STATE OF MICHIGAN
IN THE COURT OF APPEALS

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES AND ENERGY,

Plaintiffs-Appellees,

and

THE CITY OF ANN ARBOR; WASHTENAW COUNTY; THE WASHTENAW COUNTY HEALTH DEPARTMENT; WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK; THE HURON RIVER WATERSHED COUNCIL; and SCIO TOWNSHIP,

Intervenors-Appellees,

vs.

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant-Appellant.

Court of Appeals Docket No. 357599

Washtenaw County Circuit Court
Case No. 88-034734-CE

INTERVENOR-APPELLEES' MOTION FOR AN ORDER DIRECTING TRIAL COURT TO RULE ON MOTION SEEKING ENFORCEMENT OF ORDER ON APPEAL

Recently, Intervening Plaintiffs-Appellees ("Intervenors") filed a motion in the trial court seeking enforcement of the order on appeal—the trial court's June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria ("Response Activity Order"). The trial court declined to rule on Intervenors' motion, believing that it was barred from doing so under MCR 7.208(A). For the reasons described more fully below, Intervenors request that this Court direct the trial court to rule on the Intervenors' motion because the trial court retains jurisdiction to enforce the Response Activity Order while the appeal is pending.

1. On June 22, 2021, Gelman filed both a claim of appeal and an application for leave to appeal the Response Activity Order. Shortly thereafter, the Court *sua sponte* dismissed Gelman's claim of appeal for lack of jurisdiction, holding that the Response Activity Order was not a final order under MCR 7.202(6). Gelman sought review of this Court's decision, but the Supreme Court denied Gelman's application because it was "not persuaded that the questions presented should be reviewed by this Court."

2. On July 26, 2021, this Court granted Gelman's application for leave to appeal. That appeal remains pending and is scheduled for oral argument on July 7, 2022.

3. Gelman also filed with this Court a motion to stay the Response Activity Order pending appeal. The Court expressly refused to stay either the Order's provision requiring Gelman to "immediately implement" the environmental response activities described in the Order, or the provision stating that "Intervening Plaintiffs shall retain their status as Intervenors in this action." In fact, the sole provisions that the Court stayed were those providing for quarterly hearings and potential additional or modified response activities.

4. Under the Michigan Court Rules, "an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders." MCR 7.209(A)(1). In *Chrysler Corp v Home Ins Co*, the Court affirmed the trial court's entry of a default judgment while an interlocutory appeal was pending. The trial court entered the default judgment as a discovery sanction when the defendant failed to comply with the trial court's discovery orders. 213 Mich App 610, 612 (1995). Although an interlocutory appeal was pending when the default judgment was entered, no stay had been entered and under MCR 7.209(A)(1), the "defendant was not excused from complying with the trial court's orders compelling discovery." *Id.*

5. This Court granted Gelman's motion for a stay pending appeal only as to paragraphs 2 and 3 of the Response Activity Order. As a result, Gelman is still required to comply with and "immediately implement" the requirements of the Fourth Amended and Restated Consent Judgment, as incorporated into the Response Activity Order. Because the Response Activity Order was stayed only in part, the trial court retains jurisdiction and enforcement authority over the remaining provisions pending appeal. By staying the trial court's "quarterly hearings to review the progress of Response Activities and other actions required by" the Response Activity Order, this Court's decision meant, as a practical matter, that Gelman's compliance with the Response Activity Order has not been monitored on a regular basis. Without this oversight, Gelman has an incentive to delay carrying out the activities required by the Response Activity Order, hoping that it will obtain relief through its appeal and avoid the expense of fully implementing the Response Activity Order.

6. More than a year after the Response Activity Order was entered, Gelman still has not "immediately implement[ed] and conduct[ed] all requirements and activities" mandated by the Response Activity Order. For that reason, on June 3, 2022, Intervenors filed in the trial court a Motion for Entry of an Order to Show Cause Concerning Implementation of Response Activity Order. *See* **Exhibit A.** Intervenors asked the trial court to order Gelman "to appear and show cause why it is not in violation of the Response Activity Order and direct Gelman to complete the remaining requirements under that Order on a workable but aggressive time line." *Id.*, p. 2.[1]

7. Gelman filed a brief opposing the motion and wrote Intervenor counsel a letter, copying the trial court, threatening Intervenors with sanctions if they did not withdraw the motion.

[1] Prior to filing the motion, Intervenors wrote a letter to Gelman with a proposed time line for completion of the key remaining activities. *See* **Exhibit B**. Gelman never responded to the letter.

Gelman primarily argued that, under MCR 7.208(A), the trial court did not have jurisdiction to hear the show cause motion. That argument is a red herring, because the cited rule circumscribes a trial court's ability to *set aside or amend* an order under appeal. Intervenors seek enforcement of the Response Activity Order *as entered*. Intervenors do not seek to set it aside or amend it, so the court rule does not divest the trial court of jurisdiction. As described above, whether a party must comply with an order under appeal is governed by MCR 7.209. If the order has not been stayed, it remains in full force and effect (and subject to enforcement) during the appeal. To hold otherwise would allow litigants to ignore court orders any time an appeal is pending, in direct conflict with MCR 7.209(A)(1).

8. The trial court scheduled Intervenors' motion for hearing on June 16, 2022. At the hearing, the trial court declined to consider the substance of the motion, stating that it did not have jurisdiction. **Exhibit C, Transcript**, at 13:8-10; *see also* **Exhibit D, Order**. Specifically, the trial court stated on the record that it would not consider the substance of the motion absent direction from this Court:

> You get a specific direction from the Court of Appeals that allows me to hear this motion and I will. Until then, I don't believe I can. I thank you, good luck, and I'm here when the Court of Appeals tells me I can and should hear something.

Ex. C, at 13:8-12.

9. Gelman's reliance on MCR 7.208(A) is misplaced. The sole case Gelman cited in its opposition brief in the trial court is inapposite. *See Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300 (1992). The trial court in *Admiral* granted a motion for attorney fees after a party appealed from an order granting summary judgment in a tort case. The order on appeal "did not indicate an intention to award costs or attorney fees, so the court was without jurisdiction to award fees following Admiral's claim of appeal." *Id.* at 314. The Court considered existing precedent that "applied this rule (MCR 7.208(A)) to prohibit a trial court from granting a party attorney fees

or costs after the claim of appeal is filed, unless the order or judgment expressed an intention to grant such costs." *Id*. (citing *Wilson v General Motors Corp*, 183 Mich App 21, 41 (1990)).

10. Here, Intervenors do not seek additional relief, nor do they seek to change the Response Activity Order. Instead, they seek enforcement of the clear terms of the Response Activity Order, which required Gelman to "immediately implement" the activities described therein. Although Intervenors have asked the trial court to impose a time line, that request is an accommodation to Gelman because a strict reading of the Order requires "immediate" implementation. This clarification is not a substantive modification of the Order. *See, e.g., Kohler v Sapp*, 1999 Mich App LEXIS 608, at *6 (Jun 11, 1999) (holding that MCR 7.208(A) did not prohibit trial court from entering a further order as a contempt sanction and clarification of the order on appeal), attached as **Exhibit E**. At most, Intervenors' request for a time line is a request to clarify what the trial court meant by the term, "immediately." The trial court would be well within its authority to simply sanction Gelman for failing to "immediately implement" the Response Activity Order; it follows that the trial court also has the power to give Gelman one more opportunity to comply with the Order. *See Maldonado v Ford Motor Co*, 476 Mich. 372, 376 (2006) (holding that trial courts possess the inherent authority to sanction litigants and direct and control the proceedings before them); *see also* MCL 600.611.

11. Gelman moved to stay the Response Activity Order and was unsuccessful. Under MCR 7.209(A)(1), the Response Activity Order is enforceable to the extent it has not been stayed. By denying Gelman's motion, this Court clearly indicated that it expected Gelman to "immediately implement and conduct all requirements and activities stated in the Proposed 'Fourth Amended and Restated Consent Judgment,'" as incorporated into the Response Activity Order, during the pendency of this appeal. If the trial court did not have the power to enforce the Order pending

appeal, the effect would be to grant Gelman the very relief that this Court refused when it denied the motion to stay.

WHEREFORE, Intervenors respectfully request that this Court enter an Order directing the trial court to rule on Intervenors' Motion for Entry of an Order to Show Cause Concerning Implementation of Response Activity Order.

Respectfully submitted,

ANN ARBOR CITY ATTORNEY'S OFFICE

By: /s/ Atleen Kaur
Atleen Kaur (P66595)
Attorney for Intervenor City of Ann Arbor

Dated: June 29, 2022.

