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,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Court of Appeals Docket No. 357599

Washtenaw County Circuit Court Case No. 19-009098-CB

Intervenors-Appellees, Answer in Opposition to Defendant-Appellant's Application For Leave to Appeal

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INTERVENORS / APPELLEES'
ANSWER IN OPPOSITION TO THE DEFENDANT / APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL
AND
PROOF OF SERVICE

The Intervenors/Appellees, by their counsel of Record, for their Answer in Opposition to the Defendant/Appellant's Application For Leave To Appeal ("Application For Leave"), state the following:

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS CONTINUED

Pages

INDEX OF AUTHORITIES

CASES **Page**

STATUTES

COURT RULES

INDEX OF EXHIBITS

1. Consent Judgment Dated October 26, 1992

2. Third Amendment to the Consent Judgment Dated March 8, 2011

3. Emergency Rules

4. State of Michigan Trial Brief Dated April 30, 2021

5. Washtenaw County Circuit Court Order Dated June 1, 2021 without 4th Amended Consent Judgment

6. Michigan Court of Appeals Order Dated July 14, 2017 in Docket No. 337818

7. Michigan Supreme Court Order Dated January 12, 2018 in Docket Number 156373

8. Washtenaw County Circuit Court Fourth Amended Scheduling Order Dated January 27, 2020 in Case No. 88-034734-CE

9. Washtenaw County Circuit Court Order Dated April 6, 2021 Denying Motion For Reconsideration And Scheduling Hearing Dates In Case NO. 88-034734-CE

10. Washtenaw County Circuit Court Order Dated April 6, 2021 Denying Defendant Gelman Sciences, Inc.'s Motion For Entry Of Order Setting Briefing/Deposition Schedule And New Hearing Dates In Case No. 88-034734-CE

11. Washtenaw County Circuit Court Order Dated April 6, 2021 Denying Defendant Gelman Sciences, Inc.'s Motion To Stay In Case No. 88-034734-CE

12. Michigan Court of Appeals Order Dated April 29, 2021 in Docket No. 356859

13. Michigan Court of Appeals Order Dated June 29, 2021 in Docket No. 357598

14. **Baynesan** v. **Wayne State Univ.**, 316 Mich. App. 643; 894 NW2d 102 (2016)

15. **Jasper Lee Todd, Personal Representative of the Estate of Donna Todd** v. **Steiner**, Unpublished Opinion Per Curiam of the Court of Appeals, Decided [April 24, 2003] (Docket No. 234007)

16. **Granger** v. **Naegele Advertising Cos.**, 46 Mich. App. 509; 208 NW2d 575 (1973)

I. PREAMBLE

This matter is governed by a final order (Consent Judgment) from 1992. The Trial Court has not reversed that final Order. Instead, the Trial Court entered a supplemental post judgment order to address a significant change in the relevant cleanup standards. The Trial Court's recent order is simply the next milestone in this long-running environmental cleanup, which will continue long after Gelman's current Application is decided.

In the 1992 Consent Judgment–to which Gelman agreed–the Trial Court expressly retained jurisdiction going forward to enforce the applicable laws and regulations and certainly maintained its inherent authority to enforce its orders and judgments. Since entry of the 1992 Consent Judgment, the Trial Court has exercised that authority on several occasions in order to address changes in the site and science and to resolve other disputes.

The Consent Judgment is clear that revisions are required if the applicable cleanup standards for 1, 4 Dioxane change. That is the issue here.

The State of Michigan recently changed the cleanup standards for 1,4 Dioxane by more than an order of magnitude. All parties agree that the Consent Judgment must be revised to account for a recent change in the cleanup standards. Intervention was granted to the impacted local governments to provide input on the implementation of those new standards. Gelman opposed that intervention to this Michigan Court of Appeals. This Court declined Gelman's application for leave and so did the Michigan Supreme Court.

The Trial Court scheduled briefing and hearing dates to hear and review the positions of the parties on the implementation of the cleanup standards and the other site work necessary to accomplish that process. Gelman opposed that scheduling order to this Michigan Court of Appeals. This Michigan Court of Appeals declined Gelman's application for leave.

