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.

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

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.

prevented entry of the 2017 Bilateral Amendment that Gelman and EGLE had negotiated, reduced to writing, and which EGLE agreed would provide a fully protective and reliable remedy.[18]

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, 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 should have been clear: if the negotiations stalled or failed, Intervenors could file their lawsuits. Yet inexplicably, the trial court rejected this request by Gelman's counsel. Instead, defying the terms of its own Intervention Orders, the court fashioned an unprecedented type of "remedy hearing" at which 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

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7-8; Appendix 206-207). EGLE described the dynamic as: "… [T]he boards and councils have been … being driven by … subtle, very persistent, and passionate community members, which I admire. But … they've been driven to the point of ignoring their own very expert and highly qualified legal and technical experts in favor of … a couple of folks that are held up in the community as being the experts. And they would never qualify as an expert in … either a legal sense or a technical sense, but they are, you know, having been vocal through the decades, they are viewed as the experts for the site." (11/19/20 Hrg. Tr., p. 10; Appendix 209).

[18] Gelman's full performance of the remedial work required by the Third Amended Consent Judgment has continuously protected public health and the environment, even under the revised cleanup standards, while the intervention-related machinations played out. 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. Thus, Gelman did not seek to stay those activities even while seeking appellate review of the overbroad and unsupportable aspects of the trial court's June 1, 2021 Order.

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 remedial terms other than those to which the Parties to the Consent Judgment, as amended, 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.[19] The trial court 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.[20] And the trial court incorrectly 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***

[19] 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."). As a result, for 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 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.

[20] 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.").

remedial stage. We're past all that. ***We're decades beyond litigation of whether or not Gelman polluted the water***."[21]

In short, the court found that, in the absence of an agreement between Gelman, EGLE and the Intervenors, it would proceed via a hearing to consider Intervenors' demands 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, without any request to do so by the Parties and with no suggestion from EGLE that the Bilateral Amendment that it negotiated with Gelman did not adequately 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 the court's

[21] 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 agreed-upon 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.

announced plan for the "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 sought the imposition of sanctions against Gelman's counsel because "[c]ollectively, the orders [Gelman] seeks to appeal constitute nothing beyond a scheduling order." In fact, Intervenors labeled Gelman's argument that the trial court planned to judicially modify a consent judgment as "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 83-page brief 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 the scope of the May 3, 2021 "evidentiary hearing" 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.[22]

Thus, the very same parties that had represented to this Court on April 23, 2021 that there was no need to act because the trial court had simply issued scheduling orders – and who went so far as to urge 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. 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 the May 3, 2021 "evidentiary hearing" – a 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,[23] 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 extensive 603-page prehearing briefing. But after just over an hour, the trial court interrupted Intervenors' counsel to offer a

[22] 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).

[23] 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.

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 package that the Parties and Intervenors had reached before the Intervenors rejected it. The court twice stated it would finish the evidentiary hearing if its proposal was unacceptable to the parties.[24]

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 been unable 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 terms comprising the settlement package, 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.[25] 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

[24] *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.").

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

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 do all that appellate review, but at least we take one step forward." (*Id.*, p. 82).[26]

In granting intervention and throughout the case, the trial 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."[27] 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:

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[26] To be clear and as explained below, Gelman's position is that in the absence of fraud or an agreement by the parties thereto, there is no basis for the court to open up, modify or replace the Consent Judgment regardless of whether the court had a "complete record" before it. Thus, simply remanding this matter for a properly conducted evidentiary hearing would not "fix" the trial court's reversible error. But where, as here, the record is bereft of ***any*** evidence supporting the court's ruling, its error is more obvious and demonstrates just how far the trial court has deviated from ordinary but fundamental principles of jurisprudence and due process.

[27] *Id.*, p. 83. Due to COVID-related restrictions, 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.

> 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,[28] *none* of whom was even offered by a party to the proceedings or by the Intervenors, let alone provided under oath or subject to cross-examination.

At that point, the court ruled that it would "put into effect right now the proposed Consent Judgment." (*Id.*, p. 121). The court stated 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:

> 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 now be treated as if they had full 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 ostensibly to allow non-parties to the agreement who

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[28] *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.

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. (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. (Appendix 1239-1245). Gelman's response 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 Intervenors' proposed Order

referred to them as "Intervening Plaintiffs," improperly 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 a process by which the court could order Gelman on a quarterly basis going forward to implement still more remedial work beyond that necessary to provide a protective remedy and to which it did not consent.

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 clear 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 finality 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 explained 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).[29] But despite the explicit clarity of its statements regarding finality and appellate review during the May 3, 2021 hearing, the trial court again 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." 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, filed contemporaneously therewith, based on the

[29] 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.").

irrefutable record 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.

LAW AND ARGUMENT

I. THE TRIAL COURT LACKS AUTHORITY TO UNILATERALLY REPLACE 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 over the years).[30] The trial court determined – based on demands from non-parties and unsworn comments from community members – how the existing Consent Judgment should be amended and quite literally imposed a new contract upon the actual Parties to the agreement (Gelman and EGLE). But the trial court lacks legal authority to modify the Consent Judgment or to fashion a contract for these Parties without their consent.

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 for those claims is considered.

[30] 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.

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 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 Michigan jurisprudence 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, and makes abundantly clear why the trial court was without the legal authority to enter its June 1, 2021 Order replacing the Consent Judgment. At the outset, the Consent Judgment expressly provides that the 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 30.) The

Parties expressly agree "to be bound by the terms of this Consent Judgment and stipulate to its entry by the Court."[31]

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 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 made 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; emphasis added). 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***

[31] *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).