BODMAN PLC

By: /s/ Nathan D. Dupes
Nathan D. Dupes (P75454)
Attorney for Intervenor City of Ann Arbor

Dated: June 29, 2022.

DAVIS, BURKET, SAVAGE, LISTMAN

By: /s/ Robert Charles Davis
Robert Charles Davis (41055)
Attorney for Intervening Washtenaw County Entities

Dated: June 29, 2022.

GREAT LAKES ENVIRONMENTAL LAW CENTER

By: /s/ Erin E. Mette
Erin E. Mette (P83199)
Attorney for Intervenor Huron River Watershed Council

Dated: June 29, 2022.

HOOPER HATHAWAY, P.C.

By: /s/ William J. Stapleton
William J. Stapleton (P38339)
Attorneys for Intervenor Scio Township

Dated: June 29, 2022.

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

CITY OF ANN ARBOR, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER ELLEN RABINOWITZ, in her official capacity, the HURON RIVER WATERSHED COUNCIL, and SCIO TOWNSHIP,

Intervening Plaintiffs,

-v-

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

INTERVENING PLAINTIFFS' MOTION FOR ENTRY OF AN ORDER TO SHOW CAUSE CONCERNING IMPLEMENTATION OF RESPONSE ACTIVITY ORDER

MICHIGAN DEPT. OF ATTORNEY GENERAL
By: Brian Negele (P41846)
525 W. Ottawa Street, PO Box 30212
Lansing, Michigan 48909
(517) 373-7540
negeleb@michigan.gov
Attorneys for EGLE

BODMAN PLC
By: Fredrick J. Dindoffer (P31398)
Nathan D. Dupes (P75454)
1901 St. Antoine, 6th Floor
Detroit, Michigan 48226
(313) 259-7777
fdindoffer@bodmanlaw.com
Attorneys for the City of Ann Arbor

ZAUSMER, P.C.
By: Michael L. Caldwell (P40554)
31700 Middlebelt Rd., Suite 150
Farmington Hills, Michigan 48334
(248) 851-4111
gaugust@zacfirm.com
Attorneys for Gelman Sciences, Inc.

ANN ARBOR CITY ATTORNEY'S OFFICE
By: Atleen Kaur (P66595)
Timothy S. Wilhelm (P67675)
301 E. Huron, Third Floor
Ann Arbor, Michigan 48107
(734) 794-6170
akaur@a2gov.org
Attorneys for the City of Ann Arbor

DAVIS BURKET SAVAGE LISTMAN TAYLOR
By: Robert Charles Davis (P40155)
10 S. Main Street, Suite 401
Mt. Clemens, Michigan 48043
(586) 469-4300
Rdavis@dbsattorneys.com
Attorneys for Washtenaw County entities

GREAT LAKES ENVIRONMENTAL LAW CENTER
By: Erin E. Mette (P83199)
4444 2nd Avenue
Detroit, Michigan 48201
(313) 782-3372
erin.mette@glelc.org
Attorneys for Huron River Watershed Council

HOOPER HATHAWAY, PC
By: Bruce Wallace (P24148)
William J. Stapleton (P38339)
126 S. Main Street
Ann Arbor, Michigan 48104
(734) 662-4426
bwallace@hooperhathaway.com
Attorneys for Scio Township

INTERVENING PLAINTIFFS' MOTION FOR ENTRY OF AN ORDER TO SHOW CAUSE CONCERNING IMPLEMENTATION OF RESPONSE ACTIVITY ORDER

Intervening Plaintiffs ("Intervenors") jointly submit this motion concerning the Court's June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria ("Response Activity Order"). **Ex. A**.[1] For the reasons described below, Intervenors request that the Court order Gelman to appear and show cause why it is not in violation of the Response Activity Order and direct Gelman to complete the remaining requirements under that Order on a workable but aggressive time line.

1. The Court entered the Response Activity Order one year ago. The central provision of that Order required Gelman to "immediately implement and conduct all requirements and activities in the Proposed 'Fourth Amended and Restated Consent Judgment' which is attached to this Order and incorporated by reference." *Id*. The Proposed Fourth Amended and Restated Consent Judgment ("Proposed 4th CJ") described numerous activities that

[1] Given its length, Intervenors do not include in Exhibit A the Proposed 4th CJ, which was attached to the Response Activity Order.

Gelman was to undertake in order to address the significant changes the State made in 2016 to the cleanup criteria for 1,4-dioxane, the toxic pollutant that Gelman released to the environment, resulting in the contamination of billions of gallons of the public's groundwater.

2. On June 22, 2021, Gelman filed both a claim of appeal and an application for leave to appeal the Response Activity Order. Shortly thereafter, the Court of Appeals *sua sponte* dismissed Gelman's claim of appeal for lack of jurisdiction, holding that the Response Activity Order was not a final order under MCR 7.202(6). On July 26, 2021, the Court of Appeals granted Gelman's application for leave to appeal. That appeal remains pending and has been fully briefed for months, but oral argument has not been scheduled.

3. Gelman also filed with the Court of Appeals a motion to stay the Response Activity Order pending appeal. The Court only granted Gelman's motion in part, expressly refusing to stay the Order's provision requiring Gelman to "immediately implement" the activities in the Proposed 4th CJ, and the provision stating that "Intervening Plaintiffs shall retain their status as Intervenors in this action." In fact, the sole provisions that the Court of Appeals stayed were those providing for quarterly hearings and potential additional or modified response activities. Presumably, the Court of Appeals stayed those provisions because it did not want a moving target while the Order is on appeal.

4. The effect of the Court of Appeals's decision is that this Court retains jurisdiction and enforcement powers over the Response Activity Order pending appeal. Another effect of the Court of Appeals's decision is that Gelman has an incentive to drag its feet in carrying out the Proposed 4th CJ's response activities. Gelman continues to vehemently oppose entry of the Response Activity Order in order to avoid the expense of fully implementing the Proposed 4th CJ. Indeed, even after the Court of Appeals summarily dismissed Gelman's claim of appeal,

Gelman filed an application for leave with respect to that dismissal to the Supreme Court, in which it called the procedure that this Court followed in entering the Response Activity Order a "kangaroo court proceeding." On May 31, 2022, the Supreme Court denied Gelman's application because the Court was "not persuaded that the questions presented should be reviewed by this Court."

5. Keenly aware of Gelman's incentive, Intervenors repeatedly have asked Gelman to provide updates on the status of its implementation of the Response Activity Order. Gelman has refused to do so, relying on the same tired assertion that this Court has rejected—because Intervenors are not "the regulator," they have no business receiving the requested information. Gelman forgets that the Court of Appeals expressly refused to stay the provision of the Response Activity Order making clear that Intervenors retain their status in this case. Just as they fully participated in the proceedings leading to the Response Activity Order, Intervenors have every right to ensure that the Response Activity Order is implemented in accordance with its terms.

6. Rather than rush to court, however, Intervenors have sought periodic updates on Gelman's progress from the State. The most recent update Intervenors received from the State was on May 18, 2022. The State's updates have been very helpful and Intervenors certainly appreciate them, even though they cannot substitute for the information that Gelman could provide as the party directly implementing the Response Activity Order.

7. Although Intervenors do not dispute that Gelman has made limited progress in certain areas of the Proposed 4th CJ, it is clear that Gelman has not made significant progress in many other key areas and has thereby failed to "immediately implement" the Response Activity Order, as required. It also is clear that Gelman in many instances has failed to meet its own projections for conducting certain activities.

8. Equally concerning is Gelman's refusal to commit to a time line for completing the remaining response activities. More than a month ago, on April 18, 2022, Intervenors sent Gelman a letter with a proposed time line for completing what Intervenors understood to be the key remaining response activities. **Ex. B**. Intervenors asked Gelman to commit to the time line or, if it believed that Intervenors' proposal was impractical, to explain why and provide a reasonable alternative. Intervenors further asked Gelman to advise if any remaining response activities were impeded because Gelman was awaiting approval from others.

9. To date, Gelman has not even responded to Intervenors' letter. Instead, the State responded on May 5, 2022. **Ex. C**. In its letter, the State described discussions it had with Gelman concerning the Intervenors' letter and revealed that "Gelman was unwilling to agree to any specific dates for completion of activities under the Order, other than those dates that are already specifically set forth in the Order." The State further confirmed that "deadlines would be desirable for at least some of the response activities listed in the Intervenors' letter, but without Gelman's agreement to do so voluntarily we also believe that modification of the Order is unlikely during the pendency of Gelman's appeals."

