STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GREAT LAKES WATER AUTHORITY,

Plaintiff, **Case No. 22-004754-CB**

-v- **Hon. Muriel D. Hughes**

CITY OF HIGHLAND PARK,
a municipal corporation,

Defendant.

OPINION AND ORDER
GRANTING IN PART AND DENYING IN PART CITY OF HIGHLAND PARK'S MOTION FOR SUMMARY DISPOSITION AND GRANTING IN PART AND DENYING IN PART GREAT LAKES WATER AUTHORITY'S MOTION FOR SUMMARY DISPOSITION, DECLARATORY RELIEF, AND PRELIMINARY INJUNCTION

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: 7/22/2022

PRESENT: Muriel D. Hughes
Circuit Judge

This civil matter is before the Court on "Highland Park's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8)" and "Plaintiff Great Lakes Water Authority's Motion for Summary Disposition, Declaratory Relief, and Preliminary Injunction." For the reasons stated below, the Court grants in part and denies in part Highland Park's motion and grants in part and denies in part Great Lakes Water Authority's motion.

I. BACKGROUND

The instant motions arise out of a complaint filed by Plaintiff Great Lakes Water Authority ("the GLWA") against Defendant City of Highland Park ("Highland Park"). The GLWA's complaint includes four counts: (1) contempt for Highland Park's failure to abide by a 1980 Consent Judgment, a 1980 Ordinance Order, and a 2011 Order; (2) breach of contract as to a 1983 Sewage Service Contract ("the 1983 Contract") and a 1992 Wastewater Discharge Ordinance Delegation Agreement ("the Delegation Agreement"); (3) a request for declaratory relief; and (4) a request for injunctive relief.

The GLWA complains that Highland Park failed and/or refused to enact a resolution concurring in the Industrial Pretreatment Program Rules. GLWA alleges that Highland Park is the only one of 78 municipalities that has failed to concur in the recently promulgated rules. According to GLWA, the rules at issue here "are required to administer the region's industrial pre-treatment program ("IPP") and properly regulate the discharge of toxic pollutants for the protection of (a) the environment, (b) the health and safety of residents of southeast Michigan, and (c) GLWA'S Water Resource Recovery Facility ("WRRF")." The GLWA also asserts that the WRRF is the "largest single-site wastewater treatment facility in the United States, servicing an area of more than 946 square miles."

The GLWA is a regional water authority that was created as result of a mediated agreement entered into between Wayne, Macomb, and Oakland Counties, and the City of Detroit in Detroit's chapter 9 bankruptcy. *In re City of Detroit*, 524 BR 147; 198 (Bankr ED Mich, 2014).[1] The GLWA now operates, controls, and improves the regional water and sewage assets

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[1] The formation of the GLWA is explained in *In re City of Detroit*, 524 BR 147, 198-199 (Bankr ED Mich, 2014):

> **V. The Creation of the Great Lakes Water Authority**

owned by the City of Detroit, which were previously operated by the Detroit Water and Sewerage Department ("DWSD").

The GLWA is a municipal authority organized under Act No. 233 of 1955, as amended, MCL 124.281, et seq. ("Act 233"). Act 233 is described as follows:

> AN ACT to provide for the incorporation of certain municipal authorities to acquire, own, extend, improve, and operate sewage disposal systems, water supply systems, and solid waste management systems; to prescribe the rights, powers, and duties thereof; to authorize contracts between such authorities and public corporations; to provide for the issuance of bonds to acquire, construct, extend, or improve the systems; and to prescribe penalties and provide remedies.

Pursuant to MCL 124.284(1), "[a]n authority shall be a municipal authority and shall be a public body corporate with power to sue and be sued in any court of this state. It shall possess all the powers necessary to carry out the purposes of its incorporation…. The enumeration of any powers of this act shall not be construed as a limitation upon an authority's general powers." [Emphasis added].

Under MCL 124.284(1)(g), the GLWA is empowered to "[a]dopt and promulgate rules and regulations for the use of any project constructed by it under the provisions of this act." MCL 124.284a also provides in pertinent part:

> The authority shall adopt rules and regulations by resolution of its governing body and with concurrence by resolution of constituent

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Another major achievement in the case is the mediated agreement that the City entered into with Wayne, Oakland and Macomb Counties for the creation of the Great Lakes Water Authority. These counties and their customers obtain their water and sewer services from the Detroit Water and Sewerage Department ("DWSD"). By this agreement, the assets of the DWSD will be governed by representatives of the region that it serves. In exchange, the GRS pension plan will be paid $428.5 million as DWSD's share of the City's unfunded pension liability and for its share of restructuring expenses and professional fees. Although this agreement resulted in the counties' withdrawal of their objections to the plan and involved the transfer of City assets, the City exercised its right under § 904 not to request Court approval of this memorandum of understanding.

> municipalities. After adoption of the resolution and concurrence by the constituent municipalities, a notice of adoption of the resolution and the rules and regulations, or a summary of those rules and regulations, shall be published in a newspaper of general circulation within the territory encompassed by the authority and within the territory furnished service by the authority by contract pursuant to section 10. The rules and regulations shall become effective 30 days after the date of publication of the notice and the rules and regulations or the summary of the rules and regulations.
> …
>
> [Emphasis added].

As the GLWA claims, Highland Park has refused to enact a resolution in concurrence with the newly promulgated rules, while 77 other municipalities have already concurred.

