STATE OF MICHIGAN
MICHIGAN COURT OF APPEALS

Michigan Department of
Environmental Quality, *et al.*
Plaintiffs-Appellees,

and

Michigan Chapter Trout Unlimited
and Pigeon River Country Assn,
Intervening Plaintiffs-Appellees

v

Golden Lotus, Inc.,
Defendant-Appellant.

Court of Appeals No. _____

Trial Court Case No. 09-12933-CE(M)
Hon. Dennis F. Murphy

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

AND

PROOF OF SERVICE

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STATEMENT OF OPINION AND ORDER FROM WHICH APPEAL IS SOUGHT

Defendant-Appellant Golden Lotus, Inc., seeks leave to appeal the Otsego County Circuit Court's July 22, 2011 Opinion and Order granting Interveners-Appellees' Motion to Clarify and Enforce Interim Order.

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

The Appellate Court has jurisdiction over this appeal pursuant to MCR 7.203(B)(1) and MCL 600.308(e) based on the following:

1. The Opinion and Order was entered by the court on July 22, 2011.
2. Defendant-Appellant timely filed a Motion for Reconsideration on August 9, 2011.
3. The Circuit Court denied the Motion for Reconsideration by Order entered on August 26, 2011.
4. Defendant-Appellant timely filed this Application for Leave to Appeal to this Court within twenty-one days of entry of the Order Denying Defendant-Appellant's Motion for Reconsideration.

STATEMENT OF QUESTIONS INVOLVED

I. **WHETHER THE JULY 22, 2011 ORDER IS A "FINAL ORDER" DISPOSING OF THE LAST REMAINING CLAIM OF INTERVENERS; AND, IF NOT CONSIDERED A "FINAL ORDER", WHETHER GOLDEN LOTUS WILL SUFFER SUBSTANTIAL HARM BY AWAITING FINAL JUDGMENT BEFORE APPEAL.**

Trial Court says: "NO" as to the Interim Order being a Final Order.

The Trial Court: Made no finding as to whether Golden Lotus will suffer substantial harm by awaiting final judgment before appeal.

Defendant-Appellant says: "YES"

On information and belief, State-Plaintiffs say: "YES"

Interveners-Appellees say: "NO"

II. **WHETHER THE CIRCUIT COURT ERRED IN ITS JULY 22 ORDER BY ISSUING AN INTERPRETATION OF THE INTERIM ORDER WHICH IS CONTRARY TO THE EXPRESS LANGUAGE OF THE INTERIM ORDER AND TO THE UNDERSTANDING AND INTENTION OF THE TWO PRINCIPAL, ADVERSE PARTIES TO IT; AND WHERE THE COURT REFUSED TO CONSIDER ANY OF THE EXHIBITS, AFFIDAVITS AND OTHER EVIDENCE OFFERED BY GOLDEN LOTUS AND THE STATE TO PROVE THAT INTENTION.**

Trial Court says: "NO"

Defendant-Appellant says: "YES"

State-Plaintiffs say: "YES"

Interveners-Appellees say: "NO"

III. **WHETHER THE CIRCUIT COURT LACKED JURISDICTION FOR THE REASON THAT INTERVENERS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.**

Trial court says: "NO"

Defendant-Appellant says: "YES"

On information and belief, State-Plaintiffs say: "YES"

Interveners-Appellees say: "NO"

IV. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE THE INTERIM ORDER ON THE BASIS THAT THERE WAS A "MUTUAL MISTAKE" AS TO A MATERIAL UNDERLYING FACT AND BECAUSE THERE WAS NO "MEETING OF THE MINDS."

Trial Court says: "NO"

Defendant-Appellant says: "YES"

On information and belief, State-Plaintiffs say: "YES"

Interveners-Appellees say: "NO"

STATEMENT OF FACTS

This lawsuit was precipitated by an unauthorized release of sediment from the Lansing Club Pond in June of 2008. The Pond is an approximately 50-acre impoundment located east of Vanderbilt, Michigan, and is created by a dam owned by Defendant-Appellant, Golden Lotus ("Golden Lotus"). Golden Lotus is an IRC 501(C)(3) non-profit entity that operates a yoga ranch on the property under the name "Song of the Morning Yoga Ranch." It has little in the way of capital and operates on a shoestring budget.

The dam and Pond have been in existence for over a century; the dam was modified in 1957 to include wooden control and flood gates; and, it was substantially upgraded and improved in the late 1980s as a consequence of a sediment release in 1984. The 1984 event was the subject of bitter, lengthy, and expensive litigation in the Otsego Circuit Court which culminated in a Consent Judgment between the State and Golden Lotus and substantial structural improvements to the dam.

Although Golden Lotus admitted the 2008 release of sediment, it contested liability (the release was due to a "perfect storm"(the event was a one-time combination of a freak micro-shower and failure of the alarm systems), the alleged volume of released sediment (Golden Lotus' experts determined that the sediments were *de minimis*), the claimed extent of damage (Golden Lotus' experts opined that it too was *de minimis*), and the extreme nature of the relief sought by the State-Plaintiffs, MDEQ and MDNR ("State"), and Interveners, Trout Unlimited and Pigeon River Country Association ("Interveners") [Golden Lotus' position was that it was like "using a sledgehammer to swat a mosquito"] The parties and their experts were once again poised to engage in a protracted, bitter, expensive, and "to-the-death" battle in which the outcome was uncertain.

In a good-faith attempt to avoid the fate of the 1984 contest, its enormous expense, and

uncertainty of outcome, the parties agreed to participate in facilitative mediation. An all-day session was held on December 21, 2009, at which all parties, their counsel and experts were in attendance. At the end of a very long day of haggling and horse-trading, the basic terms of an agreement were struck:

1. The impoundment was to be removed to eliminate the risk of any further sediment releases.

2. Golden Lotus would submit a Conceptual Plan setting forth alternative dam removal options.

3. Golden Lotus would conduct a variety of investigations and surveys in anticipation of filing an application for permit.

4. Golden Lotus would apply to the DEQ for a permit to remove the dam under Part 315 of the Michigan Natural Resources and Environmental Protection Act (NREPA), MCL 324.31501, *et seq.* (Dam Safety Act).

5. The DEQ would process the application in accordance with the rules and procedures governing such permits.

6. Upon completion of its review, and satisfaction with the terms and conditions for dam removal set forth in the application and as modified by the DEQ, a permit for dam removal would be issued.

7. During this process, the parties would operate under an Interim Order and, upon issuance of the permit, the Interim Order would "ripen" into a Consent Judgment eliminating those portions of the Interim Order which had already been completed. The Interim Order was simply a device to allow for the possibility that two essential conditions for the agreement might not be satisfied, i.e. that the sediments in the pond were contaminated; and, that the existing bridge was determined to be structurally unsound. [1]

8. The Consent Judgment to be entered upon permit issuance would not contain any additional terms or conditions beyond those set forth in the Interim Order. In other words, the Interim Order constituted the entire agreement between the parties and, once implemented, would end the litigation *in toto*.

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[1] All of the parties were reasonably certain that the bridge was structurally sound because it had been upgraded and improved in the early 1990s as a result of the Consent Order in the 1984 litigation. The inclusion in the Interim Order for certification by a qualified engineer was virtually *pro forma*.

9. *Essential to the agreement* was that, due to the impecunious condition of Golden Lotus, the dam removal plan would allow it to retain the *existing* bridge if it was determined by a qualified engineer to be structurally sound. The bridge is supported by the concrete abutments, which in turn are laterally supported by the spillway. *It is a physical impossibility for the bridge to remain if the abutments or spillway are removed.*

10. The bridge is the sole viable access to the main buildings of the yoga ranch. There is a bridge downstream which is too small and weak to handle trucks which supply the ranch, and the road to it is impassable in winter and bad weather due to steep terrain.

11. Golden Lotus did not have the money to be able to implement a plan which included removal of the abutments supporting the bridge and the spillway providing lateral support to the abutments and to replace the existing bridge.

12. All of the parties, *including Interveners*, were well aware of these facts at the time of mediation and negotiation of the Interim Order. The agreement was deliberately crafted by the parties in such a manner that Golden Lotus would be able to afford to do a "dam removal" project which it could afford and which accomplished the goal of eliminating future sediment releases.

The complicated details of the settlement were worked out in subsequent months and finally embodied in the Interim Order entered on April 5, 2010 (**Appendix B**). The circuit court made no findings in connection with the Interim Order and did not participate in its negotiation or drafting – it was strictly a private contract between the parties presented to the court as a *fait accompli*.

Because it is the DEQ which has exclusive jurisdiction over applications for removal of dams, the Interim Order provided that the Circuit Court litigation would be stayed pending the application and DEQ review process. Once the permit was issued, the Consent Judgment would be entered, and the litigation dismissed without any action on the part of the court other than to sign it as a strictly ministerial act.