10. What Gelman and the State fail to appreciate is that the Response Activity Order directed Gelman to implement "**all** requirements and activities" in the Proposed 4th CJ "**immediately**." **Ex. A**; emphases added. That Order adopted the position the State advocated in the brief it filed and at the hearing forming the basis for the Order. The Order was clear on its face; no modification is necessary. By any definition of the word "immediate," Gelman has failed to fulfill the Court's directive.

11. Below are just some examples of Gelman's failings (with citations to the applicable section of the Proposed 4th CJ):

a. Failure to install *any* additional monitoring wells in the Eastern Area, despite being required to do so at eight locations (Sections V.A.3.a.; V.A.3.b.; V.A.5.f.);

b. Failure to install and operate monitoring wells at two locations in the Western Area (Section V.B.3.b.);

c. Failure to install and operate all of the required on-site extraction wells and the Heated Soil Vapor Extraction (HSVE) system at Gelman's own property (Sections VI.C.1; VI.C.4.), even though Gelman had told the State that it intended to install the on-site extraction wells by the end of 2021 and the HSVE system by First Quarter 2022.

12. Undoubtedly, Gelman will try to place the blame on others. For example, the State has advised that Gelman's position is that the Eastern Area monitoring wells have not been installed due to issues with securing access from the City of Ann Arbor to municipal property. Gelman's position on this issue is unfounded and the City will be happy to explain in more detail at the hearing. But even if there are issues delaying completion of certain activities, Intervenors asked Gelman to provide an explanation and even offered to help Gelman address any bottle-necks. As discussed above, Gelman has failed to even respond. And even if Gelman is having access issues with third parties, that does not explain why Gelman has been unable to address such issues well before now, nearly a full year after entry of the Response Activity Order. Gelman's attempt at displacing its responsibility by referring to "access issues" is inexcusable. No such access issues prevented Gelman from completing other activities, such as all of the on-site activities, which are to take place on Gelman's own property.

13. The Intervenors request that the Court order Gelman to show cause why it is not in violation of the Response Activity Order and direct Gelman to complete the remaining requirements in the Proposed 4th CJ on a workable but aggressive time line, in particular where the Response Activity Order directed that all activities be implemented "immediately." Previously, this Court has not hesitated to enter similar relief. In 2000, in its Opinion and Remediation Enforcement Order ("REO") the Court made the following findings:

> It is also clear, however, that the purging of dioxane has not occurred fast enough to provide the public, or the Court, with assurance that the plume of dioxane was contained as early as it should have been or that there is an ongoing approved plan that will lead to the removal of unlawful levels of this pollutant from the area's water supplies.
>
> * * *
>
> Based upon the evidence submitted, this Court is going to grant equitable relief in the sense that the Court will use its equitable powers to enforce the consent judgment to insure that dioxane levels in these water supplies is brought within acceptable standards as soon as possible. Both sides in this dispute appear to need the intervention of the Court to keep them moving toward this goal.

Ex. D. The Court then ordered numerous response activities on a tight time line, including the installation of additional monitoring and extraction wells within 60 days of the Order and installation of an additional treatment unit which was to be operational within 75 days of the Order. The Court's REO was designed to ensure that the Consent Judgment's existing requirements were met. In the same vein, the Court should take appropriate steps to ensure that its Response Activity Order is implemented. The longer that Gelman delays implementing the Order, the greater the threat to the public interest and the environment, as Gelman's plume continues to expand.

Respectfully submitted,

ANN ARBOR CITY ATTORNEY'S OFFICE

By: /s/ Atleen Kaur
Atleen Kaur (P66595)
Attorney for Intervenor City of Ann Arbor

Dated: June 2, 2022.

BODMAN PLC

By: /s/ Nathan D. Dupes
Nathan D. Dupes (P75454)
Attorney for Intervenor City of Ann Arbor

Dated: June 2, 2022.

DAVIS, BURKET, SAVAGE, LISTMAN

By: /s/ Robert Charles Davis
Robert Charles Davis (41055)
Attorney for Intervening Washtenaw County Entities

Dated: June 2, 2022.

GREAT LAKES ENVIRONMENTAL LAW CENTER

By: /s/ Erin E. Mette
Erin E. Mette (P83199)
Attorney for Intervenor Huron River Watershed Council

Dated: June 2, 2022.

HOOPER HATHAWAY, P.C.

By: /s/ William J. Stapleton
William J. Stapleton (P38339)
Attorneys for Intervenor Scio Township

Dated: June 2, 2022.

BRIEF IN SUPPORT OF INTERVENING PLAINTIFFS' MOTION FOR ENTRY OF AN ORDER TO SHOW CAUSE CONCERNING IMPLEMENTATION OF RESPONSE ACTIVITY ORDER

In support of their Motion for Entry of an Order to Show Cause Concerning Implementation of Response Activity Order, Intervening Plaintiffs rely on the facts and law in their Motion and the Court's inherent authority to enforce its directives. See, e.g., MCL 600.611; *Cohen v Cohen*, 125 Mich App 206, 211; 335 NW2d 661 (1983).

Respectfully submitted,

ANN ARBOR CITY ATTORNEY'S OFFICE

By: /s/ Atleen Kaur
Atleen Kaur (P66595)
Attorney for Intervenor City of Ann Arbor

Dated: June 2, 2022.

BODMAN PLC

By: /s/ Nathan D. Dupes
Nathan D. Dupes (P75454)
Attorney for Intervenor City of Ann Arbor

Dated: June 2, 2022.

DAVIS, BURKET, SAVAGE, LISTMAN

By: /s/ Robert Charles Davis
Robert Charles Davis (41055)
Attorney for Intervening Washtenaw County Entities

Dated: June 2, 2022.

GREAT LAKES ENVIRONMENTAL LAW CENTER

By: /s/ Erin E. Mette
Erin E. Mette (P83199)
Attorney for Intervenor Huron River Watershed Council

Dated: June 2, 2022.

HOOPER HATHAWAY, P.C.

By: /s/ William J. Stapleton
William J. Stapleton (P38339)
Attorneys for Intervenor Scio Township

Dated: June 2, 2022.

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2022, the foregoing document was filed with the Clerk of the Court via the Court's MiFile e-filing system which will give notice of such filing to all parties of record.

/s/ Nathan D. Dupes
Nathan D. Dupes (P75454)
BODMAN PLC
Attorneys for Intervenor City of Ann Arbor

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

-and-

CITY OF ANN ARBOR; WASHTENAW COUNTY; WASHTENAW COUNTY HEALTH DEPARTMENT; WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, in her official capacity; HURON RIVER WATERSHED COUNCIL; and SCIO TOWNSHIP,

Intervening Plaintiffs,

vs.

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

Case No. 88-34734-CE
Hon. Timothy P. Connors

_____/

Brian J. Negele (P41846)
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909-7712
(517) 373-7540

Michael L. Caldwell (P40554)
Attorney for Defendant
ZAUSMER, P.C.
31700 Middlebelt Road, Suite 150
Farmington Hills, MI 48334
(248) 851-4111

Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Intervenor City of Ann Arbor
ANN ARBOR CITY ATTORNEY'S OFFICE
301 E. Huron, Third Floor, P.O. Box 8645
Ann Arbor, MI 48107-8645
(734) 794-6170

Bruce A. Courtade (P41946)
Attorney for Defendant
RHOADS McKEE PC
55 Campau Ave., N.W., Suite 300
Grand Rapids, MI 49503
(616) 235-3500

Bruce T. Wallace (P24148)
William J. Stapleton (P38339)
Attorneys for Intervenor Scio Township
HOOPER HATHAWAY, P.C.
126 South Main Street
Ann Arbor, MI 48104
(734) 662-4426

Fredrick J. Dindoffer (P31398)
Nathan D. Dupes (P75454)
Co-Counsel for Intervenor City of Ann Arbor
BODMAN PLC
1901 St. Antoine, 6th Floor
Detroit, MI 48226
(313) 259-7777

Robert Charles Davis (P41055)
Attorney for Intervening Washtenaw County Entities
DAVIS, BURKET, SAVAGE, LISTMAN, TAYLOR
10 S. Main Street, Suite 401
Mt Clemens, MI 48043
(586) 469-4300

Erin E. Mette (P83199)
Attorney for Intervenor Huron River Watershed Council
GREAT LAKES ENVIRONMENTAL LAW CENTER
4444 2nd Avenue
Detroit, MI 48201
(313) 782-3372

_____/

ORDER TO CONDUCT RESPONSE ACTIVITIES TO IMPLEMENT AND COMPLY WITH REVISED CLEANUP CRITERIA

This matter having come before the court for hearing on Response Activities necessary to implement and comply with revised cleanup criteria, all parties having filed briefs and technical reports, the court having heard argument of counsel and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED:

1. Gelman Sciences shall immediately implement and conduct all requirements and activities stated in the Proposed "Fourth Amended and Restated Consent Judgment" which is attached to this Order and incorporated by reference.