On November 13, 2019, new rules were adopted after public comment, public hearing, and consultation with the member communities in Wayne, Oakland, and Macomb counties. Industry representatives and environmental groups were also involved in the rulemaking process. The new rules were designed to comply with state and federal standards for limiting the discharge of toxic pollutants for the operation of the Industrial Pretreatment Program. Apparently, Highland Park did not participate in the rulemaking process by providing any comments or attending the public hearing.

In its effort to promulgate new rules, the GLWA was concerned that outdated rules and ordinances did not accommodate for new scientific findings and do not limit the discharge of certain newly discovered toxic pollutants, such as PFAS Compounds ("PFAS"). The new rules do limit the discharge of PFAS.

As a result of Highland Park's refusal to concur in the adoption of the new rules by enacting a resolution in concurrence, the GLWA filed its complaint urging this Court to hold Highland Park in contempt of certain court orders and hold Highland Park liable for breach of the contracts obligating it to comply with the GLWA's actions. The GLWA also asks that the

Court declare that the rules are effective under MCL 124.284a, and to impose a preliminary injunction forcing Highland Park to adopt the rules.

The orders referred to by the GLWA are:

- 1980 Consent Judgment – On April 25, 1980, the U.S. District Court for the Eastern District of Michigan entered an amended consent judgment that required the City of Detroit and its suburban wastewater treatment customers to "adopt sewer use or industrial waste control ordinances which are at least as stringent as Detroit's ordinances and provide Detroit right of entry for purposes of monitoring and inspection."

- 1980 Ordinance Order - On August 26, 1980, the District Court entered an Order Re: User Charge System, Industrial Cost Recovery System and Sewer Use Ordinance, which again ordered each municipality served by the publicly owned treatment works ("POTW"). This order provided:

> IT IS ORDERED that on or before November 1, 1980, each municipality served by DWSD's sewage system shall adopt ordinance; or regulations which conform to applicable statutes and regulations of the United States and which are consistent with and at least as stringent as the provisions and principles set forth in:
>
> (a) Detroit Industrial Waste Ordinance 353-H (Detroit City Code Ch. 56, Sections 56-6-1 through 56-6-34)…
>
> (b) Rules and Regulations Governing Implementation of (Industrial) Surcharges adopted by DWSD on or about December 19, 1979...
>
> (c) Detroit Sewer Use Ordinance 340-H (Detroit City Code Ch. 56, Sections 56-6-1 through 56-6-12)…
>
> (d) Detroit Sewer Meter Ordinance 363-H (Detroit City Code Ch. 56, Sections 56-1-13 through 56-1-15) … and Rules and Regulations on Sewage Metering adopted February 6, 1980… alternatively, rules and regulations similar to those embodied in Wayne County Proposed Policy on Rates, Section 2…, providing exemption policies for waste water not discharged to sewers or other metering or exemption rules which will secure the equitable and proportionate imposition of sewage treatment rates.
>
> (e) The Industrial Cost Recovery Rules and Regulations…

- 2011 Order - On August 31, 2011, the District Court entered an order finding that the 1980 Consent Judgment, the 1980 Ordinance Order, and the 1980 Settlement Agreement

are "still applicable and relevant." The "Surviving Rate Settlement Terms" found in Attachment 2 of the order provided relevant part:

> Each wholesale customer agrees that it shall adopt and enforce, and shall cause each of the local governmental units within its jurisdiction for sewage treatment and disposal service as provided by DWSD to adopt and enforce, rules and regulations pertaining to the use, design and construction of sewers, and the discharge of industrial or commercial wastes into sewers, where such sewers are tributary to DWSD'S treatment works. Such rules and regulations shall be consistent with and at least as stringent as all applicable provisions of the pertinent ordinances adopted by the City of Detroit, these being the 1979 amendments to Chapter 56, Article 1, and Chapter 56, Article 6, of the Municipal Code of the City of Detroit as they may be adopted and amended from time to time. In the event any municipality or other governmental unit shall fail to adopt an ordinance as required herein, or shall fail to diligently enforce the same, DWSD shall take appropriate action which may include suit in an appropriate court of general jurisdiction alleging such municipality's failure to adopt or enforce an ordinance, and following a hearing on the merits, should the court find that the allegations in DWSD'S petition are true, it is agreed that such court may, in such instance, grant appropriate injunctive relief against said municipality or any individual discharger there; terminate the municipality's contractual right to discharge waste waters into DWSD'S system and/or to grant DWSD such other relief as may be appropriate under the circumstances.
>
> [Emphasis added].

Collectively, these orders will be referred to herein as "Applicable Orders."

Next, the contracts cited by the GLWA are:

- 1983 Contract – On June 8, 1983, Detroit and Highland Park entered into a Sewage Service Contract. It provides in pertinent part:

> WHEREAS, an Amended Consent Judgment was entered in United States District Court Civil Action Numbers 77-71100 and 80-71613 which required all communities and agencies under contract with the City of Detroit for sewage treatment services to enact and diligently enforce sewer use and industrial waste control ordinances consistent with and at least as stringent as those of the City of Detroit…
> …

3. HIGHLAND PARK agrees that it shall adopt and enforce rules and regulations pertaining to the use, design and construction of sewers, and the discharge of industrial or commercial wastes into sewers, where such sewers are tributary to the BOARD's treatment works. Such rules and regulations shall be consistent with and at least as stringent as all applicable provisions of the pertinent ordinances adopted by the City of Detroit... as they may be adopted and amended from time to time. In the event any municipality or other governmental unit shall fail to adopt an ordinance as required herein, ... the BOARD shall take appropriate action which may include suit in an appropriate court of general jurisdiction alleging such municipality's failure to adopt or enforce an ordinance, and following a hearing on the merits, should the court find that the allegations in the BOARD's petition are true, it is agreed that such court may, in such instance, grant appropriate injunctive relief against said municipality or any individual discharger there; terminate the municipality's contractual right to discharge waste waters into the BOARD's system and/or to grant the BOARD such other relief as may be appropriate under the circumstances. These actions shall enable the BOARD to: [2]

A. Deny or condition new or increased contributions of pollutants or changes in the nature of pollutants, to the waste collection system by Industrial and Commercial Users. ...