Immediately following entry of the Interim Order, Golden Lotus embarked on the arduous task of complying with it. As is evident from the Argument below and voluminous exhibits

submitted to the Court in connection with Interveners' Motion to Clarify and Enforce the Interim Order, the process was complex, detailed, and (oddly enough) extremely collaborative. Golden Lotus timely filed the Conceptual Plan (**Appendix E**) with the DEQ on May 3, 2010, and served a copy on Interveners. The Plan expressly set forth the fact that, if the existing bridge was determined to be structurally sound, only the gates, electric turbine, and portions of the turbine room would be removed:

> 1.1 General Dam Removal Plan.
>
> . . . . . .
>
> *While detailed structural evaluation of the bridge has not yet been conducted, the existing bridge is anticipated to remain in place following drawdown to provide continued vehicle access to Song of the Morning's main offices and gathering place. Additional discussion of bridge disposition is provided in Section 1.4.* (Emphasis added; **Appendix E**, p. 2-3).
>
> . . .
>
> 1.4 Disposition of the Existing Bridge
>
> The disposition of the existing bridge is described below in descending order of preference:
>
> 1. *Existing Bridge remains in place.* No repairs to the abutments, concrete supports, etc. following spill gate, spill gate wood deck, and power house turbine and infrastructure removal are necessary to accommodate continued use.
>
> 2. *Existing Bridge remains in place.* Some minor repairs to existing abutments, concrete supports following spill gate, spill gate wood deck, and power house turbine and infrastructure removal are necessary to accommodate continued use.
>
> (Emphasis added; **Appendix E**, p. 5).

Following submission of the Conceptual Plan, and in accordance with the Interim Order, Golden Lotus' environmental consultants conducted the required investigations and surveys, met with the State and Interveners and their experts, all working toward the goal of getting the application for permit filed.[2] When all this was done, and after an independent engineering firm had

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[2] The data gathered over the course of the summer and fall of 2010 were submitted to the DEQ and Interveners in a series of comprehensive reports and analyses, all of which were attached as exhibits to Golden Lotus' Response to Interveners' Motion.

certified that the bridge was structurally sound, the final Pre-Application meeting called for in the Order was conducted on December 15, 2010. It was now more than seven months after the Conceptual Plan had been submitted (and Interveners knew that the options for dam removal did not include removal of the concrete abutments and spillway unless after removal of the gates, turbine, etc., the bridge was determined to be structurally unsound); and, it was after seven months of intense investigations, surveys, and meetings with the State and Interveners to make sure all appropriate data was collected and analyzed. Until this time, it appeared that all parties were "on track" for Golden Lotus to submit the application for permit.[3]

At the December 15 meeting, both the State and Golden Lotus agreed that, since the engineer had certified the bridge as sound, the application to be submitted would allow it to remain. This meeting was the first time that Interveners raised objection to the dam removal plan and contended that the May 3, 2010 Conceptual Plan was inadequate and the spillway had to be removed. The problem with Interveners' contention is that the spillway cannot be removed without rendering the bridge structurally unsound. In fact, the bridge would have to be removed to accomplish removal of the spillway, and, in turn, the concrete abutments which are laterally supported by the spillway would have to come out, too. At the meeting, the State and its experts agreed 100% with Golden Lotus that the Interim Order did not require removal of the spillway or abutments because, among other things, if it did the language allowing Golden Lotus to retain the existing bridge would be nonsensical.

The State agreed that the purpose of the Interim Order was to craft and implement a dam

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[3] In fact, at a Status Hearing earlier that month, the parties appeared in open court and concurred that everything was progressing in accordance with the Interim Order. No mention whatsoever was made by Interveners' attorney that the Conceptual Plan and all of the work done by the State and Golden Lotus were contrary to the Interim Order. **Appendix O**.

removal plan which would eliminate the risk of future sediment release – no more and no less. The reason Interveners sought to modify what they agreed to in the Interim Order is that retention of the spillway, although it eliminates the possibility of future sediment releases, does not allow for fish passage upstream.

On March 30, 2011, Interveners filed a Motion to Clarify and Enforce the Interim Order with a Memorandum in Support (**Appendix H**) and on April 6, 2011, a "Supplement" to the Motion. (**Appendix I**). The Motion and Supplement alleged that Golden Lotus's Permit Application "does not provide for removal of the dam as the [Interim] Order requires, but will leave in place structures at its base . . ." which structures will "prevent fish passage, block and endanger people and watercraft, and obstruct restoration and free flow of the river." The Motion requested that the Circuit Court "direct Golden Lotus to comply with its terms by submitting for approval a further plan and additional permit application that will (a) assess the manner, method and cost for removal of the spillway structures, and (b) accomplish removal of the spillway structures."

The State joined Golden Lotus in contesting Interveners' Motion, agreeing with Golden Lotus that the Conceptual plan and Permit Application conformed to the Interim Order. The State concurred that the Interim Order was a compromise of disputed claims and defenses; disputed the allegations of the Motion; and, on April 28, 2011, filed a thorough Brief in Opposition to it (**Appendix J**). On April 28, 2011, Golden Lotus filed a response to Intervening Plaintiffs' Motion (**Appendix K**), a response to the Supplement to Motion (**Appendix L**) and a comprehensive Brief with accompanying exhibits (**Appendix M**). The State agreed that the Interim Order was a *settlement* in which each party gave something up and which Golden Lotus could afford. On May 14, 2011, Intervening Plaintiffs filed a "Reply Memorandum" in support of their Motion. (**Appendix N**).

Lengthy oral argument on the Motions was held on May 25, 2011. A copy of the transcript is attached as **Appendix C**. No evidentiary hearing was held and no testimony taken. The matter was submitted on the Briefs, exhibits, and argument, with the *proviso* that Interveners could file an additional Affidavit limited to certain matters. They filed a Supplemental Affidavit; Golden Lotus filed a Motion to Strike it; and the parties traded pleadings and affidavits ultimately resulting in a stipulated Order entered on July 5, 2011allowing all parties to file supplemental affidavits.

On July 22, 2011, the Circuit Court entered its Order granting Interveners' Motion **(Appendix A)**. The court held that: (a) the text of the Interim Order is not ambiguous; (b) although the term "dam" is not defined in the Interim Order, it is defined in Part 315 of the NREPA to include not only that portion which holds back water, but all appurtenances to it such as abutments, spillways, and embankments; (c) "dam removal" therefore must include elimination of all these appurtenant structures; and, (d) even though the Order expressly references the right and ability of Golden Lotus to retain the existing access bridge, there was no inconsistency in decreeing that the Order does not give Golden Lotus such a "preemptive right."

The court concluded that, despite Golden Lotus' and the State's unequivocal disagreement with Interveners' belated interpretation of their express agreement, Golden Lotus must revise the Conceptual Plan and submit an Application for Permit for removal of structures which were not contemplated by the State and Golden Lotus (or by Interveners at the time of agreement) to be removed – at a cost which is far beyond the financial ability of Golden Lotus.

What the Circuit Court did was rewrite the contract to deprive Golden Lotus and the State of the very essence of their agreement. It impermissibly placed its own personal "spin" on an agreement which had been laboriously negotiated and drafted by the attorneys and experts who were

much better attuned to, and experienced in, "dam removal." *What should not be overlooked in this analysis is that the State and its experts have kept this dam under microscopic scrutiny since 1984 and they all disagree with Interveners.* It should also be noted that Interveners and their experts have likewise been keeping tabs on the dam and, at the time of the Interim Order were well aware of the fact that the existing bridge could not exist without the abutments and spillway.

On July 21, 2011, immediately prior to the Court's issuance of the July 22 Order, the DEQ issued the Permit for Dam Removal. It provides for dam removal as contemplated by Golden Lotus and the State, as set forth in the Application. It does not provide for the extensive "dam removal" ordered by the Court the next day.[4] On August 9, 2011, Golden Lotus filed a Motion for Reconsideration, which was denied by the Circuit Court on August 26, 2011 (**Appendix D**).

The July 22 Order from which Golden Lotus seeks leave to appeal:

- Is contrary to the express terms and conditions of the Interim Order;
- Is contrary to what both the State and Golden Lotus – bitter adversaries in the litigation – emphatically and repeatedly told the court was intended by the Interim Order;
- Abrogates the benefit of the bargain to Golden Lotus as a result of the compromise;
- Renders utterly meaningless the provisions in the Interim Order allowing the *existing* access bridge to remain;
- Is internally inconsistent in that, on the one hand the Court posits that the Interim Order is unambiguous and no extrinsic evidence is necessary to determine its meaning, and yet looked beyond its four corners to the NREPA in arriving at a strained interpretation of what the parties meant in the Order by "dam removal"; and,
- Imposes an economic burden on Golden Lotus that it cannot possibly bear and if not reversed will result in its demise.