2. The court retains continuing jurisdiction and will hold further hearings on a quarterly basis to review the progress of Response Activities and other actions required by this order related to releases of 1,4 dioxane at and emanating from the Gelman site and consider the implementation of additional or modified Response Activities and other actions.

3. The first quarterly hearing is scheduled for September 1, 2021 at 9 a.m.

4. Intervening Plaintiffs shall retain their status as Intervenors in this action.

5. This is not a final order and does not close the case.

SO ORDERED.

Dated: 6/1/2021

/s/ Timothy Connors 6/1/2021

Timothy P. Connors
Circuit Court Judge

Drafted/Presented By:

By: **/s/Robert Charles Davis**
ROBERT CHARLES DAVIS (P40155)
Attorney for Intervenors
Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer Jimena Loveluck
10 S. Main St. Suite 401
Mt. Clemens, MI 48043
(586) 469-4300
(586) 469-4303 – Fax
rdavis@dbsattroensy.com

Dated: May 27, 2021

EXHIBIT B

NATHAN D. DUPES
NDUPES@BODMANLAW.COM
313-393-7590

BODMAN PLC
6TH FLOOR AT FORD FIELD
1901 ST. ANTOINE STREET
DETROIT, MICHIGAN 48226
313-393-7579 FAX
313-259-7777

bodman
ATTORNEYS & COUNSELORS

April 18, 2022

Michael Caldwell, Esq.
Zausmer, P.C.
31700 Middlebelt Road, Suite 150
Farmington Hills, Michigan 48334

Brian Negele, Esq.
Michigan Department of Attorney General
525 W. Ottawa Street
P.O. Box 30212
Lansing, Michigan 48909

Re: State of Michigan v. Gelman Sciences, Inc. – Case No. 88-34734-CE

Dear Mike and Brian:

I write for all the Intervenors concerning Gelman's progress implementing the Court's June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria ("Response Activity Order").

At Gelman's request, Intervenors have sought updates on the progress of Gelman's response activities from EGLE. Although we appreciate the progress Gelman has made in certain areas, we are disappointed that Gelman has not made significant progress in others. Even more concerning is the apparent lack of any realistic time line for completion of the remaining activities. EGLE could not tell us, for example, when the two additional on-site extraction wells, the heated soil vapor extraction system, or the phytoremediation system would be operational. As you are aware, the Response Activity Order requires Gelman to "immediately implement and conduct all requirements and activities" in the Proposed 4th CJ.

We propose the following time line for the completion of what we understand to be the principal, currently outstanding action items required by the Response Activity Order, as stated in the Proposed 4th CJ.[1] Please confirm that Gelman will meet this time line or, if you believe that any of the proposed dates are impractical, please explain why and offer a reasonable alternative. If we do not receive a satisfactory response, we may need to involve Judge Connors.

We understand that some of these activities require approvals from EGLE and others. To the extent that Gelman awaits feedback from EGLE on any of the below items, please provide a time line for completion of its review and identify what can be done to expedite the matter. To the extent that Gelman awaits feedback from any of the Intervenors, please advise what we can do to expedite that process.

[1] Our knowledge of Gelman's progress is of course limited to the information that is publicly available or that EGLE (or Gelman) provides us. Gelman could easily clear up any uncertainty over its progress by providing us with direct updates but, to date, it has refused to do so.

We remind you that the Intervenors have the right to ensure implementation of the Response Activity Order. Judge Connors explicitly ruled that "Intervening Plaintiffs shall retain their status as Intervenors in this action." The Court of Appeals rejected Gelman's request to stay that provision of the Response Activity Order. We have no interest in taking over the role of the regulator, but we do have a significant interest in seeing that the Order is followed.

Finally, as to the Parklake Well, Intervenors continue to object to Gelman's proposed discharge to First Sister Lake. However, the Proposed 4th CJ requires Gelman to apply for a NPDES permit for the Parklake Well and Intervenors expect Gelman to comply with that requirement, as described below.

Proposed Time Line

Activity	**Proposed 4th CJ section(s)**	**Proposed Completion date**
Installation and operation of Sentinel Wells on northern PZ boundary (A, B, C)	V.A.3.a.	2Q22
Installation and operation of PZ Boundary Wells near Southern PZ boundary (D, E)	V.A.3.b.	April 2022[2]
Installation and operation of Rose Well (or conversion of IW-2 to extraction well)	V.A.3.e.i.	2Q22
Installation and operation of Parklake Well	V.A.3.e.ii.	Apply for NPDES permit by April 2022
Installation and operation of additional downgradient investigation wells (F, G, H)	V.A.5.f.	2Q22
Completion of Western Area GSI Investigation	V.B.2.b.	May 2022

[2] We understand that a monitoring well at Location D is already installed and Location E was in the planning stages as of January 2022.

Activity	Proposed 4th CJ section(s)	Proposed Completion date
Submission of GSI Response Activity Work Plan	V.B.2.c.	June 2022
Compliance with GSI objective	V.B.2.d.	July 2022
Installation and operation of additional Western Area investigation wells (I, J, K, L, M, N)	V.B.3.b.	April 2022[3]
Amend Western Area Monitoring Plan (dated 4/18/11) to identify the network of compliance wells for non-expansion objective	V.B.3.c.	May 2022
Installation and operation of Phase I extraction wells	VI.C.1.	May 2022[4]
Implementation of phytoremediation systems in former pond areas and Marshy Area	VI.C.2., 3.	3Q22
Installation of HSVE in former Burn Pit area	VI.C.4.	3Q22

[3] We understand that monitoring wells at Locations K, L, M, and N are already installed and that Locations I and J were in the planning stages as of January 2022.
[4] We understand that one extraction well has been installed and is operational, and the second well has been installed but is not operational.

Very truly yours,

Nathan D. Dupes

cc: Intervenor counsel

EXHIBIT C

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30755
Lansing, Michigan 48909

DANA NESSEL
ATTORNEY GENERAL

May 5, 2022

SENT VIA EMAIL AT NDUPES@BODMANLAW.COM

Nathan D. Dupes, Esq.
Bodman, P.L.C.
8th Floor at Ford Field
1901 St. Antoine Street
Detroit, MI 48226

Re: *Attorney General for the State of Michigan ex rel. Michigan Department of Environment, Great Lakes, and Energy v Gelman Sciences Inc.*
Case No.: 88-34734-CE

Dear Mr. Dupes:

This follows up on your April 18, 2022, letter to Mike Caldwell and me on behalf of the Intervenors regarding the Court's June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria (Order) seeking deadlines for Gelman to complete performance of certain response activities set forth in the Proposed Fourth Amended and Restated Consent Judgment incorporated by reference in the Order.

In our April 29, 2022 phone call, I related to you my discussions with Mr. Caldwell regarding the Intervenors' proposed completion dates listed in the letter and possible alternative completion dates. Mr. Caldwell stated that Gelman was unwilling to agree to any specific dates for completion of activities under the Order, other than those dates that are already specifically set forth in the Order.

EGLE agrees that deadlines would be desirable for at least some of the response activities listed in the Intervenors' letter, but without Gelman's agreement to do so voluntarily we also believe that modification of the Order is unlikely during the pendency of Gelman's appeals. As we also discussed, EGLE remains willing to continue regular meetings with Intervenor counsel to provide updates on the status of Gelman's implementation of the Order.

Please feel free to contact me if you have any questions.

Sincerely,

/s/ *Brian J. Negele*

Brian J. Negele
Assistant Attorney General
Environment, Natural Resources,
and Agriculture Division
(517) 335-7664
negeleb@michigan.gov

BJN/rc
cc: Michael L. Caldwell
Frederick J. Dindoffer
Timothy S. Wilhelm
Erin E. Mette
William J. Stapleton
Robert Charles Davis

LF: Gelman Sciences CIR/AG #1989-001467-A/Letter – Mr. Dupes 2022-05-05

EXHIBIT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JENNIFER GRANHOLM, Attorney General for the State of Michigan, ex rel, MICHIGAN NATURAL RESOURCES COMMISSION, MICHIGAN WATER RESOURCES COMMISSION, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Plaintiff,

vs

GELMAN SCIENCES, INC.,

Defendant.

