court listed to nearly an hour of statements from 14 members of the public and media,[29] *none* of which was under oath or subject to cross-examination, nor offered by a party to the proceedings or by the Intervenors.

At that point, the court ruled that it would "put into effect right now the proposed Consent Judgment." *Id.*, p. 121. The court indicated that what it was entering was *not* a consent order, but its own order, which would *not* include any of the other related documents that all participants in the hearing agreed were part of the negotiated settlement that had been rejected by the Intervenors:

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[28] *Id.*, p. 83. The hearing was being conducted via Zoom, so was attended by more than a dozen people other than counsel, including members of the general public, elected officials and at least two members of the media.

[29] *Id.*, pp. 83-118, 125, 129, 132-133, and 137. The court also considered additional comments from the public in the midst of its attempt to formulate its order. *See, e.g.*, page 132 of the transcript, where the court asked local politicians to comment on his proposed order, and pages 137-139, where the court asked members of the media covering the hearing whether they intended to be fair about how they reported the day's events.

> MR. POSTEMA: And the Fourth CJ, the additional documents that they had talked about, the settlement and the other orders, those are not part of it because - -
>
> THE COURT: No. * * * No. I am absolutely just saying I'm ordering the proposed Consent Judgment, and then I want to say on it every quarter, and the Court of Appeals, you know, can decide whether that's appropriate or not. And then I'd like the Court of Appeals to weigh in frankly before I take any additional steps. Are you with me? *Id.*, p. 122.

The court also ruled that the Intervenors would retain their Intervenor status. *Id.*, p. 121. After discussion, the court agreed with Gelman that it was issuing a "final order," and Intervenors' counsel (whom the court had tasked with drafting the proposed order) agreed to include that language in what would be submitted to the court for entry. *Id.*, pp. 131-132.

In sum, after ordering an "evidentiary hearing" to "open up" a Consent Judgment between EGLE and Gelman – and doing so in order to allow non-parties to the agreement who had never even filed a complaint in the lawsuit to offer testimony, evidence and argument concerning the existing Consent Judgment – the court ruled that it would enter an order replacing the existing Consent Judgment without the consent of the parties thereto, based upon a fundamentally improper and invalid remedy hearing which the trial court lacked the authority to hold and at which the court considered no evidence or sworn testimony.

I. OVER GELMAN'S OBJECTIONS, THE TRIAL COURT ENTERED AN ORDER THAT CHANGED AND FURTHER EXPANDED WHAT HAD BEEN ORDERED AT THE "EVIDENTIARY HEARING"

After the hearing concluded, on Wednesday, May 5, 2021, Intervenors' counsel circulated a proposed Order to EGLE and Gelman. *See,* Appendix 1235-1238. Gelman believed that proposal to be flawed in several ways, and therefore sent an annotated response to the Intervenors including a red-lined Order with citations to the record supporting its proposed changes (*See,* Appendix 1239-1245) which pointed out that, among other things:

1. The title of Intervenors' proposed Order was inconsistent with what the Court's Scheduling Order had called the May 3, 2021 hearing. Whereas the Court's April 6, 2021 Scheduling Order (Appendix 1000) stated "A hearing on implementation of revised cleanup criteria and modification of response activity Orders and Judgments is set for May 3, 4 and 5, 2021 at 9:00 AM," Intervenors (apparently in response to this Court's April 29, 2021 Order denying Gelman's *Emergency Application*, which specifically allowed Gelman to reassert its claims after the trial court entered "an order or a judgment amending the existing consent judgment"), titled its document "Order To Conduct Response Activities To Implement And Comply With Revised Cleanup Criteria."

2. The existing (Third Amended) Consent Judgment was being replaced by the trial court's new Order. Intervenors' proposal never addressed the status of the existing Consent Judgment, which the proposed Fourth Amended Consent Judgment was clearly intended to replace as part of the now-rejected settlement package.

3. Intervenors' proposed Order elevated their status in the case. As explained above, Intervenors were permitted to join in the case for the limited purpose of negotiating with the parties to the lawsuit and Consent Judgment (EGLE and Gelman). They never filed their complaints, and therefore were "Intervenors," but not parties to the lawsuit. Yet paragraph 4 of the proposed Order referred to them as "Intervening Plaintiffs," elevating them to the position of actual parties to the lawsuit.

