STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
WILDER, P.J., AND TALBOT AND SERVITTO, J.J.

MAJESTIC GOLF, LLC, a Michigan limited liability company,

Plaintiff / Counter-Defendant – Appellee,

v

LAKE WALDEN COUNTRY CLUB, INC., a Michigan corporation,

Defendant / Counter-Plaintiff – Appellant.

Supreme Court
No. 145988

Court of Appeals
No. 300140

Livingston County Circuit Court
No. 09-24146-CZ

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APPELLEE'S SUPPLEMENTAL BRIEF
IN REPLY TO AMICI CURIAE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

INTRODUCTION 1

COUNTER-STATEMENT OF FACTS 4

LEGAL ARGUMENTS 5

I. THE GOLF COURSE GROUND LEASE AT ISSUE WAS PROPERLY TERMINATED, IN ACCORDANCE WITH ITS CLEAR AND UNAMBIGUOUS TERMS, FOR DEFENDANT'S DEFAULT IN THE PERFORMANCE OF ITS CLEARLY DEFINED OBLIGATION, UNDER PARAGRAPH 22 OF THE LEASE, TO PROVIDE ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT. 5

RELIEF 25

INDEX OF AUTHORITIES

Cases

Bloomfield Estates Improvement Ass'n of Birmingham, 479 Mich 206; 737 NW2d 670 (2007) 6

Foundation Development Corporation v Loehmann's, Inc., 163 Ariz 438; 788 P2d 1189 (1990) 14

Geno Enterprises, Inc. v Newstar Energy USA, Inc. (Unpublished, Docket No. 232777, *rel'd* 6-5-03) 12, 13

Plaza, Inc v SS Kresge Co, 32 Mich App 724; 189 NW2d 346 (1971) 22

Rory v Continental Insurance Co., 473 Mich 457; 703 NW2d 23 (2005) ..... passim

Rose v National Auction Group, 466 Mich 453; 646 NW2d 455 (2002) 21

Walker & Company v Harrison, 347 Mich 630; 81 NW2d 352 (1957) 10

Wilkie v Auto-Owners Insurance Co., 469 Mich 41; 664 NW2d 776 (2003) 1, 2, 6, 11

Other Authorities

15 *Williston on Contracts* § 44:52 (4th ed. 2009) 22

27A *American Jurisprudence 2d*, Equity § 45 (Thomson-West, 2008) 11

49 Am Jur 2d, Landlord and Tenant, § 236 19

49 Am Jur 2d, Landlord and Tenant, § 237 19

INTRODUCTION

This Supplemental Brief is respectfully submitted on behalf of Plaintiff – Appellee Majestic Golf, LLC ("Majestic Golf") to respond to arguments presented in the *Amicus Curiae* briefs filed in this matter by the Home Builders Association of Michigan and the Michigan Golf Course Owners Association.

The Appellant's Brief filed in this matter on behalf of Defendant Lake Walden Country Club, Inc. ("LWCC") has presented this Court with conflicting messages and inconsistent requests for relief. Its newly-retained appellate counsel have opened their presentation by citing this Court's holdings in *Rory v Continental Insurance Co.*, 473 Mich 457; 703 NW2d 23 (2005) and *Wilkie v Auto-Owners Insurance Co.*, 469 Mich 41; 664 NW2d 776 (2003) – that clear and unambiguous contract language must be enforced as written – and invoking that well-established principle in support of their argument that the trial court and the Court of Appeals have both erred in finding a default of the Lease agreement at issue. But having advocated that position, requesting a reversal of the lower court decisions on this point, LWCC's new counsel have then proceeded to address an alternative basis for relief in the last few pages of their brief.

The theory supporting that alternative – that enforcement of a clear and unambiguous forfeiture provision of a commercial lease may properly be denied based upon an equitable weighing of the materiality of the breach – is plainly inconsistent with this Court's decisions in *Wilkie* and *Rory*, and is therefore inconsistent with the position taken in support of LWCC's first argument. Indeed, the Appellant's Brief reflects an uncomfortable recognition of that inconsistency. Having invoked *Wilkie* and *Rory* to request reversal of the lower courts' factually-driven conclusions that a breach of the Lease was established as a matter of

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law by the evidence presented to the trial court, LWCC's new appellate counsel have not suggested that the Court of Appeals decision was incorrect with respect to the materiality issue, nor have they presented any forceful argument that this Court ***should*** adopt a new rule, inconsistent with *Rory and Wilkie,* providing that enforcement of a clear and unambiguous forfeiture provision may be denied based upon an individual trial judge's weighing of materiality – a process which could be expected to yield widely differing results in different cases, depending upon the judicial philosophies of the individual trial and/or appellate court judges. Defendant LWCC has merely suggested that this Court has authority to alter the common law, that the Court is therefore empowered to adopt a new rule creating such an exception, and that it should do so "if this Court wishes to narrow the scope of the common law created by *Wilkie* and its progeny to allow a landlord to terminate a lease only where the tenant's default is material." (Appellant's Brief, pp. 36-37, 42)