Case No. 88-34734-CE

Honorable Donald E. Shelton

OPINION AND REMEDIATION ENFORCEMENT ORDER

At a Session of the Court held in the Washtenaw County Courthouse in the City of Ann Arbor, on July 17, 2000

PRESENT: HONORABLE DONALD E. SHELTON, Circuit Judge

This case was originally filed in 1988 by the State to require Gelman Sciences, Inc. to clean up pollution of local water supplies caused by the discharge of dioxane from its manufacturing facility. A consent judgment identifying the required remediation actions was agreed to by the parties and entered on October 22, 1992. In the 12 years this case has been pending, many things have changed, including the identity if the participants. The successor to the plaintiff agency is now called the Michigan Department of Environmental Quality ("MDEQ"). The defendant corporation has been acquired by another company and is now known as Pall/Gelman Sciences, Inc. ("PGSI).

The original judge retired and the case was reassigned and has subsequently been reassign to this Court as companion to other litigation involving this issue. The original consent judgment was amended by the parties and the Court on September 23, 1996 and again on October 20, 1999.

On February 14, 2000 plaintiff filed a motion to enforce the consent judgment. The MDEQ claims that PGSI has not complied with the terms of the consent judgment as amended and seeks equitable relief in the form of an order requiring PGSI to perform specific "environmental response activities" to achieve the cleanup requirements of the consent judgment. The MDEQ also seeks to an order requiring the payment of certain "stipulated penalties" provided in the consent judgment. PGSI asserts that it has actively sought to remediate the pollution and that no penalties are due under the terms of the judgment. The issues were defined in a Joint Prehearing Statement filed by the parties on June 21, 2000. An evidentiary hearing was conducted on July 6, 7 and 10, 2000. The parties were also given the opportunity to respond to the Court's proposed Order. The Court's findings and conclusions, in part, are set forth below in this Opinion and Order.

The monitoring and purging of dioxane from the aquifers flowing under and around the Gelman facility is an ongoing process. The defendant, particularly since the change in ownership, has acted in good faith to meet its obligations to identify and clean up the polluted water supplies. It is also clear, however, that the purging of dioxane has not occurred fast enough to provide the public, or the Court, with assurance that the plume of dioxane was contained as early as it should have been or that there is an ongoing approved plan that will lead to the removal of unlawful levels of this pollutant from the area's water supplies. In part this appears to be because Gelman, especially

early on, did not know how to detect or remove the pollutant or act quickly enough to find out and do so. In part, however, this also appears to be because the MDEQ itself did not know how to monitor or purge the pollutant or it just acted far too slowly in its "reactive only" mode to Gelman's proposed work plans. It also appears that some of the delay has been the result of the inability to obtain land and other access to install the necessary monitoring, purging and treating equipment.

Assigning responsibility for these delays however is not this Court's priority. The fact is that the consent judgment of the Court, as subsequently amended, was intended to bring about a cleanup of this pollution and it has not yet done so. It is far less important to fix blame for that failure than it is to enforce its terms to bring about the cleanup. Based upon the evidence submitted, this Court is going to grant equitable relief in the sense that the Court will use its equitable powers to enforce the consent judgment to insure that dioxane levels in these water supplies is brought within acceptable standards as soon as possible. Both sides in this dispute appear to need the intervention of the Court to keep them moving toward this goal.

The Court's remediation order is designed first to require PGSI to submit an enforceable long range plan which will reduce all dioxane in these water supplies below legally acceptable levels and second to order immediate measures to move that process along faster than it has moved in the past. As to the request for monetary penalties, there has been considerable testimony about whether PGSI is liable for stipulated penalties under the amended consent judgment. The Court will take these requests for penalties under advisement. However, the parties are advised that the Court intends to enforce the consent judgment and the equitable

remediation measures in this order by virtue of its contempt powers and all of the sanctions available thereunder.

Remediation Enforcement Order

1. PGSI shall submit a detailed plan, with monthly benchmarks, which will reduce the dioxane in all affected water supplies below legally acceptable levels within a maximum period of five years from the date of this Order. The plan will also provide for subsequent monitoring of those water supplies for an additional ten year period thereafter. This plan will be submitted to the MDEQ for review within 45 days of this Order. MDEQ will respond within 75 days of this Order and the parties will confer and discuss the issues raised by the MDEQ review, if any. The plan will then be submitted to this Court within 90 days of this Order, for review and adoption as an Order of the Court.
2. As to the area in which monitoring well "10d" is located, the additional monitoring wells requested by the MDEQ will be installed within 60 days of this Order. An additional two purging wells in the monitoring well 10d area will be also be installed and operational within 60 days of this Order.
3. PGSI will install an additional ultraviolet treatment unit which shall be operational within 75 days of this Order. The capacity of the unit shall be consistent with the Court's maximum total remediation period of 5 years described in paragraph 1 of this Order.

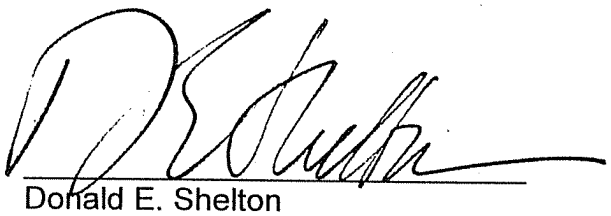
4. Purging from the horizontal well in the Evergreen area shall commence within 30 days after the additional ultraviolet treatment unit is installed.

5. The combined pumping rate of the LB1, LB2 and AE1 purging wells will be increased to 200 gpm within 30 days after the additional ultraviolet treatment unit is installed.

6. Monitoring wells in the Dupont section of the Evergreen area will be installed as requested by the MDEQ. These wells will be operational within 45 days after access is obtained. PGSI shall secure access for those wells within 30 days of this Order or, if necessary, commence legal action to do so within that time.

7. In the Western area, PGSI shall install monitoring wells as requested by MDEQ. These wells will be operational within 45 days after access is obtained. PGSI shall secure access for those wells within 30 days of this Order or, if necessary, commence legal action to do so within that time. In the event that monitoring of those wells for five months thereafter shows an increasing concentration of dioxane above legally acceptable levels, then a purging well will be installed and be operational within 60 days after that five month period. The Court reserves judgment as to any other remedial measures in this area in the event that there is no evidence of such increasing levels.

IT IS SO ORDERED.



Donald E. Shelton
Circuit Judge

EXHIBIT B

NATHAN D. DUPES
NDUPES@BODMANLAW.COM
313-393-7590

BODMAN PLC
6TH FLOOR AT FORD FIELD
1901 ST. ANTOINE STREET
DETROIT, MICHIGAN 48226
313-393-7579 FAX
313-259-7777

bodman
ATTORNEYS & COUNSELORS

April 18, 2022

Michael Caldwell, Esq.
Zausmer, P.C.
31700 Middlebelt Road, Suite 150
Farmington Hills, Michigan 48334

Brian Negele, Esq.
Michigan Department of Attorney General
525 W. Ottawa Street
P.O. Box 30212
Lansing, Michigan 48909

Re: State of Michigan v. Gelman Sciences, Inc. – Case No. 88-34734-CE

Dear Mike and Brian:

I write for all the Intervenors concerning Gelman's progress implementing the Court's June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria ("Response Activity Order").

At Gelman's request, Intervenors have sought updates on the progress of Gelman's response activities from EGLE. Although we appreciate the progress Gelman has made in certain areas, we are disappointed that Gelman has not made significant progress in others. Even more concerning is the apparent lack of any realistic time line for completion of the remaining activities. EGLE could not tell us, for example, when the two additional on-site extraction wells, the heated soil vapor extraction system, or the phytoremediation system would be operational. As you are aware, the Response Activity Order requires Gelman to "immediately implement and conduct all requirements and activities" in the Proposed 4th CJ.

We propose the following time line for the completion of what we understand to be the principal, currently outstanding action items required by the Response Activity Order, as stated in the Proposed 4th CJ.[1] Please confirm that Gelman will meet this time line or, if you believe that any of the proposed dates are impractical, please explain why and offer a reasonable alternative. If we do not receive a satisfactory response, we may need to involve Judge Connors.

We understand that some of these activities require approvals from EGLE and others. To the extent that Gelman awaits feedback from EGLE on any of the below items, please provide a time line for completion of its review and identify what can be done to expedite the matter. To the extent that Gelman awaits feedback from any of the Intervenors, please advise what we can do to expedite that process.

[1] Our knowledge of Gelman's progress is of course limited to the information that is publicly available or that EGLE (or Gelman) provides us. Gelman could easily clear up any uncertainty over its progress by providing us with direct updates but, to date, it has refused to do so.