Defendant-Appellant seeks leave to appeal the circuit court's July 22, 2011 Order.

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[4] The Permit is not attached to this Application because it was not part of the lower court record.

ARGUMENT

I. THE JULY 22, 2011 ORDER IS A "FINAL ORDER" DISPOSING OF THE LAST REMAINING CLAIM OF INTERVENERS; AND, IF NOT CONSIDERED A "FINAL ORDER", GOLDEN LOTUS WILL SUFFER SUBSTANTIAL HARM BY AWAITING FINAL JUDGMENT BEFORE APPEAL.

A. The Interim Order Is a "Final Order" Entitling Golden Lotus to Appeal as a Matter of Right.

The Interim Order is a complete and comprehensive settlement of all the claims and issues of all the parties to this litigation. Paragraph 17 specifically provides:

> 17. Upon DNRE issuance of necessary permits for dam removal pursuant to this Interim Order, the parties shall enter into a Consent Judgment filed with the Otsego County Circuit Court embodying the terms of final settlement of this matter. The Consent Judgment shall include: . . . (**Appendix A**).

Subparagraph (a) then sets the money judgment in favor of the State that is to be included in the Judgment; (b) provides for dismissal of all claims of the State and Interveners; and, (c) simply recites that the Judgment is not to be construed as an admission against interest of any party.

The only section which continues Circuit Court jurisdiction is paragraph 23:

> 23. This is not a final order resolving all claims in the litigation and the Court retains continuing jurisdiction pending completion of the conditions precedent to entry of a final Consent Judgment as set forth above.

There were only three conditions precedent: verification that the sediments in the pond were not contaminated and certification that the bridge was structurally sound. *Both conditions precedent were satisfied* and, therefore, the Permit was issued by the DEQ.

It is clear on its face that the Interim Order which was intended by the parties to be a full and final resolution of their respective claims and defenses. The Order itself provides for a "self-executing" mechanism which, upon completion, will trigger the strictly ministerial act of signing and entering the Consent Judgment. Interveners' Motion did not raise any new claim nor seek any relief

which was not already contained within the Interim Order and, instead, sought only its enforcement.

Even assuming, *arguendo*, that Intervener's Motion constitutes a "claim," the Circuit Court's July 22 Order disposes of this "last remaining claim" and awards Interveners all relief they sought in the action. There is nothing left to litigate other than enforcement of the parties' contract, as impermissibly modified by the Circuit Court pursuant to Interveners' Motion.

In its Motion for Reconsideration, and because the Interim Order resolved all claims of the parties, Golden Lotus asked the Circuit Court to include the "magic" verbiage of MCR 2.602(A)(3) that would allow it to file an appeal as of right, rather than having to risk denial of an Application for Leave to Appeal. There was no reason for the Court to decline this request, but it did. No rationale was offered for its refusal because none could reasonably be given. The July 22 Order is a "final" Order disposing of the last remaining claim between Interveners and Golden Lotus. Even though the circuit court inextricably would not certify the July 22 Order as "final", it should be treated as such, entitling Golden Lotus to appeal as of right.

B. Golden Lotus Will Suffer Substantial Harm if This Court Does Not Grant Leave to Appeal.

If this Court does not grant leave to appeal, Golden Lotus will suffer substantial harm:

(1) The July 22 Order mandates a cost of "dam removal" which is many multiples of what was understood by Golden Lotus and the State as required by the Interim Order – instead of tens of thousands of dollars, it will approximate $1 million.

(2) Golden Lotus has already invested a tremendous amount of time, effort, and money, in conducting the investigations, surveys, and analyses necessary to implement the project which it and the State agree was contemplated by the Interim Order. Golden Lotus attached the Conceptual Plan (**Appendix E**) and Application for Permit (**Appendix F**) to this Application for Leave to

Appeal, and they are illustrative of the amount of work that has already been done. There is much more work reflected in the additional reports and analyses submitted during the months between the the Interim Order (April 5, 2010) and issuance of the Permit (July 21, 2011). Virtually all of this will be rendered useless by virtue of the July 22 Order. It sends Golden Lotus and the State back to "square one" to develop a new Conceptual Plan, and proceed with another year-long process to get to a permit – scrapping almost all of what has been accomplished.

(3) Golden Lotus operates a yoga ranch at the property, is an IRC 501(C)(3) non-profit organization, and has extremely limited resources – it simply *cannot* perform the obligations the Circuit Court's Order imposes upon it. It did not, and could not have, signed onto an Interim Order which it knew it had no hope of performing. This is one of the reasons why Golden Lotus and the State find the Circuit Court's decision so illogical and baffling. No rational person would enter into a settlement agreement which he knew could never be performed. It does not make any sense.

(4) Because it cannot afford the project which the Circuit Court has ordered, Golden Lotus will lose its only viable ingress and egress to the main structures on its property, forcing it to cease operation; and, it will be faced with the grim certainty that its property will be forfeited to fund a "dam removal" project it and the State never intended. Golden Lotus did not sign onto a settlement which would ring its own death knell.

Despite the Circuit Court's refusal to deem its July 22, 2011 Opinion and Order a "final judgment," *nothing* remains to be decided and all issues are ripe for appeal. The Circuit Court committed reversible error in incorrectly expanding the burden on Golden Lotus agreed by it in the Interim Order and unconstitutionally infringed upon the parties' freedom of contract. *Both* the State and Golden Lotus, who were bitter adversaries throughout the litigation up until entry of the Interim

Order, agree on what the Order says and means. It is grossly unfair and a miscarriage of justice for the Circuit Court to completely ignore the intention and understanding of the two principal parties to the agreement. The Court summarily glossed over as meaningless (without comment, evidentiary hearing, testimony, or trial) the plethora of exhibits and affidavits submitted by Golden Lotus and the State to conclusively prove that not only they, but also Interveners, clearly understood the limited project contemplated by the Interim Order.[5]

If leave to appeal is not granted, the harm to Golden Lotus will not only be "substantial," it will be catastrophic.

II. THE CIRCUIT COURT ERRED IN ITS JULY 22 ORDER BY ISSUING AN INTERPRETATION OF THE INTERIM ORDER WHICH IS CONTRARY TO THE EXPRESS LANGUAGE OF THE INTERIM ORDER AND THE UNDERSTANDING AND INTENTION OF THE TWO PRINCIPAL, ADVERSE PARTIES TO IT.

Standard of Review.

Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are reviewed *de novo*. *Rory v Continental Ins*, 473 Mich. 457; 703 N.W.2d 23 (2005).

The Interim Order is an agreement that is, in effect, the same as a Consent Judgment. In fact, upon issuance of the permit, the Interim Order automatically "morphed" into a Consent Judgment. **(Appendix B**, par. 17.) Judgments entered pursuant to an agreement of parties are of the nature of a contract . . . and are to be construed and applied as such. *Gramer v. Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994); *Bolen v Lobaina*, 267 Mich App 415; 705 NW2d 34 (2005). Settlement agreements and consent judgments constitute contracts and are governed by the legal principles applicable to the construction of a contract. *Laffin v. Laffin*, 280 Mich. App. 513, 517; 760 N.W.2d

[5]Golden Lotus submitted over 100 exhibits. The State submitted numerous affidavits of its personnel involved in the negotiations and permit process. All contradict Interveners and the findings of the Circuit Court.

738, 740 (2008).

A. The July 22 Order is Contrary to the Express Language of the Interim Order and Ignores the Undeniable Fact that the Two Principal, Adverse Parties to It Clearly Understood its Terms and Conditions.

A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written. *Rory v. Cont'l Ins.*, 473 Mich. 457, 468; 703 N.W.2d 23, 30 (2005). Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. *Id.* The Michigan Supreme Court has previously noted that "the general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Id.* Thus, absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement. *Id.*; See also *DaimlerChrysler v G-Tech Prof'l Staffing*, 260 Mich. App. 183, 185; 678 N.W.2d 647, 649 (2003); and *City of Grosse Pointe Park v. Mich. Mun. Liab. & Prop. Pool*, 473 Mich. 188, 203; 702 N.W.2d 106, 116 (2005).

No forced or strained meaning will be given words in a contract and courts will not make a new contract for the parties under the guise of construing the contract. *Edgar's Warehouse, Inc. v. United States Fidelity & Guaranty Co.*, 375 Mich. 598; 134 N.W.2d 746 (1965). The court's primary task in construing a contract is to give effect to the parties' intentions at the time that they entered into the contract. See *SSC Assoc. Ltd. Partnership v. General Retirement Sys.*, 210 Mich. App. 449, 534 N.W.2d 160 (1995); *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174 (6th Cir. 1996). The best evidence of the parties' intent is the contract itself. *Smith v. Physicians Health Plan, Inc.*, 444 Mich. 743, 514 N.W.2d 150 (1994). As a result, when the contract terms are plain and

unambiguous, a court should construe the contract as it is written and presume that the parties' intent is consistent with the ordinary meaning of the terms in the contract. See *Pierson Sand & Gravel. v. Pierson Twp.*, 851 F. Supp. 850 (W.D. Mich. 1994).