The Trial Court set a final briefing and hearing schedule. The parties–Gelman, the State of Michigan and the Intervenors–all submitted detailed briefs and expert reports as to what actions are necessary to implement the new standards.

The Trial Court chose the middle ground among the competing positions. The Trial Court selected, as the initial process to implement the new standards, the actions supported by the State. The Gelman approach, as submitted, was rejected. The Intervenors' approach, as submitted, was rejected. The Trial Court did order quarterly Court conferences going forward to review the progress at the site and to potentially adjust/modify the implementation actions accordingly and based on the scheduled review conferences.

Simply stated, the Trial Court resolved a dispute between the parties concerning modifications to the cleanup regime, exercising authority explicitly granted in the Consent Judgment. In doing so, the Trial Court adopted, as an initial process, the position supported by the state regulatory authority. The Trial Court's decision makes significant and necessary improvements to the implementation of the new standards to the cleanup regime in the form of more removal of 1,4-dioxane from the environment and more monitoring of the contaminant plume. All of these actions are determined to be necessary to facilitate the full and safe implementation of the new standards.

The Trial Court's factual ruling was reduced to an Order ("June 1, 2021 Response Activity Order"). Gelman now opposes that June 1, 2021 Response Activity Order to this Michigan Court of Appeals. This Court should deny Gelman's application for leave for the reasons set forth herein.

II. INTRODUCTION

Gelman's primary argument in its application for Leave to Appeal is that the Trial Court did not have the authority to enter the June 1, 2021 Response Activity Order which adopted the

response activities in the Proposed Fourth Amended Consent Judgment as the initial selected methodology to implement the new cleanup standards consistent with the applicable laws. Gelman is wrong. The Trial Court not only had the necessary authority, the Trial Court also had a duty to implement the changes to the cleanup standards. Gelman does not dispute that changes to the existing Consent Judgment and orders are necessary to address the change in cleanup standards. Gelman simply challenges the "process" the Trial Court chose in its discretion.

The Consent Judgment states that the Trial Court shall retain jurisdiction to enforce the terms of the Consent Judgment. (**Exhibit 1** -- Consent Judgment) The Consent Judgment, at Section VII, states that Gelman shall undertake all activities pursuant to the Consent Judgment in accordance with the requirements of all applicable laws, regulations, and permits. (**Exhibit 1** -- Consent Judgment). The Third Amendment to the Consent Judgment, at pages 29-30, provides that additional response activities may be imposed if there is a change in cleanup criteria and the result of the change is that the existing response activities are not protective. (**Exhibit 2** -- Third Amendment to Consent Judgment). These directives are clear, concise and conclusive as to the Trial Court's authority to order additional response activities.

In 2016, the State of Michigan made findings that the existing cleanup criteria for 1,4 Dioxane were **not** protective of public health. (**Exhibit 3** -- Emergency Rules) The Governor agreed with these findings and confirmed the "emergency changes" (**Exhibit 3** -- Emergency Rules) In setting the new cleanup criteria for 1,4 Dioxane, the State made it clear it had the legal authority to do so. The cleanup criteria changed significantly and the standards for action became far more stringent. The cleanup criterion for groundwater to be used for residential drinking water went from 85 parts per billion ("ppb") to 7.2 ppb. The groundwater surface water interface ("GSI") criterion went from 2800 ppb to 280 ppb.

The Trial Court entered an order and set a hearing date to review each party's proposed methodology to address these new standards. The Trial Court was clear that it wanted each party to provide legal and scientific support to the Court outlining each party's arguments for the actions required to implement the new cleanup standards.