We remind you that the Intervenors have the right to ensure implementation of the Response Activity Order. Judge Connors explicitly ruled that "Intervening Plaintiffs shall retain their status as Intervenors in this action." The Court of Appeals rejected Gelman's request to stay that provision of the Response Activity Order. We have no interest in taking over the role of the regulator, but we do have a significant interest in seeing that the Order is followed.

Finally, as to the Parklake Well, Intervenors continue to object to Gelman's proposed discharge to First Sister Lake. However, the Proposed 4th CJ requires Gelman to apply for a NPDES permit for the Parklake Well and Intervenors expect Gelman to comply with that requirement, as described below.

Proposed Time Line

Activity	Proposed 4th CJ section(s)	Proposed Completion date
Installation and operation of Sentinel Wells on northern PZ boundary (A, B, C)	V.A.3.a.	2Q22
Installation and operation of PZ Boundary Wells near Southern PZ boundary (D, E)	V.A.3.b.	April 2022[2]
Installation and operation of Rose Well (or conversion of IW-2 to extraction well)	V.A.3.e.i.	2Q22
Installation and operation of Parklake Well	V.A.3.e.ii.	Apply for NPDES permit by April 2022
Installation and operation of additional downgradient investigation wells (F, G, H)	V.A.5.f.	2Q22
Completion of Western Area GSI Investigation	V.B.2.b.	May 2022

[2] We understand that a monitoring well at Location D is already installed and Location E was in the planning stages as of January 2022.

Activity	Proposed 4th CJ section(s)	Proposed Completion date
Submission of GSI Response Activity Work Plan	V.B.2.c.	June 2022
Compliance with GSI objective	V.B.2.d.	July 2022
Installation and operation of additional Western Area investigation wells (I, J, K, L, M, N)	V.B.3.b.	April 2022[3]
Amend Western Area Monitoring Plan (dated 4/18/11) to identify the network of compliance wells for non-expansion objective	V.B.3.c.	May 2022
Installation and operation of Phase I extraction wells	VI.C.1.	May 2022[4]
Implementation of phytoremediation systems in former pond areas and Marshy Area	VI.C.2., 3.	3Q22
Installation of HSVE in former Burn Pit area	VI.C.4.	3Q22

[3] We understand that monitoring wells at Locations K, L, M, and N are already installed and that Locations I and J were in the planning stages as of January 2022.
[4] We understand that one extraction well has been installed and is operational, and the second well has been installed but is not operational.

Very truly yours,

Nathan D. Dupes

cc: Intervenor counsel

EXHIBIT C

DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENT,

Plaintiff,

and

Case No. 88-034734-CE

Hon. Timothy Connors

CITY OF ANN ARBOR, WASHTENAW COUNTY,
WASHTENAW COUNTY HEALTH DEPARTMENT,
WASHTENAW COUNTY HEALTH OFFICER ELLEN
RABINOWITZ, in her official capacity,
the HURON RIVER WATERSHED COUNCIL,
and SCIO TOWNSHIP,

Intervening Plaintiffs,

vs.

GELMAN SCIENCES, INC., d/b/a PALL
LIFE SCIENCES, a Michigan Corporation,

Defendant.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

Case No. 88-034734-CE

Hon. Timothy Connors

CITY OF ANN ARBOR, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER ELLEN RABINOWITZ, in her official capacity, the HURON RIVER WATERSHED COUNCIL, and SCIO TOWNSHIP,

Intervening Plaintiffs,

vs.

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant.

_____

Proceedings taken before the Honorable Timothy Connors

Taken Via Zoom Videoconference

Commencing at 9:13 a.m.

Thursday, June 16, 2022

Transcribed by Carolyn Grittini, CSR-3381

APPEARANCES:

BRIAN NEGELE
Michigan Department of Attorney General
525 W. Ottawa St.
Lansing, Michigan 48909
517.335.7664
Appearing on behalf EGLE.

FREDRICK J. DINDOFFER
Bodman, PLC
1901 St. Antoine
6th Floor
Detroit, Michigan 48226
313.259.7777
Appearing on behalf of the Intervening Plaintiff, City of Ann Arbor.

TIMOTHY S. WILHELM
ATLEEN KAUR
Ann Arbor City Attorney's Office
301 E. Huron, Third Floor
Ann Arbor, Michigan 48107
734.794.6170
Appearing on behalf of the Intervening Plaintiff, City of Ann Arbor.

ROBERT C. DAVIS
Davis, Burket Savage Listman Taylor
10 S. Main Street, Suite 401
Mt. Clemens, Michigan 48043
586.469.4300
Appearing on behalf of the Intervening Plaintiffs, Washtenaw County entities.

WILLIAM J. STAPLETON
Hopper Hathaway
126 S. Main Street
Ann Arbor, Michigan 48104
734.662.4426
Appearing on behalf of the Intervening Plaintiff, Scio Township.

ERIN E. METTE
Great Lakes Environmental Law Center
4444 Second Avenue
Detroit, Michigan 48201
313.782.3372
Appearing on behalf of the Intervening Plaintiff,
Huron River Watershed Council.

MICHAEL L. CALDWELL
Zausmer, PC
32255 Northwestern Highway
Suite 225
Farmington Hills, Michigan 48334
851.4111
Appearing on behalf of the Defendant, Gelman.

Thursday, June 16, 2022

9:13 a.m.

COURT RECORDER: On the record, Kelly versus Gelman Sciences, case number 88-34 -- I'm sorry -- 34734-CE. This is a motion hearing on intervening plaintiffs' motion for entry of an order to show cause concerning the implementation of the Response Activity Order.

THE COURT: Good morning, this is Judge Connors. I have a very, very busy motion docket, part of which is because we've been assigned the business court cases with Judge Brown's early departure. So my first question for you on this, after we put on appearances is, how can I hear -- what jurisdiction do I have to hear any motion while this case is on appeal? My understanding it's on appeal, so if you can first identify those of you who are attorneys on this motion, and then if you could answer that preliminary question for me, I would appreciate it. I'm not sure I can hear this case, this motion while this case is on appeal. Go ahead.

MR. DINDOFFER: Your Honor, Fredrick Dindoffer, representing the City of Ann Arbor.

MR. DAVIS: Robert Davis, representing the Washtenaw County intervenors.

MR. STAPLETON: Good morning, Your Honor. William Stapleton, representing Scio Township, one of the intervenors.

MS. METTE: Good morning, Your Honor. Erin Mette, on behalf the Huron River Watershed Council.

MR. WILHELM: Good morning, Your Honor. Tim Wilhelm, City of Ann Arbor.

MS. KAUR: Good morning, Your Honor. Atleen Kaur, City Attorney for Ann Arbor.

MR. CALDWELL: Good morning, Your Honor. This is Mike Caldwell on behalf of Defendant, Gelman Sciences, and I am joined by Ray (inaudible) or at least his iPad, and Rachel Levitt.

MR. NEGELE: Good morning, Your Nagel. Brian Negele, Assistant Attorney General, representing Michigan Department of Environment, Great Lakes Energy.

THE COURT: Is that the -- oh, still more lawyers. Go ahead.

MR. DINDOFFER: That's fine, Your Honor. I was just going to say, I think we have all the appearances now, if you would care, I can address the question you asked.

THE COURT: What I was going to say, there's so many lawyers, is there anybody left in the entire Bar Association. We may as well have a statewide meeting here. Yes, if you could, please. That initial question is, before we even get into the weeds of the motion, is, with this on appeal, tell me if you think -- tell me how I can and then the next question is should I. Go ahead.

MR. DINDOFFER: Your Honor, I know that Gelman has raised that question, and if Mr. Caldwell would like to speak first, I will certainly wait and respond.

MR. CALDWELL: Happy to, Fred. Your Honor, as we've set forth in our brief and as I think the Court has flagged that issue on its own, that this order is on appeal; in fact, we have oral argument literally in three weeks from today, and in fairness to the interveners, they filed their motion just days prior to the oral argument being set.

But that doesn't change the fact that leave has been granted. There is a stay order that the Court issued in July of last year that stays precisely the type of progress review hearing that is required in order to hear the intervenors' motion, which frankly, they dress up as a motion for show cause, but

it's nothing other than a motion to have a hearing to review the progress we've made in implementing this Court's Response Activity Order.

And the stay order expressly states in paragraph 2 of the Court's Response Activity Order that provided for those quarterly hearings, one of the purposes of which was to review the progress we are making. So I don't understand how this type of hearing was not specifically stayed by the Court of Appeals.