4. The proposed Order improperly expanded on what the court had ordered by suggesting that the quarterly review hearings would involve "the implementation of additional or modified Response Activities and other actions." The addition created process by which the court may order Gelman to implement still more remedial work beyond that necessary to provide a protective remedy to which it did not consent on a quarterly basis going forward.

5. The proposed Order did not acknowledge that it was a final judgment modifying or supplanting the existing Consent Judgment. In paragraphs 2 and 5 of the proposed Order, Intervenors inserted language directly contradicting what the trial court had said about the finality of its order at the May 3, 2021 hearing. At the hearing, the court was adamant that its order was, in fact, a "final order" – and Intervenors' counsel (whom the court had tasked with drafting the proposed order) agreed to include that language in what would be submitted to the court for entry. (5/3/21 Hrg Tr., pp. 131-132). But in paragraph 2 of their proposed Order, the Intervenors stated that the trial court "retains continuing jurisdiction" to "consider the implementation of additional or modified Response Activities and other actions." Further, paragraph 5 was more explicitly contradictory of what the court had ordered from the bench, stating: "This is not a final order and does not close the case."

After receiving Gelman's annotated proposed redline to the proposed Order, on May 10, 2021, counsel for the Intervenors submitted their initial proposed Order for entry to the court without any modification to address Gelman's concerns. Gelman therefore objected to entry of the proposed Order, explained the basis for its objections, and submitted its own proposed Order consistent with what the court had ordered.

On May 24, 2021, the Intervenors filed a response to Gelman's objections to entry of order, 1) admitting that "for clarity, the Court's order should state that it replaces the Third Amended Consent Judgment"; 2) attaching the redlined copy of the proposal that Gelman had circulated the prior week, but altering the document to delete the annotations in that redlined version that would have clearly shown how Intervenors' proposed order diverged from the court's own words from the bench; 3) not objecting to removing the reference to "Intervening Plaintiffs" from the proposed Order; 4) re-arguing the issue of the order's finality without filing a motion for reconsideration of the court's clear statements regarding finality on the record during the May 3 hearing; and 5) arguing that it was irrelevant that the title of the Order differed from the hearing's intent, ironically accusing Gelman of engaging in a "ploy to try to improve [its] chances on appeal," when the court itself had made it clear that it intended the order to be final so that Gelman could seek appeal before the court took any further action. *See* Appendix 1259-1262.

At the May 27, 2021 hearing on Gelman's objection to entry of the proposed Order, Gelman reiterated its positions set forth in its objections. 5/27/21 Hrg Tr, pp. 6-15. Appendix 1297-1306. For its part, EGLE agreed with Gelman and the Intervenors that the order should clarify that it replaced the Third Amended Consent Judgment "so we don't have … two conflicting orders

basically there." *Id*. p. 15.[30] But despite the explicit clarity of its statements regarding finality and appellate review during the May 3, 2021 hearing, the trial court abruptly reversed course, stating "while I would like to also urge the Court of Appeals to weigh in on this, it is not a final order. It is an interim order." *Id.*, p. 28. The court concluded that it was "comfortable" with the order proposed by the Intervenors as submitted – even though Intervenors had *agreed with Gelman* that it should have clarified that the order replaced the Third Amended Consent Judgment and even though they did not object to removing the reference to them as "Plaintiffs." Gelman unsuccessfully urged the court to reconsider its ruling, because "this order does resolve all pending claims." *Id.*, p. 30.

The trial court entered Intervenors' proposed order, without change, on June 1, 2021. This application for leave to appeal followed – along with an appeal of right, also filed today, based on the irrefutable evidence that: a) there was no claim pending when the trial court allowed the Intervenors to join the case for purposes of negotiating a change to the existing Consent Judgment between EGLE and Gelman; b) neither EGLE nor Gelman asked the court to review their Consent Judgment or to enforce its terms; and c) the Intervenors never filed their complaints, so none of their claims are "pending" even today.

[30] Intervenors also reiterated that they "don't … really care" about whether they are called "Plaintiffs," because they had not yet filed their complaints and could do so at any time. *Id.*, pp. 22-23. ("If we're called Intervenors versus Intervening Plaintiffs, I don't think we really care because in our mind there isn't really a material difference. ... [I]f Gelman doesn't want us to be called Intervening Plaintiffs, and we use the term Intervenors for ourselves frequently, then so be it, you know. So we don't object to calling ourselves Intervenors.").