A contract must be interpreted in the sense in which one of the parties knew, or had reason to know, the other party understood it. A one-sided, self-serving interpretation of a contract is of no assistance in interpreting the contract. See, e.g., *Gaydos v. White Motor*, 54 Mich App 143, 220 NW2d 697 (1974); and *Davis v. Kramer Bros.*, 361 Mich 37, 105 NW2d 29, 32 (1960). Thus, the meaning of the contract cannot be established by the construction placed on it by one of the parties, unless such interpretation has been made to, and relied on by, the other party or parties, or has been known to, and acquiesced in, by the other party or parties, or, is against the interest of the party making it. *Gaydos, supra.*

(1) The Circuit Court's July 22 Order is Internally Inconsistent in that It Declared the Interim Order to be Unambiguous, but then Relied on Limited Extrinsic Evidence to Support an Unwarranted Interpretation of It.

In its July 22 Order, the circuit court held that the Interim Order was unambiguous and that it did not need to look outside it to determine what the parties meant by "dam removal." But in the next breath the court went to the NREPA for what it said was "the" definition. The Court held:

> [t]he Interim Order, and the parties to that order, clearly and plainly incorporated the statutory definition of dam removal by reference when the document provided that *removal of the Pigeon River dam would take place pursuant to Parts 31, 301, 303, 305 and 315 of the NREPA*. Opinion and Order, page 6. (emphasis added).

However, *not once* in the detailed, 17-page Interim Order does it state that "removal of the Pigeon River dam would take place pursuant to Parts 31, 301, 303, 305 and 315 of the NREPA." To the contrary, the parties went to great lengths to define, in almost excruciating detail, the

requirements and process for obtaining a permit and removing the dam. The definitions of the terms "dam" and "removal" in NREPA Part 315, or any reference thereto, appear absolutely nowhere in the Interim Order.

The references to the NREPA in the Interim Order cited by the circuit court apply solely to Golden Lotus' obligation to obtain permits in accordance with the referenced parts. They provide:

> The dam removal project will require DNRE permits pursuant to Parts 301, 303, 315, the floodplain portion of Part 31, and Part 305, of the Natural Resources and Environmental Protection Act ("NREPA") and the rules and regulations promulgated under the NREPA. **(Appendix B**, par. 3).
>
> (b) The Review Team shall notify Golden Lotus in writing of information, documentation, and data which it deems necessary and appropriate for submission, processing, and approval, of the application(s) for permits to remove the dam and associated restoration of the Pigeon River in accordance with Parts 3 1, 301,303, 305, and 315; **(Appendix B**, par. 5(b)).
>
> Promptly following the Pre-Application Meeting, DNRE shall notify Golden Lotus in writing of any additional information required to process a complete permit application for the dam removal project as provided by this Order, Parts 31, 301, 303, 305, and 315, and the applicable rules and regulations promulgated pursuant to these Parts. **(Appendix B**, par. 6).

These sections were included to outline the procedure by which Golden Lotus would be required to obtain permits and for nothing else. Indeed, the NREPA contains many parts and definitions which the parties did not include. By way of example, Part 315, on which the court relied, contains a separate definition for "Appurtenant Works":

> . . . the structure or machinery *incident to or annexed to a dam* that is built to operate and maintain a dam, *including spillways, either in a dam or separate from the dam*; low level outlet works; and water conduits such as tunnels, pipelines, or penstocks, located either through the dam or through the abutments of the dam"; [MCL 324.31502(4)] [emphasis added].

Part 315 also defines "Spillway" as "a waterway *in or about a dam* designed for the discharge of water". MCL 324.31505(6) [emphasis added].

In other words, the Circuit Court's reliance that Part 315 has restrictive "one-size-fits-all"

definitions of a "dam" and "dam removal" is belied by the statute itself. Not only did it go outside the four corners of the Interim Order to interpret it, it did not look far enough into the statute to see that its conclusion was not supported by it. The very things which Interveners want removed - the spillway and abutments[6] - are defined by the NREPA as not necessarily part of the dam itself. They are "incident to or annexed to a dam." In turn, the omission of these terms in the Interim Order had to mean that the parties did *not* intend to require removal of these structures as part of the "dam removal" plan.

The "proof of the pudding" is of course rooted in the fact that the State agrees with Golden Lotus and disagrees with Interveners. This point was hammered over and over again in the circuit court, but was completely disregarded by it. It is unfathomable how a court can interpret a contract in a manner totally opposite to the two principal parties to it. This is reason enough to reverse the July 22 Order.

What is also noteworthy about the circuit court's decision is that, immediately after holding that the Interim Order is unambiguous and it need not look outside its "four corners", *it does exactly that*. Even though the Interim Order sets forth what "dam removal" is to include in the context of this proceeding (Golden Lotus gets to, *inter alia*, keep the existing bridge), the court improperly bootstraped itself into a different interpretation using an extrinsic, and faulty, definition from the NREPA. The instant it went outside the Interim Order to ascertain the parties' intent, it was compelled to look at and consider *all* the evidence. The court ignored it all.

Golden Lotus' and the State's contention is that the Interim Order is not ambiguous. To the

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[6] It is interesting to note that Interveners themselves do not contend that other parts of the "dam" need to be removed. They are interested only in having the spillway eliminated. The Circuit Court, in its definition of "dam removal," not only went beyond what the State, Golden Lotus, and the NREPA define it as – he went beyond what even Interveners claim they intended by use of the term "dam removal."

contrary, it clearly sets forth what constitutes dam removal and the procedure to accomplish it. All parties knew that the permit would have to be issued in accordance with the statutory administrative scheme which allows the State's experts - who know that "dam removal" varies from situation to situation and permit to permit, and who are qualified to review and approve permit applications – to oversee that process.

Once the court searched outside the Interim Order for a definition of "dam removal," it was obliged to consider the abundance of evidence submitted by the State and Golden Lotus as to what was intended. If the court had even bothered to look far enough into the one resource it did consult (Part 315 of the NREPA), it would have found the definitions which would inevitably have forced it to the opposite conclusion. Had it looked even farther and considered the copious materials and affidavits submitted by the State and Golden Lotus, and took to heart the statements made by the Assistant Attorney General on behalf of the State at oral argument (all in support of Golden Lotus' position), there is no conceivable way the court could hold as it did. For whatever reason, the court did not look deeper into Part 315 and, as evidenced by its peremptory determination that it did not have to look beyond the four corners of the instrument itself, it failed to consider the overwhelming evidence offered by Golden Lotus and the State to the contrary.

(2) The Interim Order Expressly Provides for the Existing Bridge To Remain if a Structural Engineer Opines that it is Sound.

The dam removal plan which was the outcome of the settlement negotiations and contained in the Interim Order is exactly the one set forth in the Permit Application (**Appendix F**), namely, that the existing bridge is to remain intact so long as a qualified engineer opines that it is structurally sound. All parties knew during the negotiations and settlement, that it would be a physical impossibility for the existing bridge to remain if the abutments or spillway were removed. They

were all well familiar with the dam and bridge; they had personally visited it on many occasions; had numerous photographs of it; and had even been provided during discovery with detailed engineering drawings of the original dam, the modifications pursuant to the 1984 litigation, and the subsequent addition of an emergency spillway.

It was expressed twice in the Interim Order to emphasize that the bridge would stay:

> 3. Subject to and in accordance with the provisions of this Interim Order, Golden Lotus shall remove the private dam . . .
>
> The DNRE agrees that upon removal of the dam structure, *Golden Lotus will be allowed the continued use of the existing bridge* or, if in the opinion of a Golden Lotus engineer, due to structural concerns with the existing bridge structure, a replacement bridge crossing.
>
> 14. *Golden Lotus shall be entitled to maintain the current bridge*; or, if in the opinion of a qualified, licensed engineer it must be removed as part of the contemplated dam removal project, Golden Lotus shall be entitled to construct a comparable bridge across the Pigeon River at the same or the nearest feasible location.(**Appendix B**; emphasis added).

Golden Lotus provided the requisite opinion of a structural engineer that the existing bridge is structurally sound (**GL Exhibit 70**). The condition precedent was satisfied, with the result that it and is supporting structures (the abutments and spillway) were to remain.

Further confirmation of this intention is the Resolution adopted by the Golden Lotus Board of Directors and appended to, and incorporated in, the Order as Exhibit A. It reads:

> 4. Upon entry of the Interim Order by the Court, Donald Handyside, as Chairman, and William M. Schlecte, as legal counsel, are authorized and directed to take all steps necessary and appropriate to implement the provisions of the Interim Order, including, but not limited to:
>
> . . .
>
> (b) Preparation, execution and delivery of a Conceptual Plan, Application for Permit or Permits; engineering plans for dam removal *and bridge retention*, . . . (**Appendix B**, Exhibit A; emphasis added).