B. Require compliance with applicable current and future National Pretreatment Standards and other more restrictive requirements as may be imposed by the BOARD promulgated by the U.S. EPA under the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq.

C. Control, through permit, contract order, or similar means, the contribution to the waste collection system by Industrial and Commercial Users to ensure compliance with paragraph B above.

...

G. Seek injunctive relief for noncompliance with National Pretreatment Standards and other more restrictive requirements as may be imposed by the BOARD.

...

[Emphasis added].

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[2] The "Board" as it is referred to in the contract is the Board of Water Commissioners.

- 1992 Delegation Agreement – On June 15, 1992, the parties entered into a delegation agreement, in which the City of Highland Park delegated to the Detroit Water and Sewerage Department "the right, privilege and authority to administer and enforce the industrial pretreatment provisions of its applicable wastewater ordinance…" The agreement provides in relevant part:

> WHEREAS, an Amended Consent Judgment was entered in United States District Court, Civil Action Numbers 77-71100 and 80-71614, which provided that all counties, communities and agencies under contract with the City of Detroit for sewage treatment services enact, or cause to be enacted, and to diligently enforce a sewer use and industrial waste control ordinance that is consistent with, and at least as stringent as, the sewer use and/or industrial waste control ordinance of the City of Detroit;
>
> WHEREAS, on September 30, 1985, the Michigan Department of Natural Resources approved the Industrial Pretreatment Program for the City of Detroit and designated the City of Detroit as the Control Authority throughout the POTW's service area, which includes the City of Highland Park in accordance with the Federal Regulations, 40 C.F.R. Part 403 (General Pretreatment Regulations) and Part 21 of the Rules (MAC R323.2162) of the Michigan Water Resource Commission and has continuing approval authority over said program;
>
> …
>
> WHEREAS, the DWSD, as the operator of the POTW, the recipient of, and the responsible party for compliance with, the terms and conditions of the National Pollutant Discharge Elimination System ("NPDES") Permit Number as issued by the Michigan Water' Resource Commission to the DWSD, and as Control Authority, must have authority and enforcement rights over Industrial Users and their discharges within the entire service area in order to promptly and effectively fulfill its legal obligations under the NPDES permit, 40 C.F.R. Part 403, MAC R323.2162, and as Control Authority;
>
> WHEREAS, the DWSD, as operator of the POTW, pursuant to 40 C.F.R. Part 403, is responsible for enforcement of the approved Pretreatment Program;
> …
>
> 1. Delegation. The City of Highland Park: hereby delegates and assigns the right, privilege and authority to administer and enforce the industrial pretreatment provisions of its applicable wastewater

> ordinance, as amended, to the BOARD with all necessary powers attendant to that administration and enforcement, including but not limited to the power to adopt rules and regulations for purposes consistent with said ordinances, and federal and state pretreatment standards, statutes, rules, regulations and requirements, and the BOARD is hereby designated the duly-authorized representative of the City of Highland Park for such purposes under the powers of said ordinance, which administration and enforcement would otherwise be the responsibility of the (sic) the City of Highland Park.
>
> 2. Discharge Limits. At all times, the City of Highland Park shall through local ordinances enact and keep current discharge limitations no less stringent than those of the DWSD. DWSD shall provide the City of Highland Park with Detroit's current wastewater ordinances or a model of the adopted current wastewater ordinances and discharge limitations and any amendments thereto as they become effective.
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> [Emphasis added].

Therefore, as a result of the 1980 Consent Judgment and 1980 Ordinance Order, the parties entered into the 1983 Service Contract and the 1992 Delegation Agreement. Both agreements provide that Highland Park is obligated to enact wastewater ordinances "consistent with, and at least as stringent as, the sewer use and/or industrial waste control ordinance of the City of Detroit." The Delegation Agreement also assigns Highland Park's "right, privilege and authority to administer and enforce the industrial pretreatment provisions of its applicable wastewater ordinance" to the City of Detroit. Thus, both agreements require that Highland Park "through local ordinances enact and keep current discharge limitations no less stringent than those of the DWSD."

Here, Highland Park has refused to adopt the new rules for wastewater treatment and to enact by resolution and/or ordinance, which is as "stringent as" the City of Detroit's Ordinance. As the GLWA has indicated, the other 77 of the 78 communities under the GLWA have

concurred in the new rules and have adopted ordinances or resolutions consistent with the new rules.

Now before the Court is the GLWA's motion for summary disposition and for declaratory and injunctive relief as well as Highland Park's motion for summary disposition. The motions will be addressed separately below.

II. STANDARDS OF REVIEW

A. Summary Disposition

Plaintiff GLWA bases its motion on MCR 2.116(C)(7) and MCR 2.116(C)(10). Defendant Highland Park bases its motion on MCR 2.116(C)(8).