LAW AND ARGUMENT

I. THE TRIAL COURT LACKS AUTHORITY TO UNILATERALLY AMEND THE CONSENT JUDGMENT AND FASHION A REMEDY

The present appeal arises from the trial court's unsolicited and improper decision to replace a consent judgment executed by EGLE and Gelman on October 26, 1992 (an agreement that the Parties successfully amended by stipulation three times to address new conditions and cleanup standards of the parties over the years).[31] The trial court determined – based on input from non-parties and unsworn comments from community members – how the existing Consent Judgment should be amended and to quite literally impose a new contract upon the actual parties to the agreement (Gelman and EGLE). The trial court lacks legal authority to modify the Consent Judgment or to fashion a contract for these parties without their consent, and interlocutory review is both warranted and required. Upon review, Gelman respectfully requests an order of this Honorable Court of Appeals vacating the trial court's June 1, 2021 Order and remanding this matter to the trial court with instruction to direct the Intervenors to file their complaints so that the merits of their claims (which must establish that Intervenors' interests are not being adequately addressed and protected by EGLE), and Gelman's defenses thereto, may be fully tested *before* any remedy to those claims is considered.

A. STANDARD OF REVIEW

"A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Foster v Foster*, 505 Mich 151, 172; 949 NW2d 102 (2020), quoting *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). In the absence of fraud, mistake, illegality, or

[31] The October 26, 1992 Consent Judgment is included in the Appendix at 30-092. The first amendment to the 1992 Consent Judgment was entered on September 23, 1996, and the second amendment to the 1992 Consent Judgment was entered on October 20, 1999. See Appendix 093-105, and 106-111.

unconscionability, a consent judgment can only be modified with the consent of the parties. *Andrusz v Andrusz*, 320 Mich App 445, 453; 904 NW2d 636 (2017). A consent judgment is a contract and must be construed and enforced pursuant to ordinary principles of contract interpretation. *Id.* at 453. A court may not rewrite clear and unambiguous language under the guise of interpretation. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, courts are required to give "effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). A fundamental tenet of the jurisprudence of this state is that unambiguous contracts are not open to judicial construction and must be enforced as written. *Rory v Contl Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

B. THE 1992 CONSENT JUDGMENT COMPREHENSIVELY, EXPRESSLY AND EXCLUSIVELY GOVERNS THE RIGHTS AND REMEDIES OF THE PARTIES TO THIS LITIGATION

The 1992 Consent Judgment, as amended, governs the rights and remedies of the parties to this litigation. At the outset, the Consent Judgment expressly provides that parties are entering into the agreement to address environmental concerns raised in the State's Complaint, to expedite remedial action at the Site, and to avoid "further litigation concerning matters covered by this Consent Judgment." Appendix 030. The parties expressly agree "to be bound by the terms of this Consent Judgment and stipulate to its entry by the Court."[32]

The Consent Judgment is a "compromise of disputed claims," and Gelman made no admission of any of the allegations in the Complaint, made no admission of fault or liability under

[32] *Id*. See also Section II which expressly provides that, "This Consent Judgment applies to, is binding upon, and inures to the benefit of Plaintiffs, Defendant, and their successors and assigns." Appendix 032.

any statutory or common law, and made no waiver of any rights, claims or defenses with respect to any person, "except as otherwise provided herein." Appendix 031. Similarly, EGLE makes no admission concerning the validity or factual basis of any of the defenses asserted by Gelman and did not waive any rights with respect to any person, including Gelman, "except as otherwise provided herein." *Id*.

The trial court retains jurisdiction over the Parties "to enforce *this Judgment* and to resolve disputes arising under the Judgment." Appendix 032. The Consent Judgment requires Gelman to conduct environmental remediation as specified in detail in the judgment. Significantly, and as one would expect in a settlement intended to end litigation, Gelman's obligations are determined and governed by the judgment.

IV. IMPLEMENTATION OF REMEDIAL ACTION BY DEFENDANT

> Defendant shall implement the Remedial Action to address groundwater and soil contamination at, and emanating from, the GSI Property ***in accordance with*** (l) the ***terms and conditions of this Consent Judgment***; and (2) work plans approved by [EGLE] pursuant to this Consent Judgment. [Emphasis added.] Appendix 035.