The circuit court's July 22 Order ignores the key language in the Interim Order, namely that

Golden Lotus would remove the dam "[*s*]*ubject to and in accordance with the provisions of this Interim Order* . . ." The July 22 Order contradicts the plain and clear meaning of the Interim Order.

(3) The Interim Order Speaks Volumes by What it Doesn't Say.

It is evident from the length and detail of the Order that the parties and their counsel took great pains to assure that it included *everything* – the purpose being to avoid the very controversy in which Interveners have now embroiled them. They labored over this work of legal art for over three months, yet *nowhere* in any of the correspondence and nowhere in the final version of the Order does there appear any language which remotely resembles what Interveners claim was to be included. Had removal of the abutments and spillway been a condition of the settlement, it would have been a ridiculously easy thing to have written it in – it was not.

The language of the Interim Order is clear and unambiguous on this point. However, to the extent there is any ambiguity in the language, the drafts of a facilitation summary and proposed order, particularly those by the attorney for Interveners (Mr.Gustafson), drive home the point made in the final version of the Order. For example:

(i) Notes of the mediation forwarded by *Gustafson* after the session (**GL Exhibit 15**):

> 1.d.i. Golden Lotus reserves right for a bridge in a different location *if maintaining current location at dam site is not feasible.*

There is no mention of removal of abutments or spillway.

(ii) *Gustafson* draft of a proposed Facilitation Summary – Jan 13, 2010 (**GL Exhibit 16**):

> [1.b.] . . . In addition, it is recommended that the Defendant provide, as part of the pre-application materials, plans and descriptions of *any proposed modifications to the existing bridge structure* or plans for a replacement crossing structure of the Pigeon River.
>
> [1.d.i.] *Plaintiffs acknowledge the Defendant's desire to continue use of the existing bridge unless condemned by a licensed professional engineer due to safety concerns.*

If a new bridge is required at current or alternative location, the Defendant is responsible for obtaining all necessary permits and financing required to replace the bridge.

[1.d.iv.] The dam removal plan shall be designed to ensure environmental and resource protection/enhancement *and will consider various cost effective options* and safety concerns.

There is no mention of removal of abutments or spillway.

(iii) *Gustafson* revised draft of proposed Facilitation Summary– Jan 14, 2010. (**GL Exhibit 17**): same language as in January 13 draft. No mention of removal of abutments or spillway.

(iv) *Gustafson* revised draft of proposed Facilitation Summary – Jan 19, 2010 (**GL Exhibit 18**): same language as in January 13 and 14 drafts. No mention of removal of abutments or spillway.

(v) *Gustafson* draft of proposed Stipulated Order – Jan 28, 2010 (**GL Exhibit 19**): same language as in January 13, 14, and 19 drafts of Facilitation Summary. No mention of removal of abutments or spillway.

(vi) Golden Lotus attorney's (Mr. Schlecte) draft of the Interim Order – February 3, 2010: (**GL Exhibit 21**): two references to retention of bridge, and no mention of removal of abutments or spillway – *no objections or comments from Gustafson.*

(v) *Gustafson* revised draft of Interim Order – March 15, 2010 (**GL Exhibit 22**): two references to retention of bridge, and no mention of removal of abutments or spillway. No mention of removal of abutments or spillway.

If the Order was to intended to require Golden Lotus to remove the abutments and spillway, it would have said so. It does not.

(4) The Circuit Court's Interpretation of the Interim Order Renders the Provisions Regarding the Existing Bridge Mere Surplusage.

To arrive at a proper interpretation of particular language, the entire contract must be considered. *McIntosh v Groomes*, 227 Mich 215; 198 NW 954 (1924). "Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the

whole instrument." *Id.*; also see, *Laevin v St Vin. De Paul*, 323 Mich 607; 36 NW2d 163 (1949). Courts must 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*, 468 Mich 459; 633 NW2d 447 (2003); *Knight Ent v Fairlane*, 482 Mich 1006; 756 NW2d 88 (2008).

A court may not rewrite clear and unambiguous language under the guise of interpretation. *Woodington v Shokoohi*, 288 Mich App 352; 792 NW2d 63 (2010); *Wonderland Shopping Ctr v CDC Mortg. Cap.*, 274 F3d 1085 (6th Cir. Mich. 2001); *Vary v Shea*, 36 Mich 388 (1877). The circuit court's interpretation of the Interim Order renders meaningless the sections of it and the Resolution which specifically provide for retention of the bridge. Simply put, there would be no need for an engineer's opinion regarding the structural integrity of the *existing* bridge because:

- It would have to be removed in order to get rid of the spillway or abutments and no longer *existing*; and,
- Since it would no longer exist, there would be no necessity for an engineer's opinion on its structural integrity -- any replacement bridge would necessarily have to be constructed so that it was structurally sound.

The circuit court struggled to explain why his interpretation did not render the words "existing bridge" as surplusage, but it does not make any sense in light of the express verbiage of the Interim Order.

B. By Looking Beyond the "Four Corners" of the Interim Order to the NREPA to Ascertain the Parties' Intent, the Circuit Court was Obliged to Consider All Evidence Relevant to It.

To the extent that the circuit court deemed the Interim Order to be ambiguous (which it obviously did by going to the NREPA to find out what it said about "dam removal"), the intention of the parties is paramount and certain fundamental principles apply. As a general rule, where a contract is ambiguous or uncertain, weight and effect will be given to the construction placed on the

contract by the parties themselves. *L&S Bearing v Morton*, 355 Mich 219, 93 NW2d 899 (1959); *Michigan Chandelier v Morse*, 297 Mich 41, 297 NW 64 (1941). The facts and circumstances attending the making of a contract, are indispensable to a correct construction or interpretation thereof, and if it is executory, and its terms uncertain or ambiguous, the manner in which the parties themselves have treated it, in carrying it into effect, is entitled to great weight as affording a practical construction which the parties themselves have placed upon its intent and meaning. *See Klapp v. United Ins*, 468 Mich 459, 663 NW2d 447 (2003). Contract interpretation should be based on common sense. *Bianchi v Auto Club of Mich.*, 437 Mich 65, 467 NW2d 17 (1991).

Unfortunately, not only did the circuit court misapply the one outside source it consulted, it utterly failed to consider *any* of the evidence presented by Golden Lotus and the State regarding their intentions. Just some of the proofs offered by Golden Lotus' and the State to support their interpretation of the Interim Order, and not considered by the court, were:

1. The Lansing Club Pond has great spiritual, recreational, and economic value to Golden Lotus that it was loath to give up. It would not do so without either a final order from a court after years of administrative and legal proceedings, including appeals, or without a settlement which recognized that value and included a suitable *quid pro quo* for Golden Lotus – namely an agreement for a project they could not afford.

2. Golden Lotus' insurer issued a "reservation-of- rights" letter in which it stated that it would pay for defense against the claims, but would *not* pay for any damages or other relief. In other words, Golden Lotus had tremendous financial incentive to *not* settle and instead force the case through all proceedings available to it -- administrative, trial, and appeals -- *unless* it got something substantial in return. The insurance policy and reservation-of-rights letter were provided to the State

and Interveners prior to mediation and they were well aware of the economic factors which had to be considered by Golden Lotus in reaching any settlement.

3. The Interveners had copies of the Golden Lotus tax returns for the last ten years and knew that it had no funds available to perform a dam removal project of the scope that the Circuit Court is now imposing by its July 11 Order. Interveners knew that any deal for dam removal would have to be one which would accomplish the goal of getting rid of the impoundment, and the risk of future sediment releases, in the least expensive manner possible.

4. The Interim Order resolved the issues and problems that caused, and were caused by, the 1984 and 2008 releases, namely (a) elimination of the risk of future sediment build-up and releases; (b) stabilization of water flow; and (c) elimination of water temperature increases.

5. The Circuit Court's July 22 Order added an unacceptable and impossible condition to the Interim Order *ex post facto* which is not only one which Golden Lotus cannot afford, it addresses an issue for which Golden Lotus bears no responsibility – achieving "fish passage." Although a laudable goal, the settlement was intended to resolve the one thing for which Golden Lotus has responsibility, namely, assuring that there are no further releases of sediment. Interveners, and particularly Trout Unlimited, want more – "fish passage." The difficulty is that the cost of achieving it far exceeds the economic capability of Golden Lotus and is not something for which it is responsible – realities that were recognized in the negotiations and thereafter. If Interveners want fish passage, they should pay for it, or work with other "stake-holders" to do so.[7]

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[7] Golden Lotus expressed to Interveners on numerous occasions its willingness to participate in a voluntary, cooperative plan to do a "Phase II" project which would arrange for grants and funding from third-party public and private sources to remove the spillway and abutments and replace the existing bridge. Outside funding is not available if "Phase II" is mandated by court order. The State and Golden Lotus were engaged in "Phase II" discussions with possible grant sources, but they have been put on "hold" due to Interveners' Motion.