On April 30, 2021, the State of Michigan submitted its brief to the Trial Court which asked the Trial Court to adopt the response activities described in the previously proposed Fourth Amended Consent Judgment. The State of Michigan stated that updating the requirements that apply to Gelman is required to bring the Gelman Site documents up to date and to document the applicability of the more protective cleanup criteria. (**Exhibit 4** -- State of Michigan Trial Court Brief at p. 8) According to the State of Michigan, the previously proposed Fourth Amended Consent Judgment properly implements the new 1,4 dioxane cleanup criteria. (**Exhibit 4** -- State of Michigan Trial Court Brief at p. 8) The Trial Court, pursuant to the State of Michigan's request, adopted, as an initial approach, the response activities described in the previously proposed Fourth Amended Consent Judgment which stated that it reflects the State of Michigan's revision of the generic state-wide residential and non-residential generic drinking water cleanup criteria for 1,4 dioxane in groundwater. (**Exhibit 5** -- June 1, 2021 Response Activity Order) In doing so, the Trial Court rejected the Gelman approach and rejected the Intervenors' approach. The Trial Court did not grant Intervenors any relief or decide any of the Intervenors' claims or Gelman's defenses, nor did it have to. Based on the Briefs and support submitted, the Trial Court initially selected the State's approach as the method of implementation of the change in cleanup criteria, reserving quarterly Court conferences to review the progress and to potentially modify the implementation process if necessary and based on the reviews presented by the parties.

An appeal by Gelman that questions the authority of the Trial Court is not supported. That authority is in the form of a duty and is expressly embodied in the 1992 final Order.

III. COUNTER-STATEMENT OF THE QUESTION INVOLVED

(I) DID THE TRIAL COURT HAVE THE AUTHORITY TO ISSUE THE ORDER ON APPEAL?

Appellant Says	**"No"**
Intervenors Say	**"Yes"**
Trial Court Says	**"Yes"**

IV. STATEMENT OF JURISDICION

The Intervenors agree that this Michigan Court of Appeals has jurisdiction to consider Gelman's Application pursuant to MCR 7.203(B)(1). The Intervenors further point out that Gelman is not appealing (nor could it appeal) the Trial Court's order regarding intervention.

V. COUNTER-STATEMENT OF THE RELEVANT FACTS

The following is the relevant procedural history.

Gelman's Application is not the first time Gelman has sought interlocutory relief in this matter from this Michigan Court of Appeals.

A. July 14, 2017 -- Michigan Court of Appeals Order Denying Gelman's First Motion for Stay Pending Appeal and Denying Gelman's First Application for Leave to Appeal.

On the issue of Intervention, this Michigan Court of Appeals issued a July 14, 2017 Order denying Gelman's motion for stay pending appeal and Gelman's application for leave to appeal. The July 14, 2017 Order stated, in relevant part, the following:

> "The Court orders that the motions for immediate consideration are GRANTED.
>
> **The Court further orders that the motion for stay pending appeal is DENIED.**

> The Court orders that the motion for leave to exceed the page limit for combined reply to answers is GRANTED and the reply received on May 8, 2017 is accepted for filing.
>
> **The Court orders that the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.**" (**Exhibit 6** -- Court of Appeals Order in Docket No. 337818) (Emphasis Added)

B. January 12, 2018 -- Michigan Supreme Court Order Denying Gelman's Application For Leave.

Gelman then filed an application for leave to appeal with the Michigan Supreme Court. On January 12, 2018, the Michigan Supreme Court denied Gelman's application. The Michigan Supreme Court stated that it was not persuaded that it should review the questions presented.

> "On order of the Court, the motion for immediate consideration is GRANTED. **The application for leave to appeal the July 14, 2017 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.**" (**Exhibit 7** -- Order of the Michigan Supreme Court Dated January 12, 2018 in SC Docket Number 156373.) (Emphasis Added)

C. January 27, 2020 -- Trial Court's Fourth Amended Scheduling Order

On January 27, 2020, the Trial Court entered a Fourth Amended Scheduling Order which stated that a hearing will take place on March 22-23, 2021 and set a briefing schedule. The Fourth Amended Scheduling Order states, in relevant part, the following:

> "There is a Hearing on Modification of the Consent Agreement set for March 22-23, 2021 at 9:00 AM
>
> **Before commencement of the Hearing, counsel shall submit Briefs and Expert reports in Accordance with the following schedule:**
>
> **Intervenors by 2/12/2021**
>
> **Gelman response by 2/26/2021**
>
> **EGLE response/Intervenors' reply by 3/12/2021**

The Court's previous Scheduling Orders regarding this hearing are vacated and replaced by this Amended Order. . . ." (**Exhibit 8** -- Fourth Amended Scheduling Order) (Emphasis Added)

D. <u>April 6, 2021 -- Trial Court's Order Denying Gelman's Motion For Reconsideration of the Fourth Amended Scheduling Order and Setting Hearing and Briefing Schedule Dates</u>