MCR 2.116(C)(7) permits summary disposition "because of release, payment, prior judgment, [or] immunity granted by law." MCR 2.116(C)(7). "'When it grants a motion under MCR 2.116(C)(7), a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party.'" *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015), quoting *McLain v Lansing Fire Dep't,* 309 Mich App 335, 340; 869 NW2d 645 (2015). There are three requirements for res judicata to apply: (1) prior action must have been decided on its merits, (2) issues raised in second case must have been resolved in first, and (3) both actions must have involved same parties or their privies. *Limbach v Oakland Cnty Bd of Cnty Rd Com'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997).

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may consider only the pleadings in rendering its decision.

Id. All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, *supra* at 130.

In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "'Courts are liberal in finding a factual dispute sufficient to withstand summary disposition.'" *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018), quoting *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party ". . . may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116 (G)(4). If the opposing party fails to do so, the motion for summary disposition is properly granted. *Id.* at 363. Finally, a "reviewing court may not employ a standard citing the mere possibility that the claim might be supported by

evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden, supra* at 121.

B. Declaratory Relief

MCR 2.605(A) governs declaratory judgments and provides:

> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.
>
> [Emphasis added].

"The Declaratory Judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). A court has jurisdiction to issue a declaratory judgment only "[i]n a case of actual controversy." MCR 2.605(A). A case of actual controversy does not exist where the injury sought to be prevented is merely hypothetical. *Shavers, supra* at 589. The appropriate test is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co v Pacific Coal & Oil Co*, 312 US 270, 273; 61 S Ct 510; 85 L Ed 826 (1941). See also *State, Michigan Dept of Soc Services v Emmanuel Baptist Preschool*, 434 Mich 380, 411; 455 NW2d 1 (1990).

The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law

or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants. *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291; 732 NW2d 160 (2006). "An 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Groves v Dept of Corr*, 295 Mich App 1, 10; 811 NW2d 563 (2011).

C. Preliminary Injunction

The purpose of a preliminary injunction is to preserve the status quo so that upon final hearing the rights of the parties may be determined without injury to either party. *Michigan Council 25, AFSCME v County of Wayne*, 136 Mich App 21; 355 NW2d 695 (1984). The issuances of injunctions are extraordinary measures governed by court rule, specifically MCR 3.310(A). The rule provides that there must be a hearing on a motion for a preliminary injunction and the opposing party must be afforded notice of the hearing. "[T]he party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued." *Id.*

"There are four main factors to be considered in determining whether to grant a preliminary injunction: 'The trial court must evaluate whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued.'" [Footnote omitted] § 71:7 Preliminary injunctions, 3 Mich Ct Rules Prac, Forms § 71:7.

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." [Citation omitted] *Jeffrey v Clinton Tp*, 195 Mich App 260, 263–264; 489 NW2d 211 (1992).

Although "irreparable harm" is only one of four elements that must be shown before a court will order such an extraordinary remedy, it has often been called the most important element. Injunctive relief is granted only when judicial intervention is necessary to protect others' rights from irreparable injury.

> Irreparable damage, called the most important requirement for an injunction, must be likely and not merely a possibility. ... [A] plaintiff is threatened with "irreparable injury" when he or she is unlikely to be made whole by an award of monetary damages or some other legal, as opposed to equitable, remedy at the conclusion of the trial. Thus, an injury is irreparable if the damages are estimable only by conjecture and not by any accurate standard. The plaintiff need not show, however, that the injury is beyond all possibility of repair or compensation damages. Although the irreparable harm required to support the issuance of an injunction is generally not present when the plaintiff has a claim for money damages, an exception exists for when the money judgment will go unsatisfied absent equitable relief.
>
> [Emphasis added][Footnotes omitted]. 42 Am Jur 2d Injunctions § 33.

Irreparable harm consists of three factors that the Court must evaluate: "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Livonia Property Holdings, LLC v Farmington Road Holdings*, LLC, 2010 US Dist LEXIS 47595, 36 (ED Mich), quoting *Ohio ex rel Celebrezze v Nuclear Regulatory Comm'n*, 812 F2d 288, 290 (6th Cir 1987).

III. DISCUSSION

A. Highland Park's Motion

In its motion, Highland Park makes five arguments: (1) the GLWA's complaint fails to allege any violations by Highland Park of duty, state or federal regulation, or contract; (2) the GLWA's proposed rules improperly seek to amend the existing agreements because the rules would effectively increase costs; (3) the GLWA's allegations do not support a legal basis for an

injunction; (4) Highland Park has no legal obligation to concur in the rule changes because the rules effectively displace the existing enforceable agreements; and (5) the GLWA's request for declaratory relief fails because there is no case or controversy between the parties.

Preliminarily, the Court notes that Highland Park's arguments rest solely on the purported effect that the new rules would raise costs to Highland Park and, as such, contravenes existing agreements. This conflation is not the issue before the Court. The sole issue is whether communities or municipalities which are part of the GLWA are obligated to enact resolutions or ordinances that conform to the rules of the GLWA. In short, Highland Park's arguments focus primarily on the portions of the applicable agreements regarding fees and charges, rather than on the provisions relevant to the instant inquiry, which are those addressing the GLWA's authority to promulgate rules and those regarding Highland Park's obligation to enact ordinances and/or resolutions in concurrence with the rules.

As to Highland Park's first argument that the complaint fails to allege violations of its duty, state or federal regulations, or contract, this is patently false. The GLWA clearly alleges breaches of the applicable contracts and cites state law and federal regulations requiring new rules that must be implemented to prevent the discharge of toxic materials in industrial wastewater.