The terms "Remedial Action" or "Remediation" are defined terms, and their definition also confirms that Gelman's obligations are governed by the Consent Judgment.

> L. "Remedial Action" or "Remediation" shall mean removal, treatment, and proper disposal of groundwater and soil contaminants ***pursuant to the terms and conditions of this Consent Judgment*** and work plans approved '[by EGLE] under this Judgment. [Emphasis added.] Appendix 034.

The Consent Judgment also anticipates that disputes may arise between the parties and provides an ***exclusive*** mechanism for resolving those disputes.

> XVI. DISPUTE RESOLUTION
>
> A. The dispute resolution procedures of this Section ***shall be the exclusive mechanism to resolve disputes*** arising under this Consent Judgment and ***shall apply to all provisions of this Consent Judgment***, whether or not: particular provisions of the Consent Judgment in question make reference to the dispute resolution provisions of this Section. [Emphasis added.] Appendix 046.

As more fully set forth in Section XVI of the Consent Judgment, the dispute resolution procedure consists of informal negotiations between the parties limited to ten working days unless shortened or extended by agreement of the parties followed by a written statement by EGLE setting forth EGLE's proposed resolution of the dispute. Such resolution shall be final, unless within 15 days following receipt of the proposed resolution, Defendant files a petition for resolution with the trial court. The petition must set forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Judgment.

The filing of a petition for resolution triggers EGLE's obligations under the dispute resolution procedures. EGLE may file a response, and unless the dispute arises from the failure of EGLE to timely make a decision, EGLE "***will submit*** to the Court all documents containing information related to the matters in dispute, including documents provided to EGLE by Defendant." Appendix 076. [Emphasis added.] In the event that the dispute arises from the alleged failure of the EGLE to timely make a decision, each party is required to submit to the court within ten days from filing of the petition all correspondence, reports, affidavits, maps, diagrams, and other documents setting forth facts pertaining to the matters in dispute. The documents filed by the parties comprise the record to be reviewed by the circuit court in resolving the dispute. The Consent Judgment provides:

> ***Those documents and this Consent Judgment shall comprise the record upon which the Court shall resolve the dispute.*** Additional evidence may be taken by the Court on its own motion or at the request of either party if the Court finds that the record is incomplete or inadequate. ***Review of the petition shall be conducted by the Court and shall be confined to the record.*** The review shall be independent of any factual or legal conclusions made by the Court prior to the date of entry of the Consent Judgment. [Emphasis added.] *Id*.

Finally, the Consent Judgment permits EGLE to institute proceedings seeking to require Gelman to perform any additional response activity at the Site and/or seeking to reimburse EGLE for response costs incurred by the State "if and only if the following conditions are met:"

> 1. For proceedings prior to [EGLE's] certification of completion of the Remedial Action concerning the Site,
>
>   a. conditions at the Site, previously unknown to [EGLE], are discovered after the entry of this Consent Judgment, or new information previously unknown to [EGLE] is received after the effective date of the Consent Judgment; and
>
>   b. these previously unknown conditions indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment; ... [33]

In summary, the Consent Judgment, as amended, by its express terms governs the rights and responsibilities of the Parties. The judgment is comprehensive and exclusive, resolving every claim made in the litigation and setting forth the procedure for addressing and resolving any and all disputes which may arise between the parties. Significant to the present appeal, the dispute resolution procedure set forth in Article XVI has not been triggered, and the trial court has not been called upon to resolve any dispute between these parties.

C. THE TRIAL COURT LACKS AUTHORITY TO AMEND, MODIFY, OR TO REWRITE THE CONSENT JUDGMENT

It is an axiomatic principle of law that a court is without authority to set aside a consent judgment absent agreement of the parties or some other reason such as fraud, duress, mistake, or illegality which would operate to vitiate the parties' consent. As the Michigan Supreme Court stated long ago, "It is elementary that a decree by consent cannot, in the absence of fraud or

[33] Appendix 82. As stated in the statement of facts of this application, the Third Amended Consent Judgment modified this section to expressly include as a condition the adoption by EGLE of one or more new, more restrictive cleanup criteria for 1,4 dioxane.

mistake, be set aside by rehearing, or on appeal; nor can it be modified without the consent of the parties." *Horning v Kendrick*, 161 Mich 413, 414; 126 NW 650 (1910) (citations omitted).

