

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL for the
STATE OF MICHIGAN, et al,
MICHIGAN NATURAL RESOURCES
COMMISSION, MICHIGAN WATER
RESOURCES COMMISSION, and
MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

Case No. 88-34734-CE

vs

Hon. Donald E. Shelton

GELMAN SCIENCES INC.,
a Michigan corporation,

Defendant.

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**PALL LIFE SCIENCES' RESPONSE TO THE CITY OF ANN ARBOR
AND ANN ARBOR CHARTER TOWNSHIP'S MOTIONS SEEKING
PERMISSION TO FILE AMICUS CURIAE BRIEFS IN SUPPORT OF
PLAINTIFF'S MOTION TO ENTER ORDER PROHIBITING
GROUNDWATER USE**

INTRODUCTION

Ann Arbor Charter Township and the City of Ann Arbor have filed separate motions seeking to have this court consider each of their *amicus curiae* briefs in connection with Plaintiff's motion for entry of an order limiting groundwater use.¹ The City supports paragraph 7 of Plaintiff Michigan Department of Environmental Quality's proposed order. The City asks this Court to enter Plaintiff's proposed order because the City claims that PLS owes the City a legal duty to pay for replacement of the Northwest Supply Well. This is precisely the relief the City is seeking in its lawsuit against Pall Life Sciences' ("PLS") in the City's lawsuit against PLS.² Ann Arbor Township supports the City, and additionally asks the Court to modify the order so that its [unidentified] residents who will allegedly be forced to replace their current "free" water will be reimbursed for costs allegedly associated with such replacement, including increased taxes and future municipal water bills. For the reasons presented below, the arguments presented in both of these briefs should be disregarded.

A. The City's Position Would Require This Court To Resolve Issues That Are Contested And Subject To Litigation In The City Lawsuit And Should Be Rejected.

As PLS explained in its response to Plaintiff's Motion, counsel for the City of Ann Arbor drafted paragraph 7 of Plaintiff's proposed order. It is not surprising that the City

¹ Although two briefs were filed, both were prepared by the City's lawyers (Bodman, Longley) and both have similar arguments regarding why PLS should pay for replacement of the Montgomery Well as part of the proposed order. PLS takes no position as to whether this Court should consider the non-party briefs, but rather leaves that decision to the Court's discretion.

² *City of An Arbor v. Gelman Sciences (d/b/a PLS Life Sciences)*, Cas No. 04-513 CF (Washtenaw Cir. Court)("City lawsuit").

would feel the need to file an *Amicus* brief in support of that paragraph. The City’s brief, however, demonstrates the impropriety of the position it has demanded that PLAINTIFF take with respect to the Northwest Supply Well. If the City’s position were adopted, the Court would be ordering in this case relief that would completely resolve in the City’s favor all of its claims in the City Lawsuit – claims which PLS believes it can and will prevail on by motion and, if necessary, at trial.

The City, in support of paragraph 7 of the proposed order, makes several disputed contentions. First it claims (in a confusing and contradictory paragraph) that the Unit E contamination restricts its use of the Northwest Supply Well, although it also concedes that at this juncture, “the City legally could use water from that well for its municipal supply.”³ The City claims that operation of that well would exacerbate contamination that has been documented at Veteran’s Park. PLS denies this claim and intends to show in the City’s lawsuit that the City assumption that it would exacerbate contamination through the normal operation of the Northwest Supply Well is not supported by and is inconsistent with the hydrogeology of the area. Although discovery is proceeding in the City’s lawsuit against PLS, it appears so far that the restriction on use of the well is self-imposed -- based on a policy that no detectable levels in the supply well should be added to the City’s municipal supply.⁴ While this Court can, and should rely on, the City’s position that it will not turn

³ *City of Ann Arbor’s Amicus Curiae Brief In Support of State of Michigan’s Motion to Enter Order Prohibiting Groundwater Use* (“City Amicus Br.”) at 2.

⁴ Deposition of Sue McCormick, as cited in PLS’ response to Plaintiff’s motion (Exhibit 6) and the City’s response to Interrogatory 11, which states in part: “. . . while no federal or state drinking water maximum contaminant level has been promulgated for 1,4-dioxane, it has been determined to be a potential carcinogen and Ann Arbor has a duty not to unnecessarily expose those who consume water from its public water supply to any level of such carcinogens, particularly those that are attributable to hazardous substances that are not naturally occurring.” (See Exhibit 4 to PLS response to Plaintiff’s motion)(Emphasis added).

on the well, this is not tantamount to a finding that their decision is based on any legal or factual substance, let alone one that has been adjudicated.