6. Interveners' contention that Golden Lotus agreed to the additional cost of creating "fish passage" is contradicted not only by the Interim Order, but by the plethora of communications by the parties, the investigations and submissions by Golder in furtherance of the Order, and by a revealing press release which Intervener MCTU issued to its members shortly after entry of the Order **(GL Exhibit 24)**:

> All parties to the litigation have been working towards (*sic*) an agreement that would put aside the litigation and focus resources on helping the Pigeon River. Golden Lotus' desire the do what was best for the river and its aquatic life was instrumental in reaching this agreement. *This agreement will protect the river from similar incidents in the future* while allowing it to become healthier than it has ever been," said Bryan Burroughs, Executive Director of Michigan TU.
>
> *Dams disrupt the natural flow of water, sediment, nutrients and organisms in rivers and often warm water temperatures, past the ideal range for trout and other coldwater fishes.* Removal of this dam is expected to greatly improve the trout fishery *for nearly 20 miles downstream of the dam.* (Emphasis added).

There is not, nor could there be, any mention in the press release that the agreement included "fish passage" because Interveners knew that the Order did not provide for removal of the spillway.

7. The State concurs with Golden Lotus (State's Brief in Opposition to Intervening Plaintiffs' Motion), and to say that they were "bitter enemies" until reaching the settlement is putting it mildly. The fact that they are now on the same side of the argument and standing shoulder to shoulder against Interveners is conclusive evidence of what the Order was intended to mean.

8. The Affidavits of all members of the Golden Lotus negotiating team are unanimous in their recollection of the mediation, communication to Interveners of the financial condition of Golden Lotus, the non-negotiable insistence that the bridge remain, and their understanding of the

settlement. **GL Exhibits 10, 11 ,and 12.**[8]

9. There were numerous meetings and communications between the parties, and submissions to the State, all in accordance with the Order. A Chronology was attached to Golden Lotus' Brief in Opposition to the Motion (**GL Exhibit 14**) which detailed many of these.

10. All of the actions, communications, and submissions from and after April 5, 2010, in furtherance of the Order up until Gustafson's email on December 17, 2010, support the position of Golden Lotus and the State, *to wit*:.

Conceptual Plan – May 2010 (**Appendix F; GL Exhibit 2**)

Field Data Collection Work Plan – May 2010 (**GL Exhibit 3**)

Field Data Summary Report – September 2010 (**GL Exhibit 4**)

Interim Evaluation of Drawdown and Dam Removal Options – Oct 2010 (**GL Exhibit 5**)

Technical Memorandum – December 3, 2010 (**GL Exhibit 6**)

Joint Permit Application – February 1, 2011 (**GL Exhibit 7**)

Response to Application Correction Request – Feb 17, 2011 (**GL Exhibit 8**)

Response to Application Correction Request 2 – March 3, 2011 (**GL Exhibit 9**)

Interveners have known *since December 21, 2009*, at the time of facilitative mediation (which culminated in the settlement), that dam removal would *not* include removal of the abutments and spillway. Everything that has been done since that time supports and is consistent with Golden Lotus' and the State's interpretation of the settlement and Interim Order.

11. Intervener Pigeon River Country Association's ("PRCA") published an Autumn 2010

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[8] Evidence of "subsequent acts or declarations of the parties showing the practical consideration put upon [equivocal or ambiguous] words" may be considered "for the purpose of ascertaining [the parties'] intention, and parol evidence is admissible for this purpose." *Glenwood Shopping Center v K Mart Corp.*, 136 MichApp 90, 356 NW2d 281.

Newsletter (**GL Exhibit 100**) which confirmed that its understanding of "dam removal" was the same as Golden Lotus and the State:

> The spillway gates; the wall between them; the structures holding the spillway gates; the power house gate; and the power house equipment, including the generator, will be removed soon after drawdown is completed. The inlets of the existing emergency spillway tubes will be lowered to the pipe inlet invert after drawdown is completed.
>
> . . .
>
> If a structural engineer says that the bridge above the dam will be safe with it removed, the 1.5 foot wide wall between the spillway gates and the powerhouse will be removed to provide for additional capacity to pass water in a flood event. Without including the additional 1.5 feet that would be gained by removing the wall and without considering the emergency spillway tubes, calculations show that the structure, with the gates and power house equipment removed, could pass water from a flood event without overtopping the road that is close.
>
> . . .
>
> It appears that Golden Lotus is committed to . . . dismantling the dam so it will not be able to be put back in service without prohibitive expense . . .

This Newsletter clearly and unequivocally sets forth the understanding of PRCA as to what is required by the Interim Order and is "on all fours" with Golden Lotus and the State:

(a) It describes *exactly* the plan for dam removal which is contained in the Conceptual Plan and the Application for Permit;

(b) It describes retention of the bridge after removal of *only* the 1.5 foot wall between the spillway gates and the powerhouse;

(c) It describes the goal of dismantling just enough of the dam so that it could not be put back into service without "prohibitive expense";

(d) It describes "dam removal" in terms *identical* to the position presented by Defendant and the State to this Court in response to Interveners' Motion;

(e) It emphasizes that the "dam removal" plan described in the Newsletter and as envisioned by PRCA itself in the Interim Order would allow for passage of sufficient water to avoid flooding, i.e., removal of the gates and dividing wall would provide adequate stream width;

(f) It describes "dam removal" as identical to the understanding of Defendant and the State; and,

(g) It directly contradicts the pleadings filed by Interveners with, and their statements made to, the Court in support of their subsequent Motion.

12. An alternative proposal for "dam removal" presented by PRCA at a March 17, 2011 meeting with Golden Lotus and the State (**GL Exhibit 101**) provided for retention of the spillway and abutments, which belies Interveners' assertion that they intended the term "dam removal" to mean a "one-size-fits-all" project that requires removal of all appurtenant structures.

13. The State's Brief in Opposition to Interveners' Motion, which, *inter alia*, said:

> The State Plaintiffs and Golden Lotus have complied with the requirements set out in the Interim Order. The Golden Lotus Plan for Dam Removal will greatly improve the health of the Pigeon River System and accomplish the goals sought in the State Plaintiffs and Intervening Plaintiffs' Complaints. The parties have also committed to the development of the Phase 11, Pigeon River Project which will result in total river restoration. It would be tragic to see this historic conservation event jeopardized because of Intervening Plaintiffs' failure to comply with the terms of the negotiated Settlement Agreement and Interim Order. (**Appendix J**, page 3).
>
> It is important to note that neither the State Plaintiffs nor the Intervening Plaintiffs ever defined dam removal in their Complaints. Instead, dam removal is referred to as a general concept but the dam removal goals are clearly set forth within the Complaints. The Golden Lotus' plan for dam removal will accomplish the goals sought in the State Plaintiffs' and Intervening Plaintiffs' Complaints. (**Appendix J**, page 5).
>
> In an effort to bridge the communication gap between the State Plaintiffs and Golden Lotus, Bryan Burroughs and his counsel participated in confidential settlement discussions with both the State and Golden Lotus. During the facilitation, one of the important issues for Golden Lotus was retention of the existing bridge. (**Appendix J**, page 6).
>
> Golden Lotus' position was that if they were willing to agree to discontinue the operation of the dam and draw down the impoundment, they wanted a commitment from the State and the Intervening Plaintiffs that they would be able to continue to use the existing bridge. (Exhibits C, H, I, and J Affidavits of Borgeson, Pawloski, Larsen and Wuycheck respectively) There was a great deal of discussion regarding this issue during the facilitation and in further settlement negotiations. In support of their position, Golden Lotus asserted that the main (existing) bridge was an integral part of the operation of the yoga ranch. Since they were a non profit facility, they had limited funding available and replacement of the bridge would be a costly endeavor." (**Appendix J**, page 7).