> ***conditions of this Consent Judgment*** and work plans approved [by EGLE] under this Judgment. (Appendix 034) (emphasis added).

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.

(Appendix 046; emphasis added.)

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, Gelman files a petition for resolution with the trial court setting 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 [Gelman]." (Appendix 076; emphasis added). If the dispute arises from EGLE's alleged failure to timely make a decision, each party (EGLE and Gelman) 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 (EGLE and Gelman) 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.

(*Id.*; emphasis added).

Nothing in the Consent Judgment, as amended by the Parties and approved by the court, gives the court authority to consider anything beyond what is submitted to it by Gelman and EGLE in resolving any disputes arising under the Consent Judgment.

Separately, 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, but "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; ... [32]

[32] Appendix 82. As stated in the statement of facts of this brief, 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.

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 concerning the remediation. 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, and nothing permits the court to consider anything submitted by anyone other than EGLE or Gelman in any event.

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 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); *see also Trendell v Solomon*, 178 Mich App 365, 367; 443 NW2d 509 (1989).

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 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, excused the Intervenors from filing 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." (January 18, 2017 Order Granting Intervention, ¶ 1.a., Appendix 189-190).

After the Intervenors rejected the settlement package that was the product of nearly four years of negotiations, the trial court abandoned the process outlined in his 2017 Intervention Orders

that would have had Intervenors file their complaints and allowed Gelman the chance to test them on the merits. Instead, the trial court announced that it was going to hold a hearing so that it could decide, based upon evidence submitted by nonparties, what remedial activity Gelman was required to conduct in light of the change in cleanup criteria. There was no basis in law for the court to hold such a hearing. Moreover, 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. 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 obligations under the proposed Fourth Amended Consent Judgment. The court thereby replaced 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. This is directly counter to the clear Michigan law 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.

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.[33] The reason for this is clear: 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 and to order relief to which Intervenors have demonstrated no legal entitlement.

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 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 in *Rose* 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.[34]

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[33] 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.

[34] 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.

> 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 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 Judgment 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). As a result, the trial court plainly lacks authority to reopen the 1992 Consent Judgment as amended. For that reason, the June

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(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.

1, 2021 Order replacing the Consent Judgment, as amended, is clearly improper and must be vacated.[35]

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. While it is presently stayed, the Order's inclusion of a quarterly review process where the trial 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 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 for those claims is considered; 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

[35] 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 also filed a claim of appeal of the June 1, 2021 Order. On June 29, 2021, this Court denied that claim. (Court of Appeals Docket No. 357598). On July 21, Gelman timely moved for reconsideration of that Order dismissing its appeal of right. Intervenors failed to respond to the Motion for Reconsideration, which remains pending before this Court.

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 applicable to the June 1, 2021 Order, 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." (4/6/21 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 trial 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).[36] 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.

[36] 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."

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.[37]

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 Clear Error

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 liability for 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[38] – was based on its mistaken assumption that Gelman had already been determined to be legally liable for the contamination, and therefore legally liable to remediate the plume.

Contrary to the trial court's erroneous assumption, ***there has been no finding that Gelman must participate in any remediation efforts demanded by the Intervenors***. Yet the trial court

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[37] As explained above, Gelman believes that the trial court's replacement of the Consent Judgment with its own Order and over the objections of the Parties thereto is reversible error, regardless of whether the court held a procedurally correct evidentiary hearing. But where, as here, the "evidentiary hearing" was manifestly improper, the error is more egregious and underscores the need for reversal and remand to the trial court with instruction to terminate the statute of limitations' tolling and direct the Intervenors to file their complaints.

[38] As explained above in footnote 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 here.

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, over Gelman's objections.

The fact that Gelman accepted responsibility for certain costs and actions as part of a negotiated settlement – particularly when that settlement expressly denies liability for the underlying issues – does not equate Gelman to a party that has been found liable after a factfinder considers all material and competent evidence placed before it in a trial or evidentiary hearing. The trial court's failure to appreciate this distinction constitutes clear error sufficient to overturn the resulting June 1, 2021 Order.

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 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 set this matter for an evidentiary "remedy hearing" – based on its belief 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. 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. And the Intervenors (regardless of whether they were merely participants in the negotiations or whether, as Gelman believes, the trial court's decision to grant them intervention in the first place was in error) similarly presented no evidence or testimony.[39]

Instead, the May 3, 2021 hearing consisted of statements of counsel; a proposal by the trial 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 trial court issued an order scrapping a decades-old Consent Judgment and replacing it with one based not on evidence or facts or law, but rather on the trial court's desire to show that it was making progress. (The irony is that the trial court's improper decision to permit intervention is what prevented EGLE and Gelman from implementing necessary changes to the Consent Judgment years before).

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.

RELIEF REQUESTED

Defendant-Appellant Gelman Sciences, Inc. respectfully requests an order of this Court of Appeals: 1) vacating the trial court's June 1, 2021 Order and remanding this matter to the trial court with instruction to terminate the tolling of the applicable statutes of limitation and direct the

[39] As explained above, pursuant to Section XVI of the Consent Judgment, the record upon which the court must base any decision if a dispute were properly brought before it by EGLE or Gelman consists only of the Consent Judgment and documentation submitted by those parties, with no provision or allowance for the submission of anything from anyone else.

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 for those claims is considered; 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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Date: August 23, 2021

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