Appellant's Reply Brief includes the same prayer for relief, but does not address the materiality issue at all, except to state that: "As the steward of the common law, it is certainly within this Court's power to adopt a rule balancing contract and real property interests. LWCC relies on its Brief on Appeal and the briefs of amici for this alternative argument." (Appellant's Reply Brief, p. 10)

Although the materiality issue was not given significant attention in LWCC's Reply Brief, it now appears that its discussion of the question was not concluded by the submissions of its new appellate counsel. That issue has now been addressed in greater detail by *Amicus Curiae* briefs filed by the Home Builders Association of Michigan and the Michigan Golf Course Owners Association. The Court should note, however, that these *Amicus Curiae* briefs were both filed on the same date by the very same attorneys who represented Defendant

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LWCC in all of the lower court proceedings. The Court should also note, in this regard, that Mr. McClelland's law firm has also been involved in assisting LWCC's efforts in opposition to Plaintiff's interests as early as 2003.[1]

In light of these unusual circumstances, it is apparent that these are not *Amicus Curiae* briefs in the normal sense. They should instead be seen as what they appear to be – a continuation of Defendant LWCC's presentation. Indeed, Defendant's Reply Brief has expressly acknowledged that it is relying upon the briefs of these *Amici* for presentation of its arguments regarding the materiality issue. Under these rather unique circumstances, it is necessary and appropriate to submit this Supplemental Brief in response to these *Amicus Curiae* briefs to ensure that the Court is properly informed by a fairly balanced discussion of the issues presented.

[1] See, Appellee's Brief, p. 9.

COUNTER-STATEMENT OF FACTS

The pertinent facts of this matter have been sufficiently addressed, with proper citations to the record, in the previously-filed Appellee's Brief.

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LEGAL ARGUMENTS

I. THE GOLF COURSE GROUND LEASE AT ISSUE WAS PROPERLY TERMINATED, IN ACCORDANCE WITH ITS CLEAR AND UNAMBIGUOUS TERMS, FOR DEFENDANT'S DEFAULT IN THE PERFORMANCE OF ITS CLEARLY DEFINED OBLIGATION, UNDER PARAGRAPH 22 OF THE LEASE, TO PROVIDE ITS CONSENT TO THE REQUESTED ROAD CROSSING EASEMENT.

The *Amici* have correctly noted that the material breach doctrine has been recognized and often applied in Michigan. Application of that doctrine has been useful and appropriate in cases where a contractual agreement has not specified a remedy for the breach in question, and the court must therefore decide whether the breach was sufficiently severe and important to warrant a rescission of the contract, or to justify a repudiation of an obligation imposed thereby. But as Plaintiff has noted previously, Michigan's reported appellate decisions have not applied the material breach doctrine to commercial leases that include a clear and unambiguous forfeiture provision allowing termination of the lease and forfeiture of improvements as the agreed-upon remedy for a tenant's breach of the lease.

Although the decisions have often noted that forfeitures are not favored and that forfeiture provisions will therefore be strictly construed, this Court has long recognized that a clear and unambiguous forfeiture provision should be enforced when a properly established breach falls within the strictly construed scope of its coverage. The principle is not a new one, as the authorities cited in the original Appellee's Brief have shown, but it is a principle which has received greater recognition in the more recent decisions of this Court which have emphasized that clear and unambiguous contract language must be enforced as written.

No reported Michigan authority permits a weighing of "materiality" in a case such as this, where a default is clearly shown and the lease agreement in question has clearly and

specifically authorized termination of the lease as an agreed-upon remedy for the established default. Denial of Plaintiff's right to enforce that remedy based upon a judicial weighing of materiality is contrary to the well-established precedents of this Court holding that clear and unambiguous contractual language must be enforced as written. Furthermore, even if a weighing of materiality could be found appropriate, there was no basis for the trial court's finding that the breach establishing the default was not material under the circumstances of this case.

The Home Builders Association of Michigan has acknowledged this Court's holdings in *Rory v Continental Insurance Co.*, 473 Mich 457; 703 NW2d 23 (2005) and *Wilkie v Auto-Owners Insurance Co.*, 469 Mich 41; 664 NW2d 776 (2003), that clear and unambiguous contract language must be enforced as written, but suggests that those decisions are distinguishable because they involved interpretation of insurance contracts, as opposed to an agreement establishing a leasehold interest in real property. The Home Builders Association has not offered any persuasive rationale for drawing a distinction based upon this insignificant difference, and it appears to have overlooked the Court's subsequent decision in *Bloomfield Estates Improvement Ass'n of Birmingham*, 479 Mich 206, 212-213; 737 NW2d 670 (2007), which cited *Rory* with approval in a case involving enforcement of deed restrictions. The Court aptly noted, in that case, that the freedom of contract "deeply entrenched" in Michigan common law allows parties the freedom to define the scope of their rights and obligations with the expectation that those rights and obligations will be enforced as *they* have chosen. Thus, unambiguous contracts are not open to judicial construction, and must be enforced as written unless a particular contractual provision is found to be in violation of law or public policy:

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"A deed restriction represents a contract between the buyer and the seller of property. *Uday v City of Dearborn*, 356 Mich 542, 546; 96 NW2d 775 (1959). **"Undergirding this right to restrict uses of property is, of course, the central vehicle for that restriction: the freedom of contract, which is . . . deeply entrenched in the common law of Michigan.**" *Terrien, supra* at 71 n 19, citing *McMillan v Mich S & N I R Co*, 16 Mich 79 (1867). The United States Supreme Court has listed the "right to make and enforce contracts" among "those fundamental rights which are the essence of civil freedom." *United States v Stanley*, 109 US 3, 22; 3 S Ct 18; 27 L Ed 835 (1883). **We "respect[] the freedom of individuals freely to arrange their affairs via contract" by upholding the "fundamental tenet of our jurisprudence. . .that unambiguous contracts are not open to judicial construction and must be *enforced as written*," unless a contractual provision "would violate law or public policy."** *Rory v Continental Ins Co*, 473 Mich 457, 468, 470; 703 NW2d 23 (2005) (emphasis in original). As one court has stated:

> "Courts do not make contracts for parties. Parties have great freedom to choose to contract with each other, to choose not to do so, or to choose an intermediate course that binds them in some ways and leaves each free in other ways. [*Rarities Group, Inc. v Karp*, 98 F Supp 2d 96, 106 (D Mass, 2000).]"

" 'Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains. . . .' " *Fed Deposit Ins Corp v Aetna Cas & Surety Co*, 903 F2d 1073, 1077 (CA 6, 1990), quoting *St. Paul Mercury Ins Co v Duke Univ*, 849 F2d 133, 135 (CA 4, 1988). Because the parties have freely set forth their rights and obligations toward each other in their contract, when resolving a contractual dispute, "society is not motivated to do what is fair or just in some abstract sense, but rather seeks to divine and enforce the justifiable expectations of the parties as determined from the language of their contract." *Rich Products Corp v Kemutec, Inc.*, 66 F Supp 2d 937, 968 (ED Wis, 1999). Rather than attempt to apply an abstract notion of "justice" to each particular case arising out of a contract, we recognize that refusal to enforce a contract is "contrary to the real justice as between [the parties]." *Mitchell v Smith*, 1 Binn 110, 121 (Pa, 1804). See also *Brown v Vandergift*, 80 Pa 142, 148 (1875)

> (holding that enforcing a contract is "essential to do justice"). **Consequently, when parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not "contrary to public policy."** *Sands Appliance Services, Inc. v Wilson,* 463 Mich 231, 239; 615 NW2d 241 (2000). When contracts are formed, the parties to the contract are the lawmakers in such realm and deference must be shown in their judgments and to their language as with regard to any other lawmaker."
>
> (479 Mich at 212-213 – Bolding emphasis added)

There is no basis for denial of the requested enforcement on grounds of "public policy." As this Court emphasized in *Rory,* the determination of Michigan's public policy is not a matter of judicial preference; such policies must be "clearly rooted in the law." 473 Mich at 470-471. Defendant LWCC and its *Amici* have not identified any legal basis for a finding that enforcement of the forfeiture provision in question would be contrary to public policy.

On page 9 of its amicus brief, the Homebuilders Association has suggested that there is a need for this Court to establish "a balance between contract and real property law," but has failed to demonstrate a need to do so with respect to this issue. Although a lease creates an interest in real property which may be enjoyed and enforced by the tenant during its defined term, it is a contractual agreement between landlord and tenant which grants the leasehold interest subject to the specific terms prescribed therein. As a contractual agreement, a lease is subject to established principles of contract law, including the well-established rule that clear and unambiguous terms must be enforced as written, and must therefore be interpreted and enforced in accordance with those principles. This is not a new concept. As previously discussed, the reported decisions of this Court have often noted that forfeitures are

generally disfavored, but have also recognized that a clear and unambiguous forfeiture provision of a lease can, and should be enforced as written when a breach clearly falling within its strictly construed scope has been established. The proper adjudication of the dispute at issue in this matter does not require any refinement of these principles, and the *Amici* have not shown any legitimate need for the exception they propose.

On page 10, of its brief, the Homebuilders Association has stated that the Court of Appeals Opinion in this case will "require the automatic forfeiture of real property interests upon declaration of a breach of one of any number of the terms of the parties' contract – no matter how trivial" unless the contract violates the law or public policy, or "one of the five 'traditional contract defenses' (specifically, duress, waiver, estoppel, fraud or unconscionability) from *Rory* applies." This statement is an exaggeration of the Court's holding for two reasons. First, the "declaration of a breach" must obviously be upheld as legitimate by a proper judicial adjudication, as it was in this case, if the existence of the breach is contested.

Second, and most importantly, the listing of "traditional contract defenses" was not intended to be exhaustive by the Court of Appeals in this case, or by this Court in *Rory*. In this case, the Court of Appeals recognized, as this Court did in *Rory*, that enforcement of a clear and unambiguous contract provision may be avoided based upon application of "recognized traditional contract defenses," which could **include** duress, waiver, estoppel, fraud and unconscionability. 297 Mich App at 326. This was fully consistent with this Court's observation, in *Rory*, that: "**Examples** of traditional defenses **include** duress, waiver, estoppel, fraud, or unconscionability." 473 Mich at 470 fn. 23 (Emphasis added). Thus, it may be seen that enforcement of a contractual forfeiture provision may still be challenged on

the basis of any "recognized traditional contract defense" which can be properly supported by the evidence. The well-reasoned decision of the Court of Appeals in this matter has done nothing to change this.