Highland Park does not argue that it is not in contempt of the prior orders. It merely claims that its only obligation is to approve the rules implemented by the GLWA. However, Highland Park failed to participate in the rulemaking process and never made its objections to the rules known during the notice and argument period. Highland Park effectively abstained from the process.

Pursuant to MCL 600.1701(g), parties may be subject to contempt "for disobeying any lawful order, decree, or process of the court." "In civil contempt proceedings, a trial court employs its contempt power to coerce compliance with a present or future obligation, including compliance with a court order, to reimburse the complainant for costs incurred as a result of contemptuous behavior, or both. "Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply." *In re Moroun*, 295 Mich App 312, 331-332; 814 NW2d 319 (2012), citing *Porter v Porter,* 285 Mich App 450, 455; 776 NW2d 377 (2009) and quoting *DeGeorge v Warheit,* 276 Mich App 587, 592; 741 NW2d 384 (2007).

"Michigan courts of record have the inherent common-law right to punish all contempts of court." *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499; 608 NW2d 105 (2000). "By statute, MCL 600.1701 courts have the power to punish parties to actions, attorneys and all other persons for disobeying any lawful order of the court." § 8:1. Contempt of court, in general, Trial Handbook for Michigan Lawyers § 8:1 (4th). A courts' inherent power to punish for contempt extends not only to contempt committed in the presence of the court, but also to "constructive contempt" arising from refusal of defendant to comply with an order of the court. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708-709; 624 NW2d 443 (2000).

Contempt in the instant case may be characterized as "indirect" or "constructive." "An indirect or constructive contempt is an act or omission, committed beyond the court's presence, which tends to obstruct or prevent adequate administration of justice." § 8:1. Contempt of court, in general, Trial Handbook for Michigan Lawyers § 8:1 (4th).

The 1980 Consent Judgment requires municipalities to adopt sewer use or industrial waste control ordinances which are at least as stringent as Detroit's ordinances. The 1980 Ordinance required that municipalities adopt ordinances or regulations which conform to applicable statutes and regulations of the United States and which are consistent with and at least as stringent as the provisions and principles set forth in the Detroit Industrial Waste Ordinance. Finally, the 2011 Order required that municipalities adopt and enforce rules and regulations for the discharge of industrial wastes into sewers, and that such rules and regulations shall be consistent with and at least as stringent as all applicable provisions of the pertinent ordinances adopted by the City of Detroit.

Highland Park has failed to comply with these orders. It claims that its current ordinances are stringent enough. However, they do not include the new rules promulgated by the GLWA, which the GLWA is empowered to promulgate under 124.284(1)(g). Highland Park's failure to participate in the rulemaking process does not excuse its obligation to adopt such rules through either resolution or ordinance. Hence, the GLWA has properly made a claim that Highland Park is in contempt of these valid orders. MCR 2.116(C)(8).

As to Highland Park's next contention that the GLWA seeks to raise charges, in the Court's view, the GLWA instead seeks to force Highland Park to adopt the rules, based on new scientific findings, designed to prevent the discharge of hazardous and toxic materials into industrial wastewater. In this regard, the GLWA has properly alleged that Highland Park has breached its contracts, namely the 1983 Contract and the 1992 Delegation Agreement.

To make a claim for breach of contract, a plaintiff must allege (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of

contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012).

In the instant case, both the 1983 Service Contract and the 1992 Delegation Agreement require Highland Park, through local ordinances or resolution to enact regulations to keep current discharge limitations that are no less stringent than those of the DWSD, which is now the GLWA. Highland Park has refused to do so. As to damages, the GLWA alleges that Highland Park's breaches of the contracts has damaged the GLWA by causing increased operational and administrative burdens limiting the GLWA's ability to improve environmental regulation and initiatives such as the PFAS program. Hence, the GLWA has properly made a claim for breach of contract. MCR 2.116(C)(8).

Highland Park also contends that the GLWA's allegations do not satisfy the requirements for the imposition of a preliminary injunction. It claims that injunctive relief would amount to a rescission of the existing contracts and that Highland Park has no duty to approve the new rules. Although the Court disagrees with Highland Park's characterization that injunctive relief would result in a rescission of the contracts and that Highland Park has no duty to approve the new rules, the Court does agree that a preliminary injunction is not proper in the current scenario.

In order to obtain a preliminary injunction, the moving party bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 648; 825 NW2d 616 (2012). This four-factor test requires the trial court to consider: (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the

merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).

As indicated above, irreparable harm consists of three factors that the Court must evaluate: "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Livonia Property Holdings, LLC v Farmington Road Holdings*, LLC, 2010 US Dist LEXIS 47595, 36 (ED Mich), quoting *Ohio ex rel Celebrezze v Nuclear Regulatory Comm'n*, 812 F2d 288, 290 (6th Cir 1987).

Such an injunction, although allowed under the applicable contracts and the applicable orders, is an improper remedy given the circumstances of this case. Rather, enforcement of the contracts and orders as well as declaratory relief are more appropriate remedies.

The GLWA alleges that Highland Park's refusal to enact a concurring resolution endangers the health and safety of residents, including GLWA who may be exposed to toxic pollutants and harmful contaminants discharged by Highland Park's commercial and industrial users. The harm alleged here for the purpose of injunctive relief is merely speculative. "'[A] particularized showing of irreparable harm ... is ... an indispensable requirement to obtain a preliminary injunction." The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008)[Footnotes omitted]. See also *Michigan AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 149; 809 NW2d 444 (2011)(A preliminary injunction requires a particularized showing of irreparable harm; an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural). Therefore, the GLWA has failed to state a claim for a preliminary injunction. MCR 2.116(C)(8).