Michigan appellate courts continue to adhere to the rule that consent judgments may not be entered, modified, or set aside absent agreement of the parties or the presence of fraud, mistake or other circumstance which would vitiate the parties' consent to the judgment. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 461; 733 NW2d 766 (2006) (stating that, "A court cannot 'force' settlements upon parties, . . . or 'enter an order pursuant to the consent of the parties which deviates in any material respect from the agreement of the parties.'") (citations omitted); *Henry v Prusak*, 229 Mich App 162, 170-171; 582 NW2d 193 (1998) (reversing the entry of a default against defendant for failure of defendant's insurer to make any settlement offer on the grounds that default was not authorized by the court rules for the obvious reason that "A court cannot force settlements upon parties" and such action by the trial court could not be tolerated as "Such a practice would deprive a party of due process, the right to assert a defense, and the right to have a jury determine any disputed issues of fact.") (citation omitted); *Greaves v Greaves*, 148 Mich App 643, 646; 384 NW2d 830 (1986) ("In the absence of fraud, mistake or unconscionable advantage, a consent judgment may not be set aside or modified without the consent of the parties.") (citations omitted); and *In re Meredith's Estate*, 275 Mich 278, 289; 266 NW 351 (1936) (stating that, "A judgment by consent cannot ordinarily be set aside or vacated by the court without the consent of the parties thereto, ... for the reason it is not the judgment of the court but the judgment of the parties.") (citations omitted.)

Here, the June 1, 2021 *Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria* unilaterally modifies – indeed, replaces – the 1992 Consent Judgment, as amended, and it does so without the consent of either Gelman or EGLE. The trial

court entered its Intervention Orders in 2017, did not require Intervenors to file their complaints – thus preventing Gelman from testing the merits of their claims – purported to toll the statute of limitations, and put Intervenors in the driver's seat by including the following proviso in the Intervention Orders: "Should any of the Intervenors, after participating in negotiations on a proposed Fourth Amended Consent Judgment, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, they may file their complaint(s) after providing notice to the other parties."

After the Intervenors rejected the settlement package obtained after more than four years of negotiations, instead of requiring Intervenors to file their complaints and allowing Gelman the chance to test them on the merits, the trial court announced that it was going to hold an evidentiary hearing so that it could decide, based upon the evidence, what remedial activity Gelman was required to conduct in light of the change in cleanup criteria. Yet as discussed above, the proceeding the court ultimately held on May 3, 2021, was no "evidentiary hearing" at all, as it involved no sworn testimony, evidence, or documents. And more importantly, at the conclusion of this purported evidentiary hearing, the court ruled that it would enter an order which included all additional remediation activity required under the proposed Fourth Amended Consent Judgment, but without any of the concessions given by Intervenors in consideration for the increased responsibility under the proposed Fourth Amended Consent Judgment, thereby replacing the existing Consent Judgment with a new order, without the consent or request of the parties thereto and with no open issues or claims before the trial court to warrant such an action.[34]

[34] The trial court, quite literally, required the parties to engage in four years of negotiations for the purpose of reaching a Fourth Amended Consent Judgment, and after negotiations proved unsuccessful due solely to Intervenors' rejection of the proposed Fourth Amended Consent Judgment recommended to them by their counsel and environmental experts, the trial court entered

D. THE TRIAL COURT IS BOUND BY THE PROVISIONS AND LIMITATIONS CONTAINED IN THE 1992 CONSENT JUDGMENT, AS AMENDED, AND THE TRIAL COURT HAS NO AUTHORITY TO MODIFY OR REPLACE A FINAL JUDGMENT

The 1992 Consent Judgment, as amended, by its express terms governs the rights and liabilities of the Parties. The judgment is comprehensive and exclusive, resolving every claim made in the litigation and setting forth the procedure for addressing and resolving any and all disputes which may arise between Gelman and EGLE.

In the present case, as demonstrated by the Register of Actions (Appendix 2027), it is beyond dispute that the trial court's decision to reopen the Consent Judgment and replace it is inconsistent with the Consent Judgment's express terms. Since 2012, neither EGLE nor Gelman have invoked any of the carefully drafted dispute resolution procedures.[35] The reason for this is apparent: EGLE and Gelman had been cooperating in negotiating a fourth amendment to address the change in dioxane standards as authorized and required under the Consent Judgment, and were prepared to present that document to the court for entry before the Intervention Orders were issued. In short, there is no ongoing action or dispute between the Parties, so the court has no authority to re-open the Consent Judgment – let alone at the non-party Intervenors' request.