The Court of Appeals appropriately found that unconscionability was the only recognized defense that could possibly be relied upon here, and properly concluded that application of the forfeiture provision could not be found unconscionable under the circumstances of this case. 297 Mich App at 326-327. In this case, there has been no claim of mistake, overreaching, misrepresentation, or fraud in the inducement. The parties on both sides are sophisticated businessmen, ably assisted by competent counsel, who have dealt with each other at arm's length to reach the agreement now at issue. They have agreed that the lease may be terminated at the lessor's option, in accordance with the specified procedures, for any of the forms of default defined therein. The default is clear, as the trial court and the Court of Appeals have correctly found, and the termination has been properly declared in accordance the clear terms of the lease. There is no basis to conclude that enforcement of the parties' agreement would be unconscionable, as the Court of Appeals has also correctly held.

On pages 15 through 17 of its brief, the Homebuilders Association argues, without citation of supporting authority,[2] that the material breach doctrine is, itself, a "traditional

[2] The Homebuilders Association's argument is not supported by its citation of this Court's decision in *Walker & Company v Harrison*, 347 Mich 630; 81 NW2d 352 (1957), because the facts of that case are dramatically different from the facts of this case. In *Walker*, where the plaintiff sought damages for breach of contract, the Court considered whether an alleged prior breach by the plaintiff was sufficiently material to justify the defendants' repudiation of the contract at issue. That question was not addressed by the terms of the contractual agreement, which did not specify a remedy for a prior breach, and thus, there was no issue as to whether a contractually provided remedy could be conditioned upon the materiality of an alleged breach.

contract defense" which may properly be invoked to defeat the requested enforcement.[3] It is not. As previously discussed, the materiality of the breach may be raised in defense against a request for termination or forfeiture in cases where there is no clear contractual language to be enforced, but it is not a defense to enforcement of a clearly stated remedy. This suggestion that the material breach doctrine be considered a "traditional contract defense" sufficient to avoid enforcement of a clearly defined agreed-upon remedy is an invitation to adopt an exception which would completely swallow the rule, expressed in *Rory* and *Wilkie*, that clear and unambiguous contractual language must be enforced as written – an invitation which this Court should decline.

On pages 11 through 14 of its brief, the Michigan Golf Course Owners Association has suggested that there should be no distinction between rescission and enforcement of a forfeiture provision. This suggestion misses the mark because there ***is*** an important distinction, and the reason for it is simple – enforcement of a forfeiture provision is the implementation of a specific bargained-for remedy for breach provided by the terms of the lease agreement, while rescission requires an equitable determination of whether termination of the contract is warranted for the particular breach when the contract has not stated when, or if, a termination or forfeiture may be declared.[4] There are two types of lease forfeiture cases –

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[3] On page 16, the Homebuilders Association changes course to acknowledge that this Court's listing of traditional contract defenses in *Rory* was "expressly by way of example only."

[4] On page 12 of its brief, the Golf Course Owners Association has characterized forfeiture as an equitable claim. This characterization is inaccurate because enforcement of a forfeiture does not compel the performance of a contractual duty or seek to excuse a breach or repudiation based upon equitable considerations; it is, instead, a straightforward application of a specifically provided remedy for breach of the lease agreement. As the authors of *American Jurisprudence* have aptly noted, "[e]quity generally lacks jurisdiction over an action for breach of contract because a right provided by contract is, by definition, legal and not equitable." 27A *American Jurisprudence 2d*, Equity § 45, p. 585 (Thomson-West, 2008)

those where there is a forfeiture clause, and those where there is not. In cases such as this, where there is a clear and unambiguous forfeiture clause, it is not a matter of deciding what the remedy should be; it is, instead, a straightforward matter of enforcing the bargained-for remedy that the parties have agreed upon.

On page 12, the Golf Course Owners Association asserts that Plaintiff has not cited any case where a Michigan Court has considered and rejected the material breach doctrine. This, also, is an exaggeration. Plaintiff's prior submissions have cited decisions of this Court which **have** enforced clear and unambiguous forfeiture clauses in commercial leases, notwithstanding the general aversion to forfeitures noted in those decisions.[5] The Court did not apply any weighing of materiality or other equitable considerations in those cases, and it may reasonably be assumed that the Court did not do so because it felt obliged to enforce the clear terms of the parties' agreements, however distasteful that duty may have seemed in a particular case.

The *Amici* have noted that the Court of Appeals upheld a trial court's refusal to enforce a clear and unambiguous forfeiture provision in a commercial lease based upon a weighing of materiality in the case of *Geno Enterprises, Inc. v Newstar Energy USA, Inc.* (Unpublished, Docket No. 232777, *rel'd* 6-5-03),[6] and that the trial court's refusal to enforce the forfeiture provision in this case was based, in large part, upon that decision. The trial court's reliance upon *Geno* was misplaced for two reasons. First, the Court's decision in *Geno* – the ***only*** Michigan decision which has upheld a refusal to enforce a clear and unambiguous

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[5] *See,* Appellee's Brief, pp. 44-46.