Highland Park's last argument is that the GLWA has failed to state a claim for declaratory relief because there is no existing controversy. It claims that, because it has no duty to concur with the rules, no controversy exists between the parties. The Court disagrees.

As explained above, the declaratory judgment rule has been liberally construed to provide a broad, flexible remedy. *Shavers, supra.* In addition, MCL 124.284(1)(g) provides that "[t]he authority shall adopt rules and regulations by resolution of its governing body and with concurrence by resolution of constituent municipalities" and, under MCL 124.284a, these rules become "effective 30 days after the date of publication of the notice and the rules and regulations or the summary of the rules and regulations."

It should also be noted that the rulemaking procedures of the GLWA is subject to the Administrative Procedures Act, MCL 24.201, *et seq* ("the APA"). MCL 24.315. The definition of "agency" includes "a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action …" MCL 24.203(2)[Emphasis added]. "Generally, 'before the adoption of a rule, an agency ... shall give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments,' MCL 24.241(1)." *Slis v State*, 332 Mich App 312, 319–320; 956 NW2d 569 (2020). [3]

Highland Park failed to take part in the rulemaking process and the rules became effective 30 days "after the date publication the notice and the rules and regulations or the summary of the rules and regulations." MCL 124.284a. Hence, the rules are now effective and

[3] "The rulemaking process includes 'public hearings, public participation, notice, approval by the joint committee on administrative rules, and preparation of statements, with intervals between each process.'" *Bloomfield Tp v Kane*, 302 Mich App 170, 177; 839 NW2d 505 (2013)[Citation omitted].

the fact that Highland Park did not participate in the rulemaking process makes no difference and its concurrence is now required as long as it is a member of the GLWA and derives the benefits from the GLWA.

As the GLWA asserts, Highland Park's contention ignores its duties under the existing orders and contracts to adopt sewer use or industrial waste control ordinances which are at least as stringent as Detroit's ordinances. Highland Park clearly has not done so. Therefore, there is an "actual controversy" with respect to the applicable orders and contracts. MCR 2.605(A)(1).

Accordingly, the Court will deny Highland Park's motion as to the GLWA's contempt claim, the breach of contract claim, and the request for declaratory relief. The Court, however, will grant Highland Park's motion as to the GLWA's request for injunctive relief.

B. The GLWA's Motion

The GLWA first argues that summary disposition is proper because, under MCR 2.116(C)(7), the Applicable Orders, which constitute prior judgments, require Highland Park to adopt the new rules. Highland Park contends that it has no duty to concur in the new rules. Highland Park argues that the 2011 Order does not impose any obligation on Highland Park to adopt the new rules. It also claims that the prior rate settlement orders were abolished.

The Court disagrees with Highland Park's characterization of the 2011 Order. Attachment 2 of the 2011 Order enables DWSD to "[r]equire compliance with applicable current future National Pretreatment Standards and other more restrictive requirements as may be imposed by DWSD promulgated by the U.S. EPA under the Federal Water Pollution Control Act, 33 USC 1251 et seq. As indicated above, Attachment 2 of the 2011 Order states that "rules and regulations shall be consistent with and at least as stringent as all applicable provisions of the pertinent ordinances adopted by the City of Detroit." It also states that if "any municipality …

shall fail to adopt an ordinance as required herein… DWSD shall take appropriate action which may include suit in an appropriate court of general jurisdiction…" Notably, this section of Attachment 2 is part of the "Exclusive List of Surviving Applicable and Relevant Ratemaking Terms." It further provides that the "court may, in such instance, grant appropriate injunctive relief against said municipality…; terminate the municipality's contractual right to discharge waste waters into DWSD'S system and/or to grant DWSD such other relief as may be appropriate…"

Hence, the 2011 Order clearly states that the requirement for adoption of new rules clearly survived in the 2011 Order. Therefore, all Applicable Orders mandate Highland Park to adopt the new rules either through a resolution or a new ordinance. Accordingly, the Court grants the GLWA's motion pursuant to MCR 2.116(C)(7).

In addition, because Highland Park has refused to comply with the Applicable Orders, it is subject to the Court's contempt powers for disobeying lawful orders. *In re Moroun*, *supra; In re Contempt of Auto Club Ins Ass'n, supra.*

The GLWA next argues that summary disposition under MCR 2.116(C)(10) may be properly granted in its favor because there is no question of material fact that Highland Park breached the 1983 Contract and the 1992 Delegation Agreement by refusing to adopt a resolution concurring in the new rules.

To establish a claim for breach of contract, a plaintiff must establish both the elements of a contract and the breach of it. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). A plaintiff must also demonstrate that the contract was breached and that he or she suffered damages as a result. See *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 6-8; 516 NW2d 43 (1994).

Highland Park's breach of contract claim involves the interpretation of the parties' contracts. "The primary goal of contract interpretation is to honor the parties' intent. When the contract is unambiguous, the parties' intent is gleaned from the actual language used." *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 57; 698 NW2d 900 (2005) [Citations omitted]. "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.*" *Rory v Continental Ins Co,* 473 Mich 457, 468; 703 NW2d 23 (2005) [Emphasis in original].