In addition, the 1992 Consent Judgment is a final judgment in that it is the "first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties" under MCR 7.202(6)(a)(i). The trial court lacks authority to modify the final judgment except as

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over Gelman's objections a Fourth Amended Consent Judgment eliminating all of the consideration promised by Intervenors in exchange for Gelman's agreement to accept responsibility for increased remedial activity.

[35] The July 2014 stipulation resolved a 2001 dispute between EGLE and Gelman concerning interpretation of the Consent Judgment that had been held in abeyance since that time, and the Parties wanted to resolve those issues before then-sitting trial court Judge Shelton retired, reinforcing the fact that there were *no* pending issues before the trial court when the Intervenors filed their motions.

authorized under the terms of that judgment or by court rule. See *Rose v Rose*, 289 Mich App 45; 795 NW2d 611 (2010), where a party to a divorce judgment sought to modify his spousal support obligation which was expressly made nonmodifiable by the divorce judgment. The trial court granted modification of the spousal support obligation, and the Court of Appeals reversed, holding in pertinent part that the trial court erred in applying MCR 2.612(C)(1)(f) as grounds for modifying the divorce judgment.[36]

> Well-settled policy considerations favoring finality of judgments circumscribe relief under MCR 2.612(C)(1). See *Wayne Creamery v Suyak*, 10 Mich App. 41, 51; 158 NW2d 825 (1968). The first five grounds for vacating a judgment, subrules (a) through (e), delineate narrow, time-critical pathways for relief. Subrule (f) indisputably widens the potential avenues for granting relief from a judgment. But the competing concerns of finality and fairness counsel a cautious, balanced approach to subrule (f), lest the scale tip too far in either direction. Thus, while permitting relief under this subrule for "any other reason" justifying it, our courts have long required the presence of both extraordinary circumstances and a demonstration that setting aside the judgment will not detrimentally affect the substantial rights of the opposing party. Cautious application of MCR 2.612(C)(1) in divorce cases also advances the policy considerations described in *Staple*, 241 Mich App. at 579–580, 616 NW2d 219.

Rose, 289 Mich App at 58. The Court of Appeals found that modifying the obligor's spousal support obligations detrimentally affected the obligee's substantial rights and that the trial court

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[36] MCR 2.612(C)(1) provides as follows:

On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

abused its discretion in granting the motion to set aside the judgment under MCR 2.612(C)(1)(f). *Rose*, 289 Mich App at 61.

Here, neither Party to the 1992 Consent Judgement has availed itself of the dispute resolution procedures set forth in the judgment – because there has been no dispute. Nor has any party filed a motion for relief from judgment under MCR 2.612(C), and the trial court lacks authority to reopen the 1992 Consent Judgment as amended.[37]

E. CONCLUSION

Gelman respectfully submits that the trial court was without authority to modify the 1992 Consent Judgment and to fashion a new Fourth Amended "Consent" Judgment without the consent of Gelman or EGLE and instead, at the behest of nonparties whose claims have not even been *filed*, let alone litigated. Neither EGLE nor Gelman ever petitioned the court to modify the Consent Judgment, and Gelman clearly never consented to the entry of the June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria. The Order's inclusion of a quarterly review process where the court will consider imposing still additional response activities on Gelman without any legal authority to do so only makes the court's error more flagrant. Thus, Gelman respectfully requests an order of this Court of Appeals: 1) vacating the trial court's June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria; 2) reinstating the Third Amended Consent Judgment; and 3) remanding this matter to the trial court with direction to, (consistent with the terms of the Consent

[37] This application is being filed in an abundance of caution. Because Gelman takes the position that the June 1, 2021 Order is a final, appealable order, as it is a "judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties," MCR 7.202(6)(i), Gelman has also filed a claim of appeal of the June 1, 2021 Order.

Judgment as amended from time to time by the parties thereto) consider entry of any bilateral amended Consent Judgment as submitted jointly by EGLE and Gelman.