But even more generally, the Michigan Court Rules 7.208(A) specifically prevents the intervener or any party from seeking this Court from hearing a motion to amend the order that is, in fact, up on appeal. Even interveners recognize that the Court issued that stay and I think implicitly that the purpose behind MCR 7.208(A) is to prevent the creation of a moving target for the Court of Appeals to consider while reviewing and ruling on the appeal.

And interveners' request for the hearing itself, but more specifically, for completion deadlines that are provided nowhere in the Response Activity Order or the proposed Consent Judgment that was incorporated therein, is simply an impermissible request for amending that order and creating the very

scheduling@fortzlegal.com
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
Toll Free: 1844.730.2066

moving target that they acknowledge would be inappropriate. So I would agree with this Court's concerns that there is not jurisdiction to have this hearing at all.

THE COURT: Thank you. If I could please, and maybe the interveners could pick one person to articulate their concerns and I'll give you five minutes. Go right ahead.

MR. DINDOFFER: Thank you, Your Honor. Fredrick Dindoffer, representing the City and bringing this argument for all interveners.

Your Honor, we all recognize that MCR 7.208 (A) limits what may be heard or what may be changed in an order when the matter is on appeal. And so we understand the position that Mr. Caldwell has expressed. However, Your Honor, we are not asking that the Court amend the order in that we aren't requesting that the Court order different or additional actions be taken. What we're asking the Court to do is enforce the order that it issued which told Gelman to immediately do a number of things; all of the requirements set forth in the proposed fourth amended CJ.

Now, would what we've requested amount to an amendment, that's the question that's I think in

front of us. And I think, Your Honor, again, we're not asking that different things be required of Gelman; but rather, that Gelman be required to comply with the order that was issued, which said immediately do these things.

Now, there isn't a lot of case law under this section of the Court Rule, but there is, in fact, one unpublished decision which, of course, limits -- it didn't give presidential effect, but it does illustrate the reasoning that the Court of Appeals might apply in cases like this.

And I'll just bring to the Court's attention the case that is Kohler vs. Sapp. It was a 1999 decision from Michigan Court of Appeals, and we can certainly send a copy of that to everyone involved, if necessary. But that particular case involved a circumstance in which the defendant, Mr. Sapp, had been operating a commercial business in a residential neighborhood. Actions were brought against him to force him to cease doing commercial business in that neighborhood. What he was doing was operating a car repair operation at his home.

The Court held a trial and found that he was inappropriately conducting a commercial business in that neighborhood and ordered that he cease doing

that commercial activity.

When that judgment was entered, Mr. Sapp then appealed the matter to the Michigan Court of Appeals. But he did not stop doing the commercial business, continued to operate his car repair business, continued to have wrecked cars and disabled cars parked all over the lawn. And so the plaintiffs went back to the circuit court, the trial court, and said judge, they're disobeying, this guy's disobeying your order; we need to have you do something here.

And so the Court, while not finding him in contempt, nonetheless illustrated, or would say changed the order in the sense that he ordered that all wrecked vehicles and disabled vehicles be removed from the premises.

This was raised by the defendant in front of the Court of Appeals saying hey, the judge was not allowed to do that. This was before you on appeal. He couldn't amend his order in that way and force me to remove these things. And the Court of Appeals reviewing that said, no, this was not an amendment of the order, it was merely an illustration or explanation of what was required when the Court said cease all commercial activity.

And so the Court found that it was not an

amendment, it was, indeed, simply an illustration or explanation of what was meant by the spirit of the order when the judge had ruled that he was no longer allowed to conduct commercial activity.

Similarly, we have a situation here where the Court a year ago, more than a year ago now, ordered Gelman to immediately implement the requirements that were set forth in proposed fourth amended CJ. Gelman has done some things, we acknowledge that; however, there are numerous items that for no understood good reason Gelman has not accomplished.

Illustrating that, for example, Your Honor, would be the installation of monitoring wells throughout the area, which is a year later, Gelman still hasn't installed most of them. Similarly, many onsite activities at Gelman's own property have not been conducted, have not been completed.

Gelman has chosen not to discuss these matters with the interveners, but instead, has demanded that we speak solely by talking to the state and get secondhand version of things.

THE COURT: Apologizing in advance for interrupting you but I have to. I told you you have five minutes, you've taken six. You have not

convinced me that I can and you certainly have not convinced me that I should hear this motion at this time. I understand the arguments, I am happy to deal with the case, I've always been happy to deal with the case. The Court of Appeals has taken jurisdiction, it's just like when the bankruptcy court takes jurisdiction.

You get a specific direction from the Court of Appeals that allows me to hear this motion and I will. Until then, I don't believe I can. I thank you, good luck, and I'm here when the Court of Appeals tells me I can and should hear something. Have a good day everybody.

(Proceedings concluded at 9:26 a.m.)

scheduling@fortzlegal.com
ofortzlegal@gmail.com
Toll Free: 844-730-4066

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)

) SS

COUNTY OF MACOMB)

I, CAROLYN GRITTINI, certify that this proceeding was transcribed by me on the date hereinbefore set forth; that the foregoing proceedings were recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to, either party nor interested in the event of this cause.

_____

CAROLYN GRITTINI, CSR-3381
Notary Public,
Macomb County, Michigan.
My Commission expires: July 15, 2024

EXHIBIT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

CITY OF ANN ARBOR, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER ELLEN RABINOWITZ, in her official capacity, the HURON RIVER WATERSHED COUNCIL, and SCIO TOWNSHIP,

Intervening Plaintiffs,

-v-

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

ORDER REGARDING INTERVENING PLAINTIFFS' MOTION FOR ENTRY OF AN ORDER TO SHOW CAUSE CONCERNING IMPLEMENTATION OF RESPONSE ACTIVITY ORDER

MICHIGAN DEPT. OF ATTORNEY GENERAL
By: Brian Negele (P41846)
525 W. Ottawa Street, PO Box 30755
Lansing, Michigan 48909
(517) 335-7664
negeleb@michigan.gov
Attorneys for EGLE

BODMAN PLC
By: Fredrick J. Dindoffer (P31398)
Nathan D. Dupes (P75454)
1901 St. Antoine, 6th Floor
Detroit, Michigan 48226
(313) 259-7777
fdindoffer@bodmanlaw.com
Attorneys for the City of Ann Arbor

ZAUSMER, P.C.
By: Michael L. Caldwell (P40554)
31700 Middlebelt Rd., Suite 150
Farmington Hills, Michigan 48334
(248) 851-4111
gaugust@zacfirm.com
Attorneys for Gelman Sciences, Inc.

ANN ARBOR CITY ATTORNEY'S OFFICE
By: Atleen Kaur (P66595)
Timothy S. Wilhelm (P67675)
301 E. Huron, Third Floor
Ann Arbor, Michigan 48107
(734) 794-6170
akaur@a2gov.org
Attorneys for the City of Ann Arbor

DAVIS BURKET SAVAGE LISTMAN TAYLOR
By: Robert Charles Davis (P40155)
10 S. Main Street, Suite 401
Mt. Clemens, Michigan 48043
(586) 469-4300
Rdavis@dbsattorneys.com
Attorneys for Washtenaw County entities

GREAT LAKES ENVIRONMENTAL LAW CENTER
By: Erin E. Mette (P83199)
4444 2nd Avenue
Detroit, Michigan 48201
(313) 782-3372
erin.mette@glelc.org
Attorneys for Huron River Watershed Council

HOOPER HATHAWAY, PC
By: Bruce Wallace (P24148)
William J. Stapleton (P38339)
126 S. Main Street
Ann Arbor, Michigan 48104
(734) 662-4426
bwallace@hooperhathaway.com
Attorneys for Scio Township

ORDER REGARDING INTERVENING PLAINTIFFS' MOTION FOR ENTRY OF AN ORDER TO SHOW CAUSE CONCERNING IMPLEMENTATION OF RESPONSE ACTIVITY ORDER

At a session of said Court,
held in the City of Ann Arbor
County of Washtenaw
State of Michigan
on 6/24/22

PRESENT: HONORABLE TIMOTHY P. CONNORS
Circuit Court Judge

This matter having come before the Court on June 16, 2022 for a scheduled hearing on Intervening Plaintiffs' Motion for Entry of an Order to Show Cause Concerning Implementation of Response Activity Order ("Motion");

IT IS HEREBY ORDERED that the Court declines to rule on the Motion for the reasons stated on the record.

This is not a final Order and does not close the case.