A contract will be susceptible to only one interpretation if it is clear and unambiguous, however inartfully worded or clumsily arranged. *Farm Bureau Mut Ins Co,* 460 Mich 558, 566; 596 NW2d 915 (2003). On the other hand, a contract is ambiguous if its words may reasonably be understood in different ways. "When contractual language is unambiguous reasonable people cannot differ concerning the application of disputed terms to certain material facts, and summary disposition should be awarded to the proper party." *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 393; 837 NW2d 439 (2013) [Citations and quotation marks omitted].

No doubt exists that two contracts are involved in this case, the 1983 Service Contract and the 1992 Delegation Agreement. Under the 1983 Contract, Highland Park clearly and unambiguously agreed "that it shall adopt and enforce rules and regulations pertaining to …the discharge of industrial or commercial wastes into sewers," which "shall be consistent with and at least as stringent as all applicable provisions of the pertinent ordinances adopted by the City of Detroit." As indicated, the City of Detroit DWSD is no longer the water authority, but the GLWA has replaced it as the authority. By the 1992 Delegation Agreement, ceded its powers, authority, and privileges to the Detroit Water Board "to administer and enforce the industrial

pretreatment provisions of its applicable wastewater ordinance," and "[a]t all times, the City of Highland Park shall through local ordinances enact and keep current discharge limitations no less stringent than those of the DWSD."

Highland Park, thus far, has refused to adopt a resolution concurring with the GLWA's new rules. It claims that its current ordinances are sufficient. The relevant portions of Highland Park's current ordinance are as follows:

> 1043.01 PURPOSE; OBJECTIVES.
>
> (b) The objectives of this chapter are:
>
> (1) To prevent the introduction of pollutants into the wastewater system which will interfere with the operation of the system or contaminate the resulting sludge, or pose a hazard to the health or welfare of the people or of employees of the City of Detroit Water and Sewerage Department;
>
> 1043.02 AUTHORITY. By virtue of the obligations and authority placed upon the City of Highland Park and the City of Detroit by the Federal Water Pollution Control Act, also known as the Clean Water Act, as amended (33 U.S.C. §§ 1251 et seq.); the 1963 Constitution of the State of Michigan; Public Act 245 of 1929, as amended (M.C.L.A. 323.1 et seq.); M.S.A. 3.521 et seq.; the 1997 City of Highland Park Charter; the National Pollutant Discharge Elimination System (NPDES) permit for the City of Detroit Publicly Owned Treatment Works (POTW); the Consent Judgment in U.S. EPA v. City of Detroit et al., Federal District Court for the Eastern District of Michigan Case No. 77-1100, as amended; and existing or future contracts between the Board of Water Commissioners and suburban communities or other governmental or private entities; or by virtue of common law usage of the system, this chapter shall apply to every user contributing or causing to be contributed, or discharging, pollutants or wastewater into the wastewater collection and treatment system of the City of Detroit POTW.
>
> 1043.03 - DEFINITIONS
>
> (36) Pollutant means any dredged spoil, solid waste, incinerator residue, sewage garbage, sewage sludge, munitions, chemical

waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, or industrial, municipal and agricultural waste which is discharged into water.

(37) Pollution means the introduction of any pollutant that, alone or in combination with any other substance, can or does result in the degradation or impairment of the chemical, physical, biological or radiological integrity of water.

1043.04 DELEGATION OF AUTHORITY.

The City of Detroit, through the Detroit Water and Sewerage Department, as the State approved Control Authority, is authorized to administer and enforce the provisions of this chapter on behalf of the City of Highland Park. The City of Highland Park has executed and hereby ratifies its delegation agreement with the City of Detroit through the Detroit Water and Sewerage Department, which sets forth the terms and conditions of such delegated authority, consistent with this chapter, and shall allow the Detroit Water and Sewerage Department to perform the specific responsibilities of Control Authority pursuant to State and Federal law. (Ord. Unno. Passed 12-7-98.)

1043.05 DISCHARGE PROHIBITIONS.

(b) Specific Pollutant Prohibitions. No user shall discharge wastewater containing in excess of the following limitations:

(1) Compatible pollutants.
A. Any fats, oil or grease (FOG) in concentrations greater than 2,000 mg/l based on the average of all samples collected within a twenty-four hour period.
B. Any total suspended solids (TSS) in concentrations greater than 10,000 mg/l.
C. Any biochemical oxygen demand (BOD) in concentrations greater than 10,000 mg/l.
D. Any phosphorus in concentrations greater than 500 mg/l. Unless otherwise stated, all limitations are based upon samples collected over an operating period representative of a user's discharge, and in accordance with 40 C.F.R. Part 136.

(2) Noncompatible pollutants. No user shall discharge wastewater containing in excess of the following:
Total Arsenic (As) 1.0 mg/l
Total Cadmium (Cd) 2.0 mg/l
Total Copper (Cu) 4.5 mg/l

Total Cyanide (CN) 2.0 mg/l
Total Iron (Fe) 1,000.0 mg/l
Total Lead (Pb) 1.0 mg/l
Total Mercury (Hg) 0.005 mg/l
Total Nickel (Ni) 5.0 mg/l
Total Silver (Ag) 2.0 mg/l
Total Chromium (Cr) 25.0 mg/l
Total Zinc (Zn) 15.0 mg/l
Aroclor 1260 Polychlorinated Biphenyl (PCB)0.0005 mg/l
Total Polychlorinated Biphenyl (PCB) 0.001 mg/l
Total Phenolic Compounds which cannot be removed by the POTW treatment plant as determined by the EPA approved method or amendments thereto 0.5 mg/l

[Emphasis added].