II. THERE WAS NO BASIS IN LAW, FACT, OR EVIDENCE SUPPORTING THE TRIAL COURT'S ENTRY OF ITS JUNE 1, 2021 ORDER REPLACING THE EXISTING CONSENT JUDGMENT

A. STANDARD OF REVIEW

It is difficult to identify the burden of proof in this matter, because there was no claim pending before the trial court when it *sua sponte* ordered a "hearing on implementation of revised cleanup criteria and modification of response activity Orders and Judgments." April 6, 2021 Scheduling Order (Appendix 1000). Since neither of the parties to that Consent Judgment sought to implement revised cleanup criteria or modify the response activities set forth in the existing Consent Judgment, they clearly bore no burden of proving any right to relief. Likewise, the Intervenors had never filed any complaint or motion with the court (other than the granted motion to intervene in the negotiations), so they had no pending claims before the court.

Had the Intervenors filed their complaints, and had they then moved for summary disposition under MCR 2.116(C)(8), they would have had to have shown that the pleadings upon which they based their claim for relief stated a valid cause of action, and that Gelman's responsive pleadings were in some way deficient. But there were no complaints pending before the court, so Gelman could offer no defense to any such complaint, and Intervenors did not move for entry of judgment under MCR 2.116(C)(8).

Had the Intervenors actually sued Gelman and moved for summary disposition under MCR 2.116(C)(10), they would have had to support their motion with citations to the pleadings and facts submitted into evidence through discovery, affidavits, or sworn witness testimony – none of which happened here. There was no motion. Gelman had no opportunity to offer a defense or show that there was a material issue of fact.

Had the Intervenors filed their complaints, and Gelman been given the opportunity to respond thereto, and had the matter proceeded to trial or evidentiary hearing and the trial court thereafter made findings of fact and entered an order based on those findings of fact, then Gelman would presumably bear the burden of proving that the court's findings of fact were "clearly erroneous," pursuant to MCR 2.613(C).[38] Generally speaking, factual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made. *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384, 392 (1999). A finding of fact is also clearly erroneous when, although evidence supports it, this Court is left with a firm conviction that the trial court made a mistake. *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6, 9 (1997). But here, there was no finding of fact by the court, which terminated the so-called "evidentiary hearing" before opening statements were even complete, let alone before any witnesses testified under oath or any documents were offered into evidence, and after admitting that it had not even read the legal or technical materials submitted by the parties just three days before the hearing.

In any event, no matter the burden of proof or standard of review applied to this appeal, Gelman is entitled to the relief it seeks. The trial court's hearing and the order that followed are manifestly improper, procedurally invalid, and lacking in any substantive legal or factual basis.

[38] That Rule provides: "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."

B. THE COURT'S RULING AND JUNE 1, 2021 ORDER WERE CLEARLY ERRONEOUS

1. The Trial Court's Conclusion That Gelman Had Already Been Found Liable And Therefore It Could Move Directly To A "Remedy Hearing" Was Wrong.

With no claims pending before the court, its decision to convene an "evidentiary hearing" to open and modify the existing Consent Judgment and the June 1, 2021 Order emanating therefrom were unsupported by fact or law and were therefore clearly erroneous. Further, the trial court's decision to proceed directly to an evidentiary hearing to determine a "remedy" – without first requiring the Intervenors to prove that Gelman had caused the pollution at issue, that those Intervenors had been damaged as a result of Gelman's acts, or that the Intervenors had any right to bring those claims against Gelman[39] – was based on its mistaken assumption that Gelman had already been determined to be legally liable for causing the contamination, and therefore legally liable to remediate the plume.

Even if the trial court had the authority to proceed with the envisioned hearing and the June 1, 2021 Order – and it did not – *there has been no finding that Gelman must participate in any remediation efforts demanded by the Intervenors*. Yet the trial court barred Gelman from any chance to defend itself from the Intervenors' underlying complaints, or even to respond to the unsworn comments of the 14 members of the public to whom the court allowed input into the order it fashioned to replace the existing Consent Judgment between EGLE and Gelman. It then issued an order replacing the Consent Judgment, even though Gelman objected to it.

[39] As explained above in fn. 20, the City of Ann Arbor previously sued Gelman for injuries allegedly suffered as a result of this same underground contamination, has been paid for its alleged damages, and in return therefor has waived all rights to bring future claims against Gelman resulting from this contaminant plume except under circumstances that do not exist.