There was much discussion on this issue and a compromise was reached by the parties

regarding the bridge issue. As a result, the language in the Order regarding the bridge was carefully crafted, reviewed, revised, edited, and approved by all of the parties. It took over three months for the parties to draft an acceptable Order. The language pertaining to the bridge is quite detailed and reflects the degree of specificity that was warranted, because of the strained relationship between the State Plaintiffs and Golden Lotus. The Order states in paragraph 3 that:

> 'Subject to and in accordance with the provisions of this Interim Order, Golden Lotus shall remove the private dam it owns and maintains on its property creating the impoundment on the Pigeon River known as the Lansing Club Pond, Corwith Township, Otsego County. The dam removal project will require DNRE permits pursuant to Parts 301, 303, 3 15, the floodplain portion of Part 3 1, and Part 305, of the Natural Resources and Environmental Protection Act ("NREPA") and the rules and regulations promulgated under the NREPA. The DNRE agrees that upon removal of the dam structure. Golden Lotus will be allowed the continued use of the existing bridge or, if the opinion of a Golden Lotus engineer. due to structural concerns with the existing bridge structure, a replacement bridge crossing. Golden Lotus shall apply for and be issued DNRE permits that authorize the construction and placement of a new bridge structure at or near the existing bridge location as long as the replacement bridge crossing is a clear span structure which spans the bankfull channel and has a minimum of five feet clearance between the ordinary high water level and low steel of the bridge and meets the necessary regulatory, engineering, and design requirements. Plaintiffs are willing to support Golden Lotus' application for permit or variance to County zoning authorities under the Natural Rivers Act or otherwise with respect to such bridge authorized by DNRE permits.'" (**Appendix J**, page 7-8).

The intent of this provision by the State Plaintiffs and Golden Lotus can be summarized as follows: 1) upon removal of the dam, Golden Lotus will be allowed to continue use of the existing bridge; 2) If Golden Lotus engineers determine that the existing bridge is structurally unsound, Golden Lotus will be allowed to have a replacement bridge; 3) If Golden Lotus determines a replacement bridge is necessary, DEQ agrees to process the Golden Lotus permit application for a new bridge; and 4) The parties agreed to the design of the replacement bridge." (**Appendix J**, page 8).

Golden Lotus considered this issue to be a "deal breaker" and as a result, required that the language be included not once but twice in the Interim Order. In paragraph 14 of the Interim Order it states, "Golden Lotus shall be entitled to maintain the current bridge." It appears that the Golden Lotus fears were well founded but the interesting twist is that it isn't the State Plaintiffs that are attempting to renege on the agreement, but instead it is the Intervening Plaintiffs. While the State Plaintiffs recognize that it would be advantageous to agree with Intervening Plaintiffs and their "creative" interpretation of the Interim Order, it can not do so since it would be inconsistent with the intent of the parties and in direct violation of this Court's Order to cooperate with each other in good faith to accomplish dam removal in accordance with the provisions of this Order. (Exhibit A - Interim Order, Paragraph 12).

(**Appendix J**, page 8).

14. Oral Argument presented by the State on May 25, 2011, include the following:

If you would have told me a year and a half ago that I'd be standing before you and stating that I was in agreement with Golden Lotus, and in particular Mr. Schlecte's statements and position, I would have been questioning your sanity. But having said that, that's exactly where we are, in a very unusual and quite ironic position."(**Appendix C**, page 40, lines 20-25).

And what is truly tragic is you see from the evidence presented to you, you see from the wealth of information: the documents, the dialogue, the e-mails, the letters, the correspondence, the chronology, the meetings, the facilitation -- the amount of work and effort that has went into making this a successful project to get to restore the Pigeon River to being one of the best rivers in this state have been tremendous and extraordinary. (**Appendix C**, page 41, lines 2-9).

And as I put in the opening introduction of our brief, that -- reaching the interim order was a monumental task and everyone was quite satisfied with the results. I quoted Dr. Burroughs and I think he put it quite well when he said:

> 'The agreement that was reached is a huge benefit to the Pigeon River and corrects persistent damage to the resource that has been in place for a century. Past attempts to try to remove this dam failed. People all across this state that hold the Pigeon River Country dear to their hearts perceive -- perceive this as a historic conservation event and are smiling that it seems almost too good to be true.'"

(**Appendix C**, page 41, lines 10-22).

. . . and the three goals that we were seeking for dam removal were as follows: The State did not want to see any future release of sediments to the Pigeon River . . . (**Appendix C**, page 42, lines 20-23).

. . . The other major concern is since it's a peaking operation there's a continuous fluctuation in the flow and the temperature of the river. If you eliminate the operation of the facility, you eliminate the -- those crucial impacts to the river. So from the State's perspective, to have that interim order and to have Golden Lotus voluntarily agree to cease the operations, to draw down the impoundment will accomplish those three major goals: no future release of sediment, no fluctuation in flow or temperature. (**Appendix C**, page 43, lines 12-21).

So it is -- the State is at a complete loss to understand why the intervening plaintiffs would file any type of motion that could delay or potentially derail what was this major accomplishment under the interim order. (**Appendix C**, page 43, lines 22-25).

I think clearly the proofs preserve and establish our position that we are not in violation of

the inter- -- of what our duties and requirements are under the interim order. They have been fully complied with. You saw all parties here on December 8th. We were basically holding hands and singing 'Kumbaya.' (**Appendix C**, page 44, lines 2-8).

Once a determination had been made by the technical team and -- and I won't go into what Dr. Burroughs believes, but once the technical team had felt that it had completed its duties and responsibility it was always envisioned that the next step would be that Golden Lotus would file its permit application, and at that point the regulatory authority to review and approve the permit rested solely with the State. (**Appendix C**, page 44, lines 21-25 & page 45, lines 1-3).

We want to move forward under the interim order. It's stated in our brief, *we agree with Golden Lotus's position. Though it is not in the State's best interest to do so, it is what was the intent of this agreement*; that if the bridge -- if they could establish that there was no question regarding the structural integrity of the bridge – if that could be established, then they were able to maintain the bridge. *Would it be advantageous for me to argue no, that wasn't the intent; that they should remove everything? Would that put the State in a better position? Yes, it would, but it wouldn't be truthful. That was not what the intent of the parties was*. (**Appendix C**, page 47, lines 9-20; emphasis added).

And finally, I -- I think -- and -- and Mr. Schlecte emphasized this, but if you look at the goals that are set forth in this motion, if you look at the relief that is requested, all of that can be accomplished under the second phase. It isn't as though this can't happen, but as Golden Lotus has pointed out: They don't have the financial wherewithal to accomplish it on their own. Dam removal or, that is, the removal plan that has been provided, will accomplish the goals that the State wanted. But phase two of this project would not only accomplish those goals but would accomplish the goals that the intervening plaintiffs are seeking. (**Appendix C**, p 46, lines 11-22).

The intention of the parties is everywhere in the evidence of the negotiations, drafting of the Interim Order, and the conduct and statements of the parties thereafter. None of this was considered by the Circuit Court in formulating its decision and, as is evident, it is not only persuasive – it is conclusive that"dam removal" was not intended to include removal of the bridge and supporting structures.

III. THE CIRCUIT COURT LACKED JURISDICTION TO GRANT INTERVENERS' MOTION BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

The doctrine of exhaustion of administrative remedies generally requires that where an

administrative agency provides a remedy, an aggrieved party must seek such relief before petitioning a court of law. *Cummins v. Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009); *Bonneville v. Michigan Corrections Org, Service Employees Int'l Union, Local 526M, AFL-CIO*, 190 Mich App 473, 476; 476 NW2d 411 (1991). Where a plaintiff has not exhausted his or her administrative remedies, the plaintiff's claim is not ripe for review. *Hendee v. Putnam Twp*, 486 Mich 556, 573; 786 NW2d 521 (2010). "When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law." MCL 24.301.

The July 22 Order disregarded the statutory framework for DEQ review and issuance of permits for dam removal, usurped the exclusive authority granted to the DEQ to do so, and bypassed the statutory process for administrative challenge of an issued permit by an affected party as a pre-condition for appeal to the Circuit Court.

NREPA Article I, Part 11, Section 1101 provides, in pertinent part:

> If a person has legal standing to challenge a final decision of the department under this act regarding the issuance, denial, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a permit or operating license, the commission, upon request of that person, shall review the decision and make the final agency decision. A preliminary, procedural, or intermediate decision of the department is reviewable by the commission only if the commission elects to grant a review. *If a person is granted review by the commission under this section, the person is considered to have exhausted his or her administrative remedies with regard to that matter.* The commission may utilize administrative law judges or hearing officers to conduct the review of decisions as contested case hearings and to issue proposals for decisions as provided by law or rule. MCL 324.1101 (emphasis added).

This provision creates an obligation on any person challenging the issuance of a permit under the NREPA to first exhaust the administrative remedies set forth in Section 1101. See *Aquatic Mgmt. Serv. v. DEQ*, 2010 Mich. App. LEXIS 2449 (Mich. Ct. App. 2010; copy attached as

Appendix G). In *Aquatic*, the appellate court upheld the lower court's dismissal of Plaintiff's claim challenging the DEQ's denial of certain permit applications. The court held:

> MCL 324.1101(1) expressly contemplates the issue of remedy exhaustion by providing that when a person obtains review of a permit decision, 'the person is considered to have exhausted his or her administrative remedies with regard to that matter'. *Id.* at 17-18.