Gelman then sought reconsideration of the Fourth Amended Scheduling Order and the Trial Court allowed briefing and a hearing on Gelman's Motion. The Trial Court denied Gelman's Motion from the bench and on April 6, 2021 entered an Order Denying Motion For Reconsideration And Scheduling Hearing Dates. In that Order, the Trial Court ordered that a hearing will be conducted on May 3, 4, and 5 of 2021 and set a briefing schedule which required Briefs be submitted on or before April 30, 2021. This April 6, 2021 Order stated, in relevant part, the following:

"IT IS HEREBY ORDERED:

1. Gelman Sciences, Inc.'s Motion for Reconsideration is DENIED for the reasons state on the record.

2. **A hearing on implementation of revised cleanup criteria and modification of response activity Orders and Judgments is set for May 3, 4 and 5, 2021 at 9:00 AM.**

3. **Before commencement of the hearing, counsel for all parties shall submit Briefs and Expert Reports on or before April 30, 2021.**" (**Exhibit 9** -- April 6, 2021 Order Setting Hearing and Briefing Schedule) (Emphasis Added)

The Order did not make any substantive rulings. The Order simply set new dates for the hearing and a briefing schedule previously set by the Fourth Amended Scheduling Order.

On April 6, 2021, the Trial Court entered another order that denied Gelman's Motion for Entry of Order Setting Briefing/Deposition Schedule and New Hearing Date which was heard on

March 22, 2021 ("April 6, 2021 Order Denying Gelman's Motion For New Schedule"). This Order states, in relevant part, the following:

> "**IT IS HEREBY ORDERED that Gelman's Motion For Entry Of Order Setting Briefing/Deposition Schedule And New Hearing Dates is denied.**" (**Exhibit 10** -- April 6, 2021 Order Denying Gelman's Motion for New Schedule) (Emphasis Added)

This Order did not make any substantive rulings. The Order is simply another Order addressing scheduling that denied Gelman's Motion seeking different dates. On April 6, 2021, the Trial Court also entered an Order that denied Gelman's Motion to Stay the scheduled May, 2021 hearing. (**Exhibit 11** -- April 6, 2021 Order Denying Motion to Stay)

E. <u>April 29, 2021 -- Michigan Court of Appeals Order Denying Gelman's Application For Leave To Appeal Appealing the Fourth Amended Scheduling Order</u>

On April 12, 2021, Gelman filed an Application which contains a section titled "Orders Appealed From And Statement Of The Basis Of Jurisdiction". This section identifies (3) three orders which Gelman sought to appeal. The first Order is the January 27, 2021 Fourth Amended Scheduling Order. Collectively, the orders Gelman sought to appeal constituted nothing beyond a scheduling order. On April 29, 2021, this Michigan Court of Appeals issued an Order denying Gelman's Application For Leave to Appeal. **(Exhibit 12)**

F. <u>June 29, 2021 -- Michigan Court of Appeals Order Dismissing Gelman's Claim of Appeal and Motion For Partial Stay Of Proceedings Pending Appeal.</u>

On June 29, 2021, this Michigan Court of Appeals issued an order ("June 29, 2021 Order") pursuant to MCR 7.203(F)(1) which dismissed the Defendant's Claim of Appeal and Motion For Partial Stay of Proceedings Pending Appeal for lack of jurisdiction.

> "**The claim of appeal and attendant "motion for partial stay of proceedings pending appeal" are DISMISSED for lack of jurisdiction because the June 1, 2021 post judgment order is not a final order as**

> **defined in MCR 7.202(6). MCR 7.203(A)(1).**" (**Exhibit 13** -- June 29, 2021 Court of Appeals Order) (Emphasis Added)

The June 29, 2021 Order stated that the Trial Court's June 1, 2021 Order was not the first judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties. This Michigan Court of Appeals ruled that the October 26, 1992 consent judgment was "the first" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case.

> "Specifically, the **June 1, 2021 order was not "the first" judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties**; the October 26, 1992 consent judgment was "the first" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case." (**Exhibit 13** -- June 29, 2021 Court of Appeals Order) (Emphasis Added)

This Michigan Court of Appeals further ruled that the post judgment addition of the intervening parties into the case did not change this outcome.