[6] The *Amici* have submitted copies of the *Geno* decision as attachments to their respective amicus briefs. It is noteworthy that Defendant LWCC has not cited *Geno* to this Court in either of its briefs.

forfeiture provision in a commercial lease based upon a weighing of materiality – was not binding as authority under the doctrine of *stare decisis* because it is unpublished.

Second, and more importantly, *Geno* is plainly inconsistent with the numerous published decisions, previously discussed, which have made it clear that unambiguous contracts, including those providing for termination and forfeiture as a remedy for default, must be enforced as written. This inconsistency is a likely explanation of why the Court's decision in *Geno* was issued as an unpublished opinion, and why that decision was not discussed by the Court of Appeals in this case. It is noteworthy that a request for publication of the Court of Appeals' decision in *Geno* was made, and **denied by the hearing panel**, as evidenced by the Court's online docket printout for that case. No application for leave to appeal to this Court was pursued in that case. This Court should also note, in this regard, that the denial of publication in *Geno* may also have been prompted by the Court's realization that it had been unnecessary to discuss the materiality issue at all in light of its separate conclusion that the trial court had improperly rejected the lessee's claim that the plaintiff lessor had waived its right to declare a forfeiture for the breach in question.[7]

The cited decisions from other states are also unhelpful to the extent that they are inconsistent with these well-established principles of Michigan law. It appears that many of the foreign decisions cited on Defendant's behalf are consistent with the Michigan decisions

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[7] See pages 8 and 9 of the Westlaw Opinion submitted as attachments to the *Amicus Curiae* briefs. With respect to this issue, the *Geno* panel stated that "GEI clearly waived its right to forfeit the lease based on the failure to provide seismic data relating to the Geno 1-18 well, drilled in 1995. . ." (Opinion, p. 9) This finding of waiver was fully sufficient, in itself, to deny enforcement of the requested forfeiture and uphold the trial court's decision, and thus, it was unnecessary for the *Geno* Court to consider whether enforcement could also be denied based upon a weighing of materiality. As Plaintiff Majestic Golf has discussed in its prior submissions, the evidence presented to the trial court did not provide any support for a finding of waiver in this case.

discussing the general rule requiring a material breach for repudiation or rescission of a lease or other contract in cases where there is no contractual provision establishing termination and forfeiture as an available remedy for a breach. Others appear to be consistent with the reported Michigan authorities discussing enforcement of lease provisions authorizing termination and forfeiture discussed in the previously-filed Appellee's Brief.

It may be acknowledged that some of the foreign decisions discussed in these amicus briefs have held that enforcement of a clearly applicable forfeiture provision may be denied if the court determines, as a matter of equity, that the breach or default in question was not material. These decisions are unhelpful because they are plainly inconsistent with the controlling decisions of this Court which have repeatedly held that clear and unambiguous contractual remedies must be enforced as written because *our* courts are not in the business of rewriting contractual agreements.

The foreign decisions which have refused to enforce clear and unambiguous forfeiture provisions based upon a weighing of materiality are less deferential to freedom of contract, and more open to expansive interpretation of statutory enactments than this Court's decisions have found to be appropriate. The Arizona Supreme Court's decision in *Foundation Development Corporation v Loehmann's, Inc.*, 163 Ariz 438; 788 P2d 1189 (1990) – the case most prominently cited in the amicus briefs – is a good example. In that case, the lease in question included a clear and unambiguous forfeiture clause, similar to the one involved here, which allowed the landlord to terminate the lease for any uncured failure to pay rent or other charges. 788 P2d at 1190-1191. There was also a statute on point, which granted the landlord an unqualified right to terminate the lease for a breach of any lease provision, with or without a contractual provision establishing that right. *Id.* at 1193-1194. Nonetheless, the Arizona

Court concluded that the lease did not permit a forfeiture for the alleged non-payment because the tenant's delay in making payment was not a material breach, and held that "absent some express statement of legislative intent, we are hesitant to believe that, in enacting A.R.S. § 33-361, the legislature intended to permit forfeitures under any and all circumstances..." *Id.* This analysis is plainly inconsistent with the governing precedents of this Court which require enforcement of clear contractual language as written and interpret statutory enactments based upon what the clear statutory language ***does*** say, without assumptions based upon statements that the Legislature ***could*** have included.

Defendant LWCC and its *Amici* have not shown that there is any valid reason for departure from this Court's precedents requiring enforcement of clear and unambiguous contract terms. On the first page of their respective briefs, each of the *Amici* has asserted that it "seeks to oppose laws and court decisions which delay, restrict or otherwise impede" the ability of its members to conduct their business – to "construct affordable housing in Michigan" in the case of the Home Builders Association, and to "conduct golf business in Michigan" in the case of the Golf Course Owners Association. The Golf Course Owners Association complains that the decision of the Court of Appeals will ultimately result in the closure of the golf course,[8] and states that it "obviously opposes this result." The Home Builders Association complains that the Court of Appeals decision will allow parties to terminate building contracts for "trivial or non-material breaches," and predicts that strict enforcement of forfeiture clauses will discourage real estate investment, and thus, real estate

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[8] The Court should note that there is no basis in the record for any assumption that the enforcement of the forfeiture clause will result in a closure of the golf course for any period of time longer than may be required for a prompt resumption of its operation under new management.

development. On pages 17 and 18 of its amicus brief, the Home Builders Association laments that this will negatively affect the banking and development industry, the insurance industry and the real estate industry, and makes a dire prophesy that enforcement of forfeiture clauses as written will bring real estate development to "a screeching halt."