Here, the Interim Order makes specific reference to the need for Golden Lotus to follow the administrative procedures appropriate for issuance of a DEQ permit. Golden Lotus followed that process to a successful conclusion – the Permit was issued on July 21, 2011. The proper course of action for Interveners to challenge the issued permit was to file an administrative appeal with the DEQ Office of Administrative Hearings. This affords Interveners the opportunity to have their grievances and concerns about the permit to be aired and decided in a forum specifically created by the state legislature to handle them. The reasoning is obvious: the DEQ and other state and federal agencies which must be consulted in connection with a dam removal project possess the requisite expertise, knowledge, and experience to assess, review, modify, deny, and grant environmentally-related permits. The Circuit Court does not. Our statutory system provides for review of the agency's decision only after the aggrieved party has exhausted all administrative remedies first – here an administrative appeal pursuant to MCL 324.1101.

Interveners have not availed themselves of that opportunity and, until they do, their claims are not ripe for consideration by the circuit court and they are barred from challenging the DEQ permit issuance there. In light of the circuit court's "reaching out" to the NREPA for its (incorrect) definition of "dam removal," it is surprising that the court did not also apply its provisions for administrative appeal which clearly prevent Interveners from bringing their challenge directly to the circuit court prior to prosecuting the statutory administrative appeal. The court should have

dismissed the Interveners' Motion as being "unripe" for decision.

IV. AT A MINIMUM, THE CIRCUIT COURT'S JULY 22 ORDER NECESSARILY MEANS THAT THERE WAS A "MUTUAL MISTAKE" AND NO "MEETING OF THE MINDS" AS TO THE INTERIM ORDER, ENTITLING GOLDEN LOTUS TO RESCISSION.

A. In Reaching a Result Which was Diametrically Opposed to the Understanding and Intention of Golden Lotus and the State, the July 22 Order Means that There was a Mutual Mistake as to an Underlying Material Fact, i.e., What "Dam Removal" was to Entail, Entitling Golden Lotus to Rescission.

A contract may be rescinded because of a mutual misapprehension of the parties, and is granted in the sound discretion of the court. *Lenawee County Bd. Of Health v. Messerly*, 417 Mich. 17, 16; 331 N.W.2d 203, 208 (1982). Rescission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties. *Id.* at 21. Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake . . . . *Id.* at 22.

The July 22 Order demonstrates that there has been a mutual mistake on the part of all parties (Golden Lotus and the State on one side; Interveners on the other) as to the meaning of the term "dam removal" in the Interim Order. As clearly set forth in the parties' Briefs filed in opposition to Interveners' Motion, Golden Lotus and the State believed "dam removal" was not a "one-size-fits-all" term and varied from project to project and application to application. It means whatever the parties want it to mean – in this case, removal of the "dam" that impounds water, but not the appurtenant structures which do not, such as the spillway and abutments. Golden Lotus and the State presented a veritable mountain of evidence to establish this, but it was completely ignored by the

circuit court.

Interveners' belated interpretation of the phrase "dam removal" is a drastic departure from what Golden Lotus and the State anticipated in entering into the Interim Order. It contradicts the express provisions for which Golden Lotus and the State negotiated and upon which they relied, namely, a "dam removal" project of limited scope which Golden Lotus could afford and which would accomplish the specific objectives of the State and Interveners as set for in their respective Complaints. The cost of the project as agreed upon by Golden Lotus and the State in the Interim Order is a fraction of the cost of the work which will be required if the "contract modification" wrought by the circuit court's tortured interpretation is not overturned.

The vast discrepancy between the State's and Golden Lotus' understanding as to the underlying definition of "dam removal" on the one hand, and Interveners' on the other, represents a serious mistake as to a basic assumption that goes to the essence of the agreement and upon which Golden Lotus relied. It so materially affects its position in the agreement that it renders performance on the part of Golden Lotus impossible as of the time of execution. In lieu of granting Intervener's motion, the circuit court should have at the very least declared that the Interim Order was rescinded and the parties placed back in their positions prior to its entry.

B. The July 22 Order Demonstrates That There Was No "Meeting of the Minds" as to the Requirements of the Interim Order and it Should Have Been Declared a Nullity.

When a mutual mistake strikes at the very basis on which a contract has been made, such that there cannot be said to have ever been a "meetings of the minds," no contract ever existed and the contract in question is considered null and void. See *Higbie v. Higbie*, 306 Mich. 577; 11 N.W.2d 248 (1943); holding that one of the basic elements of a valid contract, without which no agreement

has been reached, is "[a]n agreement by offer and acceptance, or, in other words a communication and meeting of minds whereby the parties come together in a common expression of will as to their legal relations." *Id.* at 590. See also *City of Warren v. McCabees Mut. Life Ins.*, 83 Mich. App. 310, 317; 268 N.W.2d 390, 393 (1978), holding:

> Where a mistake is of so fundamental a character that the minds of the parties have never, in fact, met, or where an unconscionable advantage has been gained, by mere mistake or misapprehension; and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner claiming redress; and no intervening rights had accrued; and the parties may still be placed *in statu quo*; equity will interfere, in its discretion, to prevent intolerable injustice.

Here, Interveners disagree with Golden Lotus and the State as to the fundamental subject matter upon which the entire Interim Order was founded. As discussed above, Interveners propose a definition of "dam removal" that was *not* what Golden Lotus *or the State* contemplated in entering into the Interim Order. Had Golden Lotus (and the State, too) thought that a court could conceivably twist the words of the Interim Order in such fashion as to render its meaning the exact opposite of what it and the adverse party intended, it would not, and could not, enter into it. It would never have obligated itself to a project which it knew it would not be able to afford.

Any contention by Interveners that there was negligence or fault on the part of Golden Lotus in entering into an order which it failed to properly understand is contradicted by the fact that the State has the same understanding.

Lastly, the July 22 Order modifies the Interim Order solely to the great benefit of Interveners, rendering the parties' agreement completely one-sided and granting Interveners all of the relief sought by them in their Complaint without any "*quid pro quo*" for Golden Lotus. Interveners will not be harmed in any way by this Court's declaration of the Interim Order as a nullity and restoration of the parties to the *status quo* which existed prior to it so that the parties may then either re-

negotiate a fair contract or have their day in court. If the circuit court's decision is not reversed, Golden Lotus will have been denied both.

CONCLUSION/REQUEST FOR RELIEF

The July 22 Order is effectively a "final order" and the impossible financial burden it imposes on Golden Lotus will cause substantial harm if not reviewed and reversed by this Court.

The Interim Order unambiguously provides for "dam removal" as envisioned, understood, and agreed upon by the principal, adverse parties, Golden Lotus and the State. It addresses and resolves the sediment issue for which Golden Lotus acknowledged responsibility and, at the same time, does not impose an unattainable financial burden on Golden Lotus. It eliminates the dam and impoundment, and eliminates forever the risk of a future sediment release – all at a cost which is manageable by Golden Lotus. It is a miscarriage of justice for the circuit court to inject itself into that agreement, and to modify the bargain struck by the parties to it, especially where two of the three are in complete agreement as to what it says.

The circuit court's July 22 Order is internally inconsistent – the court initially held that the Interim Order was unambiguous, but then proceeded to look outside it for interpretation. The court went to one source – the NREPA – but failed to properly understand and apply it; and, once it went beyond the "four corners", was obliged to consider all the evidence relevant to intention of the parties. It did not and the evidence is overwhelming that all parties, including Interveners, knew at the outset that "dam removal" did not include removal of the spillway or abutments –it was going to be a project which got rid of the "dam" and impoundment, but would leave the bridge and its supporting infrastructure intact. The circuit court should have considered that evidence, but it instead held that it was all irrelevant. Not only was the court wrong – it deprived Golden Lotus of

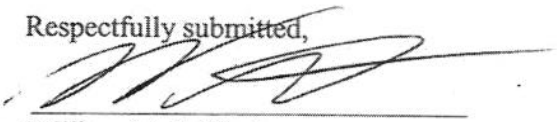
its "day in court."

There is a statutory scheme in place governing challenges to a permit issued by the DEQ. Interveners have not availed themselves of the administrative remedies available to them and their claim that DEQ issuance of the permit is improper is not "ripe" for adjudication in the circuit court.

Once the circuit court made a determination that "dam removal" meant something other than intended by Golden and the State, there was, *a fortiori*, a "mutual mistake" and no "meeting of the minds", rendering the Interim Order subject to rescission. Although Golden Lotus prefers an outright reversal of the Circuit Court's decision allowing Golden Lotus and the State to proceed with dam removal as set forth in the Application (**Appendix E**) and permit, once it interpreted the Interim Order differently than Golden Lotus and the State, the court should have ordered that the Interim Order be set aside and restored the parties to their original positions before its entry.

For all of the foregoing reasons, Golden Lotus requests that this Court grant its Application for Leave to Appeal, and upon granting leave and hearing, reverse the circuit court's July 22, 2011 Opinion and Order.

Respectfully submitted,



September 15, 2011

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