Second, the City claims that the Northwest Supply Well is a critical component of the Ann Arbor water system.⁵ This is also a claim that PLS disputes in the City lawsuit. PLS believes that the evidence will show that: a) the Northwest Supply Well provided only a marginal contribution to the system when it was in use; b) that its lost volume has been replaced by increased pumping from the City's Steere Farm well field; c) that the well is old, obsolete, and contaminated by arsenic from collateral sources; and d) to the extent the City needs to expand its system, the Northwest Supply Well would not be a material component to a solution.⁶

Finally, the City contends that PLS has an affirmative statutory obligation to provide a reliable replacement for the Northwest Supply Well and its infrastructure.⁷ This is the core contention in the City Lawsuit and one that PLS vigorously disputes. It is not necessary to resolve this contention in the context of entry of this order, nor should this Court do so as it would prejudice PLS's ability to defend itself. There are many significant questions that have to be resolved in the City Lawsuit, including whether PLS is liable to the City for any compensation at all, and even if it is, the appropriate measure of damages. For instance, PLS has evidence that arsenic at 18 ppb has been detected in the Northwest Supply

⁵ *City Amicus Br.* at 2.

⁶ It appears to PLS based on discovery conducted to date in the City Lawsuit and recent articles appearing in the Ann Arbor News that there are substantial fact issues regarding whether the City needs to expand the system and if it does, whether it needs to do so for reasons unrelated to its decision to discontinue use of the Northwest Supply Well. What does seem clear is that the Utilities Department is evaluating the need to add significantly more groundwater to its system than has or could be provided by the Northwest Supply Well.

⁷ *Id.* at 4.

Well. The State has recently adopted a drinking water standard for Arsenic of 10 pbb. Under state law, this becomes a residential cleanup criterion. MCL 324.20120a(5). The presence of arsenic in this well raises substantial doubt as to the extent of the City's claims for damages and water supply replacement against PLS that must be resolved in the City's lawsuit, not in the instant proposed order.

B. Ann Arbor Township's Brief Raises Issues That Are Outside Of The Scope Of The Plaintiff's Motion And Must Be Disregarded.

In addition to echoing the positions set forth in the City's *Amicus* Brief, Ann Arbor Township advocates its own wrinkle to Plaintiff's proposed order. The Township asks this Court to order PLS to pay hypothetical, unidentified residents in Ann Arbor Township "affected" by the proposed Order what amounts to consequential damages (i.e., increased property taxes and water bills) allegedly associated with the required water connection.⁸ This request should also be disregarded.

It should be noted that the eastern part of the protected zone ends at the river and bridge near the U of M Medical Center complex. This is west of the Geddes Road "island" of Ann Arbor Township that includes a significant number of residents on private water wells. Within the zone there are only a handful of township "islands". Neither the Township nor the City has identified any wells located in those "islands". If there are any Township parcels serviced by private wells, those properties will be connected to municipal water at PLS' expense. If the owners of such parcels (if any) have additional claims against PLS, they may make them directly to PLS at the appropriate time. The Township has no standing to make claims on the behalf of unidentified and hypothetical residents.

⁸ *Ann Arbor Charter Township's Amicus Curiae Brief In Support of State of Michigan's Motion To Enter Order Prohibiting Groundwater Use* ("Township *Amicus Br*") at 3.

Further, the hypothetical claims for taxes and water bills that the Township asks this Court to resolve with the proposed order may or may not exist and are subject to individual adjustment. In general, as the Township knows, if the Township properties within the City borders have well or septic system failures, they cannot replace those systems but must instead hook up to municipal water.⁹ This would be the case regardless of whether or not the islands are within the Protected Area. The consequences of hooking up to the City utilities, which is inevitable for these Township islands, includes payment for those services and increased taxes. It is therefore far from clear that the owners would have any consequential claim for “damages” to the extent suggested by the Township. What is clear is that, to the extent there are potential claims out there, this Court need not and should not decide them in advance without the benefit of a “case in controversy.”

⁹ See “Utility Hookup Deadline Looms,” *Ann Arbor News*, Wednesday, February 9, 2005, copy attached as Exhibit 1. All township islands within the Protected Area appear to have City utilities nearby and are required to hook up to them when their well or septic field fails. In this event the residences would also be annexed to the City. The hookup costs, the increased taxes, and the utility fees incurred would be the responsibility of that resident.

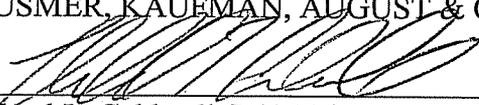
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CONCLUSION

For the reasons stated above, PLS asks this Court to disregard the arguments presented by the City and Ann Arbor Township and to enter PLS proposed order attached to PLS' Response to Plaintiff's Motion to Enter Order Prohibiting Groundwater Use, along with the attached map, which depicts the "Protected Area" to be covered by the Order.

Respectfully submitted,

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