The latest date indicated in the Highland Park ordinance that this Court can find is December 7, 1998. It clearly does not account for new science and makes no mention of PFAs. The new rules adopted by the 77 other communities address concerns about newly discovered harmful pollutants. In the Court's view, Highland Park's ordinance is insufficient to address those concerns. Highland Park not only refused to concur in the new rules by adopting a resolution, but it also refused to take part in the rulemaking process and never made known its objections before the promulgation of the rules. Therefore, there is no genuine issue of material fact that Highland Park has breached its duties under both contracts and must fulfill its obligation to memorialize its concurrence with the rules in a formal resolution. MCR 2.116(C)(10).

The GLWA's third argument is that the Court may declare the adopted rules effective because an actual controversy exists. The GLWA asserts that Highland Park has effectively concurred in the new rules by and through the applicable orders and applicable agreements but has refused to adopt a formal resolution memorializing its concurrence.

After the GLWA complied with all requirements for rulemaking, Highland Park failed to take part in the process. As this Court stated above, by virtue of MCL 124.284a, the rules

became effective 30 days after publication of notice and of the rules. Hence, the rules are now effective and the fact that Highland Park did not participate in the rulemaking process makes no difference and its concurrence is now required as long as it is a member of the GLWA and derives the benefits from the GLWA. Nevertheless, its refusal to adopt a formal ordinance has created an actual controversy. MCR 2.605(A). The facts alleged "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co v Pacific Coal & Oil Co, supra.* Therefore, the Court declares the new rules are effective and apply equally to Highland Park as to other GLWA communities. Highland Park must comply by adopting a formal resolution concurring in the rules or be held in contempt of this Court's order.

The GLWA's final argument is that injunctive relief is appropriate to preserve the status quo of an uncontaminated environment and an uncontaminated wastewater system. "Injunctive relief … issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Jeffrey, supra.* Irreparable harm consists of three factors that the Court must evaluate: "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Livonia Property Holdings, LLC, supra.* Here, there is no adequate remedy at law. However, although it would appear that there might be a substantial and likely injury, it is unknowable at the present.

As the Court stated above, although allowable under the 1983 and 1992 contracts and the Applicable Orders, an injunction is an improper remedy given the circumstances of this case. Rather, enforcement of the contracts and orders and declaratory relief are more appropriate remedies.

IV. CONCLUSION

Highland Park's motion for summary disposition as to the contempt claim, the breach of contract claim, and the declaratory relief claim is denied, but is granted as to the GLWA's claim for injunctive relief. MCR 2.116(C)(8).

All Applicable Orders mandate Highland Park to adopt the new rules either through a resolution or a new ordinance. Accordingly, the Court grants the GLWA's motion pursuant to MCR 2.116(C)(7) and finds Highland Park in contempt by its refusal to adopt a resolution concurring with the new rules. There is also no genuine issue of material fact that Highland Park has breached its duties under both contracts and must fulfill its obligation to memorialize its concurrence with the rules in a formal resolution. MCR 2.116(C)(10). The Court also grants the GLWA's motion for declaratory relief and declares the new rules effective and declares that the rules apply equally to Highland Park as to other GLWA communities. Highland Park must comply by adopting a formal resolution concurring in the rules or be held in contempt of this Court's order. Finally, the Court denies the GLWA's motion for injunctive relief.

V. ORDER

On the basis of the foregoing opinion;

A. "HIGHLAND PARK'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)"

IT IS ORDERED that the motion for summary disposition filed by Defendant City of Highland Park is hereby **DENIED** as to Plaintiff's claims for Contempt / Enforcement of Court Orders (Count I), Breach of Contract (Count II), and Declaratory Relief (Count III);

IT IS FURTHER ORDERED that the motion for summary disposition filed by Defendant City of Highland Park is hereby **GRANTED** as to Plaintiff's claim for Injunctive Relief (Count IV); and that Plaintiff's claim for Injunctive Relief (Count IV) is hereby **DISMISSED.**

B. "PLAINTIFF GREAT LAKES WATER AUTHORITY'S MOTION FOR SUMMARY DISPOSITION, DECLARATORY RELIEF, AND PRELIMINARY INJUNCTION"

IT IS ORDERED that "Plaintiff Great Lakes Water Authority's Motion for Summary Disposition, Declaratory Relief, and Preliminary Injunction" is hereby **GRANTED** as to its claims for Contempt/Enforcement of Court Orders (Count I), Breach of Contract (Count II), and for Declaratory Relief;

IT IS FURTHER ORDERED that the newly promulgated Rules of the Great Lakes Water Authority are hereby **EFFECTIVE** as to Defendant City of Highland Park;

IT IS FURTHER ORDERED that Defendant City of Highland Park shall adopt a formal resolution or enact an ordinance concurring in the newly promulgated Rules of the Great Lakes Water Authority within 60 days of the date of this Order;

IT IS FURTHER ORDERED that, if Defendant City of Highland Park fails to comply with this Order, it shall be subject to a fine of $1,000.00 for every day after 60 days has elapsed from the date of this Order it fails to comply with this Order;

IT IS FURTHER ORDERED that Plaintiff's motion is hereby **DENIED** as to its claim for Injunctive Relief (Count IV).

IT IS FURTHER ORDERED that this **RESOLVES** the last pending claim and **CLOSES** the case.

IT IS SO ORDERED.

DATED: 7/22/2022

/s/ Muriel D. Hughes 7/22/2022
Circuit Judge