There is an undeniable and significant difference between a party being found liable after a factfinder considers all material and competent evidence placed before it in a trial or evidentiary hearing *vis-à-vis* its acceptance of responsibility for certain costs and actions arising as the result of a negotiated settlement – particularly when that settlement expressly denies liability for the underlying issues. The court's failure to appreciate this distinction constitutes clear error sufficient to overturn the resulting June 1, 2021 order expanding the scope of Gelman's responsibilities under the Consent Judgment that it negotiated with EGLE.

As explained above, when this case went to trial more than 30 years ago, the initial judge presiding over the case dismissed the vast majority of the claims against Gelman. Rather than continuing to litigate the remaining minimal issues before the court at that time, Gelman and EGLE's predecessor administrative agency entered the initial Consent Judgment in 1992, which expressly stated that there had been no finding of liability on Gelman's behalf, and that Gelman expressly denied any such liability. Therefore, when the current trial court stated at its March 22, 2021 hearing setting this matter for an evidentiary "remedy hearing" that "… [W]e're already in the remedial stage. … We're decades beyond litigation of whether or not Gelman polluted the water," (3/22/21 Hrg Tr, p. 45, Appendix 947), that belief (and to the extent it may be deemed so, that finding of fact) was clearly erroneous.

2. The Court's May 3, 2021 Hearing Provides No Support For The June 1, 2021 Order, and the Order Was Improper In Any Event

The May 3, 2021 "evidentiary hearing" – itself improper and without legal or procedural justification – provided no basis in law or fact for entry of the June 1, 2021 Order, and the court was without authority to issue that order in any event. No witnesses offered sworn testimony. Neither party to the lawsuit (Gelman or EGLE) offered a single document into evidence, nor did the court admit any document into evidence. Neither did Intervenors (regardless of whether they

were merely participants in the negotiations or whether, as Gelman believes, the court's decision to grant them intervention in the first place was in error).

Instead, the May 3, 2021 hearing consisted of statements of counsel; a proposal by the court for consideration by the parties; and unsworn public comment from non-parties not subjected to cross-examination. Based on that and only that, the court issued an order scrapping a decades-old Consent Judgment and replacing it with one based not on evidence or facts or law, but on the trial court's desire to show that it was making progress. (The irony is that the court's ill-advised and legally unsupportable decision to permit intervention is what prevented EGLE and Gelman from implementing necessary changes to the Consent Judgment years before, so it was the trial court's prior order that slowed progress on the remediation efforts).

Lacking any support in fact or law, the court's June 1, 2021 Order is a *sua sponte* unauthorized and improper assertion of authority to unilaterally change the terms of a final and binding consent judgment between Gelman and EGLE, substituting a new Order to which neither party consented and to which both objected. That Order cannot withstand scrutiny upon appeal and should be overturned.

III. GELMAN'S APPLICATION FOR LEAVE SHOULD BE GRANTED, AS EVEN THE TRIAL COURT EXPRESSED ITS DESIRE FOR APPELLATE REVIEW

During the course of the May 3, 2021 hearing, the trial court acknowledged that its consideration of public comment might be viewed as improper (the court's precise wording was that it might be viewed as "crazy" by this Court). (5/3/21 Transcript, p. 110). Later in that same hearing, the trial court stated that it would "like the Court of Appeals to weigh in frankly before I take any additional steps." (*Id.*, p. 122). And again, in the May 27, 2021 hearing regarding Gelman's objections to the proposed Order submitted by the Intervenors, the trial court once more

essentially pled for this Honorable Court to review what the trial court had ordered, saying it "would like to also urge the Court of Appeals to weigh in on this." (5/27/21 Hrg Tr, p. 28).

Gelman could not agree more strongly with the trial court: the June 1, 2021 Order replacing the existing Consent Judgment was fundamentally and entirely improper, as was the hearing that purported to form the basis for that order, and this Court must intercede before the trial court's foray into unprecedented, unauthorized, unsupported and unpredictable abuses of its powers goes any further through its consideration and adoption of additional changes to the Order considered during the quarterly meetings held thereunder.

RELIEF REQUESTED

Defendant-Appellant Gelman Sciences, Inc. respectfully request an order of this Honorable Court of Appeals: 1) vacating the trial court's June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria; 2) reinstating the Third Amended Consent Judgment; and 3) remanding this matter to the trial court with direction to (consistent with the terms of the Consent Judgment as amended from time to time by the parties thereto) consider entry of any bilateral amended Consent Judgment as submitted jointly by EGLE and Gelman.

Respectfully submitted,

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