Plaintiff trusts that this Court will not be swayed by these hysterical prognostications. Enforcement of clear and unambiguous forfeiture provisions in commercial leases will not cause the sky to fall or lead to a collapse of our economy. To the contrary, it is more reasonable to predict that this, like the enforcement of bargained-for remedies in other contexts, will be beneficial for business interests and the economy in general, because contracting parties will be assured that the remedies they have bargained for will be enforced as written, and will not be nullified by an individual judge's feeling that enforcement would not be "equitable." Certainty of obligations and consequences is essential to sound business planning, and will therefore promote, rather than hinder, development of business ventures in Michigan. This will be as true for the *Amici* and their respective members as it is for all other entrepreneurs.

If contracting parties know that they will be held to the agreements that they make, they will take care to ensure that they understand, and are willing to be bound by, the terms of the leases they sign. Many tenants may insist that forfeiture be allowed for material breaches only, and if that is agreed upon, appropriate limiting language may be included in the lease to express that agreement. But some lessors may find it appropriate to insist upon an unconditional forfeiture clause, and in that event, prospective tenants may, or may not, wish to lease their properties. These are choices that landlords and tenants should be allowed to make as *they* choose. And again, as this Court held in *Rory,* enforcement of a clear and

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unambiguous forfeiture provision can still be avoided based upon application of recognized traditional contract defenses, which could include duress, waiver, estoppel, fraud and unconscionability, in cases where a proper basis for establishment of any such defenses may be found.

The *Amici* have proposed a special exception for commercial leases, but they have not shown that there is any need for such an exception which could justify the uncertainty and unnecessary limitation of freedom of contract which would inevitably result. Plaintiff Majestic Golf respectfully suggests that if such an exception is to be established, it should be established by duly enacted legislation, not by a decision of this Court. Thus, the concerns expressed by these *Amici* would be more appropriately addressed to the Legislature.

The Golf Course Owners Association has devoted considerable discussion to defense of the trial court's finding that the breach was not material. Plaintiff Majestic Golf contends that the trial court's finding on this point was not supported, and respectfully suggests that this case does not present a necessity or appropriate opportunity for consideration of the legal issue, even if a weighing of materiality might be found appropriate in other cases such as this, because there was clearly no basis for the trial court's finding that the breach was not material under the circumstances of this case. The facts disclosed in discovery and presented to the trial court in this matter point with compelling force to the conclusion that: 1) LWCC's continuing failure to execute and deliver the required consent was a flagrant and willful disregard of a clearly-stated obligation of great importance to Majestic Golf and Waldenwoods – a violation which was committed and continued in bad faith as a means for thwarting Waldenwoods' development of its adjoining property and/or securing an unfair advantage in the negotiation of the contemplated merger; and 2) Majestic Golf and

Waldenwoods were harmed by this continuing breach because the resulting inability to secure the necessary easement has prevented the completion and approval of the master plan for their long-desired planned development. Under these circumstances, the trial court's conclusion that the breach was not material is puzzling.

As previously discussed, the provisions of Paragraph 22 were included in the lease agreement for a very important reason. The golf course was but one part of the Crouse family's long-range plan to develop its property in Hartland Township into a first-class residential-recreational community. The right to secure approval of utility and road crossing easements was specifically reserved in Paragraph 22 to ensure that the planned developments of Waldenwoods' adjoining property could be tied together cohesively. (Crouse Affidavit, ¶¶ 4-5 – Apx. p. 103a) As Mr. Crouse noted in his correspondence of October 27, 2006, the easement at issue in this case was required for connection of two separate segments of Waldenwoods' adjoining property. (Crouse Affidavit, ¶ 8 – Apx. p. 105a-105a; Correspondence of October 27, 2006 – Apx. pp. 56b-59b)[9]

Securing LWCC's consent to the easement was also a matter of great importance because approval of the road crossing easement was a necessary precondition for finalizing Waldenwoods' master plan for its planned development. Mr. Crouse's Affidavit has explained that without the road crossing easement, Waldenwoods could not complete its master plan and obtain Hartland Township's approval for the planned development. (Crouse Affidavit, ¶ 8 – Apx. pp. 104a-105a). Thus, LWCC's continuing failure to execute and

[9] The need for the road crossing easement to join the parcels in the central and northwest segments of the adjoining property may be better understood upon examination of the reduced Site Plan 1c included in the Appellee's Appendix at page 47b. The full-size Site Plan (Complaint, Exhibit 2) is also available for the Court's examination.

deliver the required consent to the road crossing easement has thwarted Waldenwoods' ability to complete its master plan and obtain the desired Township development approval. (Crouse Affidavit, ¶ 16 – Apx. pp. 107a-108a) The occurrence of this very substantial harm has not been disputed by any of the affidavits or other documentary evidence offered in support of, or opposition to, the cross-motions for summary disposition filed in this case.[10]

