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 357599

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

BRIEF ON APPEAL BY DEFENDANT-APPELLANT GELMAN SCIENCES, INC.

ORAL ARGUMENT REQUESTED

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BRIEF ON APPEAL BY DEFENDANT-APPELLANT GELMAN SCIENCES, INC.

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ORDERS APPEALED FROM AND STATEMENT OF THE BASIS OF JURISDICTION

Defendant-Appellant Gelman Sciences, Inc. ("Gelman") appeals by leave granted the Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria entered on June 1, 2021 ("June 1, 2021 Order") by the Honorable Timothy P. Connors in the Circuit Court for the County of Washtenaw, State of Michigan.

Jurisdiction is premised upon MCR 7.203(B)(1), which authorizes this Court of Appeals to grant leave to appeal from "a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right." Gelman's application was timely filed within 21 days following entry of the June 1, 2021 Order in accordance with MCR 7.205(A)(1)(a), and this Court of Appeals granted leave to appeal on July 26, 2021.

This Court of Appeals has jurisdiction to consider Gelman's appeal from the June 1, 2021 Order.[1]

[1] 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 consent 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 nearly 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 tried to salvage its failed intervention experiment. Without giving Gelman any opportunity to raise defenses or challenge Intervenors' standing or the sufficiency of their 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 (1) replacing the existing Consent Judgment, as amended, with a new remediation scheme requiring cleanup and monitoring activities well beyond what EGLE (the administrative body authorized by Michigan law to administer and enforce the State's environmental laws) agreed was sufficient to protect the public health and environment, and (2) putting in place a quarterly review process through which 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."

STATEMENT OF FACTS

I. INTRODUCTION

In 1988, 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"), seeking to require Gelman to clean up contamination of local groundwater caused by permitted 1,4-dioxane ("dioxane") discharges.[2] 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 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 state-wide cleanup criteria for 1,4-dioxane and were in the process of finalizing the terms of what would have been a Fourth

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

Amended Consent Judgment.[3] 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). But before that bilateral agreement could be entered, 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[4] – and did so without even requiring those entities to file complaints against which Gelman had the right to defend itself. The trial court justified 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 failed for any reason, 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.[5]

But then, when the negotiations failed nearly four years later, the trial court abruptly changed course and *sua sponte* announced that all of the entities would proceed straight to a

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[3] 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 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.

[4] 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."

[5] 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 nearly four years.

"remedy hearing," where – despite no finding of liability against Gelman, let alone a demonstration of an entitlement to relief by Intervenors – the trial court would hear from both the Parties' and the Intervenors' technical consultants and counsel, 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, 2021. 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 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 proceeded with its plan to unilaterally replace the existing consent judgment in a manner entirely unencumbered by even rudimentary due process considerations,[6] ordering the parties to prepare for the May 3, 2021 "evidentiary hearing."

[6] 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 entities to submit their briefs and technical reports concerning how to properly remediate a complex groundwater contamination 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 and Intervenors 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. Given the timing and volume of these submissions, *the trial 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).

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 and Intervenors had negotiated before the Intervenors' political entities rejected that deal. More specifically, the court planned 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.[7] Then – after taking nearly an hour of public comments from members of the community in virtual attendance before ***and while*** it formulated its order on the record – the

[7] The fact that the court replaced the existing Consent Judgment with a document that was only one part of a larger 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 Gelman to implement significant additional remedial work that goes well beyond what EGLE and Gelman agreed in the 2017 bilateral Consent Judgment is sufficient to appropriately address the new cleanup criteria and provide a protective remedy. Gelman only offered to implement this additional 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 and are not included in the June 1, 2021 Order. (Appendix 122). In particular, each intervening local unit of government ("LUG") 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 provided other valuable consideration, including the LUGs' commitment not to seek United States Environmental Protection Agency takeover of 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 in accordance with state law – and not by a committee of Intervenors motivated by local politics.

court finally ordered that it was unilaterally replacing the existing Consent Judgment and imposing new and additional cleanup activities different than those agreed to by the Parties to that agreement and beyond what the responsible state regulator had deemed necessary to protect public health and the environment.[8]

This Honorable Court has twice declined Gelman's requests to intercede to prevent the travesty that this matter has become. 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 now subject to an order replacing and expanding the existing remedial regime and Consent Judgment (and reserving to the trial court the right to make more changes at each quarterly meeting), Gelman respectfully requests that this 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

[8] 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; Appendix 1317).