> "**The postjudgment addition of intervening parties into the case does not change this outcome.**" (**Exhibit 13** -- June 29, 2021 Court of Appeals Order) (Emphasis Added)

G. June 22, 2021 – Gelman's Application for Leave to Appeal to this Michigan Court of Appeals.

On June 22, 2021, Gelman submitted another Application for Leave to Appeal to this Michigan Court of Appeals. This serves as the Intervenors' Answer in Opposition to that Application.

VI. COUNTER STATEMENT OF THE STANDARD OF REVIEW

Gelman's Application challenges the authority of the Trial Court to enter the June 1, 2021 Response Activity Order on Appeal. In essence, Gelman is challenging the Trial Court's hearing process. The Michigan Court of Appeals has ruled that a trial court's exercise of its inherent

authority to control its own docket may only be disturbed upon a finding that there has been a clear abuse of discretion:

> **"A trial court has the inherent authority to control its own docket.** Maldonado v Ford Motor Co, 476 Mich 372, 376; 719 NW2d 809 (2006) ("[T]rial courts possess the inherent authority . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); see also Brenner v Kolk, 226 Mich App 149, 158-160, n 5; 573 NW2d 65 (1997). "**An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion.**" Brenner, 226 Mich App at 160." "An abuse of discretion occurs when a court chooses an outcome outside the range of principled outcomes. Maldonado, 476 Mich at 376." (**Exhibit 14 -- Baynesan** v. **Wayne State Univ.**, 316 Mich. App. 643, 651; 894 NW2d 102, 106 (2016).) (Emphasis Added)

According to this Michigan Court of Appeals--by definition--discretionary rulings may not be disturbed merely because the reviewing court would have ruled differently.

> "**By definition, discretionary rulings may not be disturbed merely because the reviewing court would have ruled differently.**" (**Exhibit 15 -- Jasper Lee Todd, Personal Representative of the Estate of DONNA Todd** v. **Steiner**, Unpublished Opinion Per Curiam of the Court of Appeals, decided [April 24, 2003] (Docket No. 234007).) (Emphasis Added)

Discretionary rulings may only be disturbed when the lower court is found to have committed an abuse of discretion.

> **"Discretionary rulings may only be disturbed when the lower court is found to have committed an abuse of discretion."** (**Exhibit 15 -- Jasper Lee Todd, Personal Representative of the Estate of DONNA Todd** v. **Steiner**, Unpublished Opinion Per Curiam of the Court of Appeals, decided [April 24, 2003] (Docket No. 234007).) (Emphasis Added)

An abuse of discretion occurs only when the result is so violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.

> "**An abuse of discretion "occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance**

> **thereof, not the exercise of reason but rather of passion or bias.**' " *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich. 219, 227-228; 600 N.W.2d 638 (1999), quoting *Marrs v Bd of Medicine*, 422 Mich. 688, 694; 375 N.W.2d 321 (1985), and *Spalding v Spalding*, 355 Mich. 382, 384-385; 94 N.W.2d 810 (1959). Factual determinations made by a trial court in conjunction with discretionary rulings are reviewed for clear error. MCR 2.613(C). Clear error exists where a reviewing court is left with a definite and firm conviction that a mistake was made. *Boyd v Civil Service Comm*, 220 Mich. App. 226, 235; 559 N.W.2d 342 (1996)." (**Exhibit 15 -- Jasper Lee Todd, Personal Representative of the Estate of DONNA Todd** v. **Steiner**, Unpublished Opinion Per Curiam of the Court of Appeals, decided [April 24, 2003] (Docket No. 234007).) (Emphasis Added)

VII. LEGAL ARGUMENTS

A. The Trial Court Had The Authority To Enter The June 1, 2021 Response Activity Order.

The focus of Gelman's current Application For Leave To Appeal is best stated in Gelman's Motion for Partial Stay of Proceedings Pending Appeal.