/s/ Timothy Connors
June 24, 2022
Honorable Timothy P. Connors
Washtenaw County Circuit Court Judge

Approved as to form:

/s/Fredrick J. Dindoffer
Fredrick J. Dindoffer (P31398)
Attorney for Intervenor City of Ann Arbor

/s/Michael L. Caldwell *(w/consent)*
Michael L. Caldwell (P40554)
Attorney for Def. Gelman Sciences

/s/ Robert Charles Davis *(w/consent)*
Robert Charles Davis (P41055)
Attorney for Intervening Washtenaw County Entities

/s/Erin E. Mette *(w/consent)*
Erin E. Mette (P83199)
Attorney for Huron River Watershed Council

/s/Brian J. Negele *(w/consent)*
Brian J. Negele (P41846)
Michigan Dept. of Attorney General
Attorney for Plaintiff EGLE

/s/ William J. Stapleton *(w/consent)*
William J. Stapleton (P38339)
Attorneys for Intervenor Scio Township

EXHIBIT E

KOHLER v. SAPP

Court of Appeals of Michigan

June 11, 1999, Decided

No. 205029, No. 207901

Reporter
1999 Mich. App. LEXIS 608 *; 1999 WL 33441238

DONALD L.KOHLER, SHARON L. KOHLER and HOME ACRES SKYRANCH, INC., Plaintiffs-Appellees, v ARTHUR W. SAPP, JR., Defendant-Appellant, and RICHARD SHIELS, SANDRA SHIELS, and ROBERT BURCH, Defendants. [1] DONALD L. W. KOHLER, SHARON L. KOHLER, and HOME ACRES SKYRANCH, INC., Plaintiffs-Appellees, v ARTHUR W. SAPP, JR., Defendant-Appellant, and RICHARD SHIELS, SANDRA SHIELS, and ROBERT BURCH, Defendants.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: No. 205029. Missaukee Circuit Court. LC No. 96-003552 CZ.

No. 207901. Missaukee Circuit Court. LC No. 96-003552 CZ.

Disposition: Affirmed.

Judges: Before: Griffin, P.J., and Wilder and R. J. Danhof [*], JJ.

Opinion

PER CURIAM.

Defendant Arthur W. Sapp, Jr., appeals as of right following a bench trial verdict in favor of plaintiffs. Defendant also appeals by leave granted from a later order granting plaintiffs' motion for show cause. We affirm both orders.

Following a bench trial, the court determined that defendant breached a restrictive covenant which provided that no resident engage in commercial activity on his or her property. Defendant argues that the judgment was erroneous where the character of the neighborhood had changed and where plaintiffs had waived enforcement of the covenant. We disagree. A trial court's findings will not be set aside unless clearly erroneous. *MCR 2.613(C)*. A trial court's findings are clearly erroneous when the reviewing **[*2]** court is left with a definite and firm belief that it would have reached a different result. *Wiley v Wiley, 214 Mich App 614, 615; 543 NW2d 64 (1995)*.

Defendant never denied that the operation of his business was a violation of the restrictive covenant prohibiting commercial activity on residential land. He argues that the doctrines of laches and/or waiver apply. In *Rofe v Robinson (On Second Remand), 126 Mich App 151; 336 NW2d 778 (1983)*, this Court reiterated that, for the doctrine of laches to apply, "it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense of laches." *Id. at 154*, quoting *In re Crawford Estate, 115 Mich App 19, 25-26; 320 NW2d 276 (1982)*. Defendant points out that he has been conducting business on his premises since

[1] A consent judgment as to these parties was entered by the court.

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

he began living there full-time in 1980. He argues that plaintiffs' failure to bring suit until some sixteen years later bars plaintiffs' action. However, while it is true that plaintiffs acquiesced to defendant's commercial use of the property, evidence showed that defendant's use substantially changed **[*3]** and increased in the 1990s and that, in 1996, defendant had as many as nineteen cars in front of his property. Plaintiffs brought suit shortly thereafter to enjoin defendant from further commercial activity. Thus, given the circumstances, it does not appear that there was an unjustifiable delay in bringing suit. In addition, defendant has not demonstrated how a delay caused him prejudice. Defendant testified that he repaired the automobiles more as a hobby than as a business and that it provided him with "rest and relaxation." Thus, there was no economic reliance on the business. Defendant also pointed out that in the past three years he either made no profit or approximately $ 3,000 a year. There are no fixtures or buildings that would need to be removed. Therefore, defendant has failed to show that he would be prejudiced.

Defendant maintains that, even if plaintiffs timely brought suit, enforcement of the restriction is barred by the doctrine of waiver. Defendant points to the fact that others in the neighborhood were guilty of violating the restriction and also points to the fact that the character of the neighborhood had changed over time. *Rofe* affirmed that "the right to **[*4]** enforce a restrictive covenant may be lost by waiver if by one's failing to act he leads another to believe that he will not insist upon the covenant and the other is thereby damaged." *Id. at 155*. However, this Court in *Rofe* also stated that "where variations from deed restrictions constitute minor violations, the concept of waiver does not apply" and "there is no waiver where the character of the neighborhood intended and fixed by the restrictions remains unchanged." *Id. at 155*.

The evidence demonstrated that many other individuals had been operating businesses in violation of the covenant against commercial use. However, the evidence also demonstrated that these other businesses were innocuous. The trial court had an opportunity to view the neighborhood and concluded that no other property came close to defendant's in terms of commercial activity. While there was testimony that the character of the neighborhood had changed, the court was in the best position to determine the credibility of the witnesses' testimony. *State Farm Fire & Casualty Co v Couvier, 227 Mich App 271, 275; 575 NW2d 331 (1998)*. The court also viewed the neighborhood **[*5]** and stated that "it is clear from my view of the premises that this is a residential plat with homes, people living there" and that "the original intent of the developer here has not changed over a period of time. It's still a residential area." This Court will defer to the trial court's ability to assess the character of the neighborhood given the trial court's unique opportunity to visit the area. *Rofe, supra at 156*. Therefore, defendant failed to show that the character of the neighborhood had changed to such an extent that it would be impossible "to secure in a substantial degree the benefits sought to be realized through the performance of a promise respecting the use of land." *Morgan v Matheson, 362 Mich 535, 545; 107 NW2d 825 (1961)*.

Defendant next argues that the trial court abused its discretion when it changed the original judgment and imposed additional burdens on defendant by way of a show cause order. We disagree. Whether the trial court was entitled to "amend" the original judgment is a question of law which is reviewed de novo on appeal. *Brucker v McKinlay Transport, Inc (On Remand), 225 Mich App 442, 448; **[*6]** 571 NW2d 548 (1997)*.

Defendant appealed the trial court's judgment in favor of plaintiffs. While the appeal was pending in this Court, plaintiffs brought a motion to show cause why defendant should not be held in contempt for violating the court's order. While the court did not hold defendant in contempt, the court did point out that defendant had violated the spirit of the original order which prohibited commercial

activity. The court then entered an order that provided that defendant remove all "wrecked or disabled vehicles from his property." *MCR 7.208(A)* provides, "after a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law." However, the trial court retains jurisdiction to enforce its orders. *People v Norman, 183 Mich App 203, 207; 454 NW2d 393 (1989)*; *Shaw v Pimpleton, 24 Mich App 265, 269; 180 NW2d 384 (1970)*. Defendant argues that the trial court violated this provision by imposing additional restrictions **[*7]** on him. Rather than amending the order, however, it appears that the court was merely clarifying the purpose of the order and mandating that defendant comply. On more than one occasion the court advised that the purpose of the order was to eliminate commercial activity. The spirit of the order was clear: defendant was not to engage in commercial activity. The court determined that defendant had not ceased operating the business. Defendant admitted that these vehicles were on his property before the trial began. They were in the name of his business. Defendant claimed that the vehicles were not being offered for sale, but were simply being repaired for other family members. The court was in the best position to determine defendant's credibility and whether the order was being complied with. *State Farm, supra at 275*.

Finally, defendant claims that the trial court erroneously ordered defendant to remove the wrecked vehicles from his property in contravention of a township ordinance which provides that a resident may have up to three inoperable vehicles on his land. We disagree. Defendant has failed to preserve the issue for appeal because the issue was never raised or **[*8]** addressed by the trial court. *Environair v Steelcase, Inc, 190 Mich App 289, 295; 475 NW2d 366 (1991)*. In addition, defendant failed to cite any authority for his position. Insufficiently briefed issues on appeal are deemed waived. *Dresden v Detroit Macomb Hosp, 218 Mich App 292, 300; 553 NW2d 387 (1996)*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder

/s/ Robert J. Danhof

End of Document