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 remediate 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 19-27). 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.[9]

B. THE 1992 CONSENT JUDGMENT IDENTIFIED THE RESPONSE ACTIVITIES GELMAN AGREED TO IMPLEMENT IN ORDER 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 30-92). 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

[9] 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 Gelman polluted the water," meaning that the court could proceed directly to adjudication of remedies and responsibility for cleaning up the dioxane plumes – is just wrong. (Appendix 947).

by the court. *Id*., Section XXIV.[10] 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) and which 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 three 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 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

Pursuant to the process outlined above, 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.

[10] 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.").

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) applies 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 statewide 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 based on the new standards. Rather, because it and Gelman had anticipated the new criteria, the Parties had already agreed by that time on the additional response actions needed to address that change and were far along in negotiating a fourth amendment to the Consent Judgment's terms that would address the more stringent cleanup levels.

By late 2016, Gelman and EGLE had reached an agreement in principle on a Fourth Amended Consent Judgment (the "Bilateral Amendment") and reduced that amendment to writing in early 2017. *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 the Bilateral Amendment if it was not satisfied that the agreement adequately protected the public health and environment. (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 the Consent Judgment, but before Gelman or EGLE had petitioned the court to enter 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.[11] Indeed, without even requiring Intervenors to prove that they had standing – or how, in the City's case, its claims were not precluded by the City's prior Settlement[12] – 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 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." (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 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.[13] Thus, having not filed their complaints, Intervenors are neither parties to the lawsuit nor Parties to the Consent Judgment, yet the trial court afforded them

[11] 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.

[12] *See* footnote 19, below.

[13] *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).

that status by allowing them to participate in the "remedy hearing" without filing their complaints, and the applicable statutes of limitation remain tolled.

In short, the unorthodox 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 that 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 NEARLY FOUR YEARS OF NEGOTIATIONS, THE INTERVENORS REJECTED A SETTLEMENT RECOMMENDED BY THEIR ATTORNEYS AND RETAINED EXPERTS

Over the course of the next nearly 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 technical 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 previously negotiated between EGLE and Gelman. The resultant proposed Fourth Amended Consent Judgment was only one document in the larger three-part settlement package.[14]

[14] *See* City of Ann Arbor, "Gelman Proposed Settlement Documents," https://www.a2gov.org/Pages/Gelman-Proposed-Settlement-Documents.aspx (last visited August 11, 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-

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 Commissioners.[15] Intervenors and EGLE solicited and responded to public comment, endorsed the settlement and corrected misinformation fueling public concern about the proposed resolution.[16]

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. [17] In so doing, the Intervenors scuttled the years-long process that had already

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Litigation/DindofferGelmanPresentation09242020.pdf at 2, last visited August 11, 2021, (listing "three proposed documents" as comprising settlement and stating "***[t]hese documents should not be viewed in isolation***"). (Emphasis added).

[15] *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.

[16] 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.

[17] *See* Transcript of the November 19, 2020 Status Conference, in the Appendix at 200-264, at which one of the City's attorneys explained the settlement's rejection as: "This is stepping back from all of us having recommended the settlement documents to our clients." (11/19/20 Hrg Tr., p. 8; Appendix 207). Both the City's attorney and EGLE ascribed the settlement's rejection to loud but uninformed public complaints disagreeing with what the Parties' *and Intervenors'* experts recommended. The City's attorney said "[W]e as attorneys think that there's a lot of comment from the community that our clients believe comes from experts but doesn't come from experts, and there needs to be a diplomatic way to diffuse that perceived expertise." (11/19/20 Hrg. Tr., pp.