> "4 **The gravamen of Gelman's appeal is that the trial court lacks the authority to enter the June 1, 2021 Order**, because the Order represents a modification of the consent judgment which was entered by the parties to this litigation, EGLE and Gelman, in 1992 and amended by the parties on three occasion by stipulation of EGLE and Gelman. . . ." (Motion For Partial Stay) (Emphasis Added)

While Gelman questions whether the Trial Court had the authority to enter the June 1, 2021 Response Activity Order, the legal and factual reality is that the Trial Court had the authority and a duty to address the circumstances created by the revised cleanup standards.

1. The Consent Judgment States That The Trial Court Retains Jurisdiction To Enforce The Terms of the Consent Judgment.

The Consent Judgment at issue expressly states that the Trial Court shall retain jurisdiction to enforce the terms of the Consent Judgment and resolve disputes. Gelman's argument that the Trial Court lacked authority to enter the June 1, 2021 Response Activity Order is undermined by the clear language of the Consent Judgment.

> "B. **This Court shall retain jurisdiction over the Parties and the subject matter of this action to enforce this Judgment and to resolve disputes arising under the Judgment.**" (**Exhibit 1** -- Consent Judgment at p. 3) (Emphasis Added)

This Michigan Court of Appeals has ruled that the term "shall" is equivalent to the word "must" and implies a word of command which is mandatory.

> "We cannot agree with the trial judge that the language of section 8 was permissive in nature. It appears that he has placed the emphasis on the words "subject to", rather than the word "shall". **HN2 "Shall" is equivalent to the word "must"**. Bateman v Smith, 183 Tenn 541; 194 SW2d 336 (1946). **Black's Law Dictionary (4th ed), p 1541, states that "shall" implies a word of command, and is generally imperative or mandatory**. On the other hand, the words "subject to" imply only a qualification or limitation, which must be subservient to the word "shall"." **(Exhibit 16 -- Granger** v. **Naegele Advertising Cos.**, 46 Mich. App. 509, 512; 208 NW2d 575, 577 (1973).) (Emphasis Added)

The parties to the Consent Judgment agreed under a mandatory standard that the Trial Court retained authority and jurisdiction to enforce the terms of the Consent Judgment. As a result, there is no dispute that the parties to the Consent Judgment expressly granted the Trial Court the authority to enforce the terms of the Consent Judgment. In addition to this express language, "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments" (MCL 600.611) and it is well-settled that courts have inherent authority to enforce their own directives. **Cohen** v. **Cohen**, 125 Mich. App 206, 211 (1983).

2. The Consent Judgment States That It Shall Comply With Laws And Regulations And That Additional Response Activities Can Be Imposed To Address A Change In Cleanup Criteria.

One of the many terms of the Consent Judgment, as set forth at Section VII, is that Gelman shall undertake "all activities" pursuant to this Consent Judgment in accordance with the requirements of all applicable laws, regulations, and permits. This is a mandatory "shall" standard, as defined above.

> "A. **Defendant shall undertake all activities pursuant to this Consent Judgment in accordance with the requirements of all applicable laws, regulations, and permits.**" (**Exhibit 1** -- Consent Judgment at p. 33) (Emphasis Added)

The fact that the Consent Judgment states that Gelman shall undertake all activities pursuant to this Consent Judgment in accordance with the requirements of all applicable laws, regulations, and permits is now relevant because the laws and regulations changed significantly in 2016. This change triggered the jurisdiction of the Trial Court and by implication imposed on the Trial Court a duty to act. In addition, the Third Amendment to the Consent Judgment specifically provides for additional response activities to address the adoption of more restrictive cleanup criteria. (**Exhibit 2** – Third Amendment to the Consent Judgment at pages. 29-30).

3. <u>In 2016 The Laws and Regulations Changed</u>.

In 2016, the State of Michigan made findings that the then controlling cleanup criteria for 1,4 Dioxane were **<u>not</u>** protective of public health:

> "**<u>The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health</u>** with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.
>
> **Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.**
>
> **Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion."** (**Exhibit 3** -- Emergency Rules) (Emphasis Added)

The Governor agreed with these findings and confirmed the "emergency":

> "Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), **I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and**

> **the public interest requires the promulgation of the above rule.**" (**Exhibit 3** -- Emergency Rules) (Emphasis Added)

In setting the new cleanup criteria for 1,4 Dioxane, the State made it clear it had the legal authority to do so. This legal authority was not challenged by any entity, including Gelman.