The Court should note that the trial court's decision appears to have been based, in large part, upon its erroneous belief that the general rule across the country prohibits forfeiture "in the absence of willful and culpable neglect on the part of a lessee." (Trial Court Opinion, Apx. p. 44a) This belief appears to have been instrumental in light of the court's subsequent conclusion, despite the compelling evidence to the contrary, that "[i]t is uncertain whether defendant's breach was willful." (*Id.*, Apx. p. 46a) This reasoning was erroneous for three reasons. First, as previously discussed, the resolution of this case must be governed by controlling Michigan law, not by inconsistent decisions of other states. Second, there is no general recognition that enforcement of a forfeiture requires a showing of willful and culpable neglect. The authority cited by the trial court for this belief – 49 Am Jur 2d, Landlord and Tenant, § 236 – addresses termination and forfeiture in general. The next section – § 237 – addresses cases like the present one, where termination and forfeiture are sought pursuant to a specific forfeiture clause. That section states, quite differently, that "where a lease contains a default clause, but the breach of the lease, while not insignificant, is also not material, (that is,

[10] The trial court suggested that the breach was not material because harm resulting from the withholding of the easement may be compensated by money damages. (Trial Court Opinion – Apx. p. 46a) This assumption was inaccurate because it was Waldenwoods, Plaintiff Majestic Golf's parent entity, which had been damaged by Majestic Golf's inability to secure the necessary easement on its behalf.

it is not a breach of an essential and inducing feature of the agreement), the default clause will in most cases be controlling."

Finally, the evidence presented to the trial court points with compelling force to the conclusion that the breach giving rise to the termination and forfeiture **was** willful and culpable. The evidence has strongly suggested that thwarting the development of Waldenwoods' adjoining property was precisely the result intended by LWCC. That purpose has been revealed by the Memorandum of Law prepared by LWCC's counsel (the same firm now representing the *Amici*) in May of 2003 (Apx. pp. 49b-55b), which addressed legal questions concerning the Hartland Township Zoning Ordinance and specifically postulated how LWCC might prevent the approval of Waldenwoods' master plan by exercising the option to purchase and forcing a closing before its approval. This intent is also plainly suggested by LWCC's persistent failure or refusal to provide the necessary consent, despite the lack of any legitimate objection, and in spite of Mr. Crouse's repeated requests indicating that prompt approval was necessary for completion of Waldenwoods' master plan. *See*, Correspondence of October 27, 2006 – Apx. pp. 56b-59b; E-mail correspondence of June 19, 2007 – Apx. pp. 88b-91b)

The evidence presented to the trial court also points with compelling force to the conclusion that LWCC's failure to grant the required consent was motivated by a desire to link its consent to the final approval of the proposed merger in order to gain leverage in the merger negotiations. LWCC has not denied that this "linkage" was intended, but has claimed, rather feebly, that this had been agreed to by the parties. But this suggestion has been solidly refuted by Mr. Crouse's very specific assertions, which have **not** been refuted, that he objected to any such "linkage" in February and March of 2008, and continued to do so

thereafter. (Crouse Affidavit, ¶ 15 – Apx. 106a-107a) LWCC's claim that Mr. Crouse consented to this "linkage" is also solidly refuted by the clearly stated demand for compliance within 30 days presented by his correspondence of October 7, 2008. Upon receipt of that notice, LWCC clearly knew, or should have known, that there was no longer any agreement (if ever it thought there was) to link consent to the easement with completion of the merger, and that execution of the required consent was then expected, and required, without further delay.

In any event, LWCC has never offered any authority or justification for linking its consent to completion of the merger. Clearly, there was no authority to do so under the terms of the lease, and LWCC was required, by Paragraph 22, to provide its consent.[11] It had no right to hold the required consent hostage, pending the accomplishment of its own unrelated objectives. Under these circumstances, there can be no question that LWCC's failure to provide the required consent was indeed willful, and that the continuing breach of its obligation to do so was material.

The Court should also note, in this regard, that "no material breach" is an equitable defense, and thus, for LWCC to avail itself of that defense, it must come before the Court with "clean hands." *Rose v National Auction Group*, 466 Mich 453, 463; 646 NW2d 455 (2002). But it is obvious that LWCC has come to court with dirty hands, and this should have precluded any discussion of equitable relief. It is also inappropriate to dismiss LWCC's breach as "not material" based upon notions of substantial performance. Substantial

[11] Authority for the alleged linkage could only be established by a written agreement of the contracting parties. As previously discussed, Paragraph 43 of the Lease provides that: "This Lease contains the entire agreement between the parties and cannot be changed or terminated orally, but only by an instrument in writing executed by the parties."

performance requires a good-faith attempt to perform without intentional or material departures from what was promised. *Plaza, Inc v SS Kresge Co*, 32 Mich App 724, 746; 189 NW2d 346 (1971). Thus, substantial performance cannot be found where the breach is a product of willful misconduct or intentional variation or omission:

> "Substantial performance permits recovery by the breaching party only when the omissions or deviations may be said to be inadvertent or unintentional, the result of a failure that occurs in good faith, as opposed to a breach that is committed purposely and in bad faith or that results from willful misconduct or an intentional variation or omission." 15 *Williston on Contracts* § 44:52 (4th ed. 2009).

On pages 26 through 28 of its amicus brief, the Golf Course Owners Association has repeated, virtually word-for-word, several of the arguments regarding the materiality of the breach previously made by Defendant LWCC in the Court of Appeals.[12] On page 26, the Golf Course Owners Association contends that LWCC's breach was not material because LWCC had developed the golf facility and paid rent for 16 years, and thus, Majestic Golf had already obtained "the benefit it reasonably expected to receive." This argument fails because it overlooks the very important fact that Plaintiff legitimately expected to receive the consent to the road crossing easement that it was entitled to receive, under Paragraph 22, to facilitate the desired development of Waldenwoods' adjoining property, but LWCC failed to provide it without any justification. Thus, there was a very substantial benefit that Majestic Golf expected and was entitled to receive, that it did not receive due to Defendant's intransigence.

On pages 26 and 27, the Golf Course Owners Association contends that the breach was not material because delay of Waldenwoods' residential development caused by the

[12] These same arguments were presented on pages 30 – 32 of LWCC's Appellee's Brief in the Court of Appeals.

breach "has been cured and/or could be compensated through money damages." But of course, the delay occasioned by the breach has already occurred, and thus, cannot be undone. And the Golf Course Owners Association has overlooked the fact that it is Waldenwoods, Majestic Golf's parent entity, that has been damaged, because it is Waldenwoods that owns and has plans to develop the adjoining property. The Golf Course Owners Association has not explained how Majestic Golf could seek to recover the damages that Waldenwoods has sustained.

On page 27, the Golf Course Owners Association contends that LWCC's breach was not material because it had fully performed its other obligations under the lease. Although this may be acknowledged, it does not diminish the materiality of the breach. Defendant's performance of its *other* obligations under the lease was no compensation for its long-continuing failure or refusal to comply with its very important obligations under Paragraph 22.

On page 27, the Golf Course Owners Association contends that LWCC's breach was not material because enforcement of the agreed-upon forfeiture provision would be unduly harsh. This argument is unpersuasive because the alleged harshness is mitigated by the fact that termination and forfeiture were specifically agreed upon as a remedy for failure to comply with the terms of the Lease. The harshness of the remedy is also mitigated by the fact that the notice of noncompliance provided under Paragraph 26 afforded LWCC a fair opportunity to avoid a potential forfeiture by remedying its noncompliance within 30 days. LWCC chose to disregard that opportunity, and Majestic Golf should not be penalized for that unwise decision by denial of its agreed-upon remedy.

On pages 27 and 28, the Golf Course Owners Association contends that LWCC's breach was not material because it was not willful. In support of this argument, it refers to "Majestic's sporadic requests for the easement" and "its implicit agreement to make the Easement Agreement part of the merger negotiations," and claims that these circumstances excuse LWCC's failure to provide the requested consent, and thus, demonstrate a lack of willfulness. The Golf Course Owners Association has even gone so far as to suggest that "LWCC's assertion that its actions were inadvertent and/or accidental are undisputed," which is certainly not the case at all.

In light of the circumstances previously discussed, it can hardly be suggested that Plaintiff's requests for the easement were "sporadic," or that there was any "implicit agreement" to link the easement to completion of the merger. The idea of linking the easement with the merger first appeared in the draft merger documents provided by LWCC in December of 2007. But LWCC has not refuted the very specific assertions, in Mr. Crouse's supporting Affidavit, that the proposed "linkage" was objected to in February of 2008, and on several occasions thereafter. And in any event, the notice of October 7, 2008 made it very clear that there was no such "agreement" at that time. The record evidence has shown that the required consent was requested on several occasions between April of 2007 and October of 2008, but was never provided. When the very specific request for compliance within 30 days was made on October 7, 2008, that request was ignored. All of this points with compelling force to the conclusion that the breach was indeed willful, and Defendant's hands, unclean.

On page 28, the Golf Course Owners Association contends that LWCC's breach was not material because the circumstances suggest a likelihood that it will perform the remainder

of its obligations under the lease. This, also, is speculation, and does not diminish the harmful effect or willfulness of the breach already committed.

For all of these reasons, Plaintiff Majestic Golf contends that the clear and unambiguous forfeiture provision of the Lease must be enforced as written. It is the remedy that these sophisticated parties have agreed upon in their dealings at arm's length, and Plaintiff is entitled to have that remedy enforced without an after-the-fact judicial assessment of whether the breach was "material." Enforcement of that remedy is consistent with the established precedents of this Court, and Defendant LWCC has failed to demonstrate any legitimate need for the exception that its *Amici* have proposed. Indeed, there is no necessity for the Court to consider this issue at all in this case, where the materiality of the breach cannot be seriously questioned. The Court of Appeals has correctly decided this matter. Its well-reasoned decision should therefore be affirmed.

RELIEF

WHEREFORE, Plaintiff – Appellee Majestic Golf, LLC, respectfully requests that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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