> "**These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended.**" (**Exhibit 3** -- Emergency Rules) (Emphasis Added)

The State action was supported by the existing threats related to 1,4 Dioxane:

> "**The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment.**" (**Exhibit 3** -- Emergency Rules) (Emphasis Added)

More importantly, the State took time in this process to identify the specific and well-known groundwater contamination issues in Ann Arbor that are now before this Honorable Court:

> "**Recent shallow groundwater investigations In the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes**. The known area of 1,4-dioxane groundwater contamination in Ann Arbor covers several square miles defined by a boundary of 85 parts per billion, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings." (**Exhibit 3** -- Emergency Rules) (Emphasis Added)

In sum, the studies concluded that the cleanup criteria for 1,4 Dioxane as established in 2002 failed to properly protect human health.

> "**The *current* cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.**" (**Exhibit 3** -- Emergency Rules) (Emphasis Added)

The changes to cleanup criteria are significant. The groundwater criterion was lowered from 85 ppb to 7.2 ppb. The groundwater surface water interface criterion was lowered from 2800 ppb to 280 ppb. These changes mandated a revision of the existing Consent Judgment to fully and safely implement these new criteria.

4. The State of Michigan Requested That The Trial Court Update the Consent Judgment To The New And Current Cleanup Criteria For 1,4 Dioxane.

The State of Michigan is a party to the Consent Judgment. Pursuant to the terms of the Consent Judgment, the State of Michigan has the power to ask the Trial Court to modify the Consent Judgment to comply with the terms of new cleanup standards. (See: Third Amended Consent Judgment at Section XVIIIE)

On April 30, 2021, the State of Michigan submitted its brief to the Trial Court which stated that additional response activities are needed to establish compliance with the updated, lowered cleanup criteria for 1,4 dioxane under Part 201. The State of Michigan's brief stated, in relevant part, the following:

> "Plaintiffs, the Attorney General for the State of Michigan and the Michigan Department of Environment, Great Lakes, and Energy (EGLE), submit this Brief and attached EGLE Expert Report (Exhibit 1) as directed by the Court's April 6, 2021 Order Denying Motion for Reconsideration and Scheduling Hearing Dates. **As explained below, EGLE supports implementation of a remedy at the Gelman Site of 1,4 -dioxane contamination in Scio Township and the City of Ann Arbor (Gelman Site) that requires additional investigation and response activities. The additional response activities are needed to establish compliance with the updated , lowered cleanup criteria for 1,4-dioxane under Part 201, Environmental Response, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.20101 et seq. (Part 201).**" (**Exhibit 4** -- State of Michigan Brief at p. 1) (Emphasis Added)

In its brief, the State of Michigan clearly states that it supports the revisions contained in the previously proposed Fourth Amended Consent Judgment.[1]

> "**EGLE continues to support the revisions contained in the proposed 4th CJ.**" (**Exhibit 4** -- State of Michigan Brief at p. 6) (Emphasis Added)

In support of its position, the State of Michigan further stated that the proposed Fourth Amended Consent Judgment implements the new drinking water criterion and that updating the requirements that apply to Gelman is needed to bring the Gelman Site documents up to date and to document the applicability of the more protective cleanup criteria.

> "**A. Proposed 4th CJ – Updated 1,4 Dioxane Cleanup Criteria Implementation.**
>
> **The proposed 4th CJ implements the current Part 201 drinking water cleanup criterion of 7.2 ppb for 1,4-dioxane**. As noted above, EGLE and Gelman have in practice implemented the 7.2 ppb criterion since October 2016. **Updating the requirements that apply to Gelman (and all 1,4 -dioxane cleanups) is needed to bring the Gelman Site documents up to date and to document the applicability of the more protective cleanup criteria to this site."** (**Exhibit 4** – State of Michigan Trial Court Brief at p. 8) (Emphasis Added)

According to the State of Michigan, the proposed Fourth Amended Consent Judgment also implements the current 1,4 dioxane GSI cleanup criteria.

> "**The proposed 4th CJ also implements the current 1,4 dioxane cleanup criterion** of 280 ppb for groundwater venting into surface water (known as the "groundwater-surface water interface" (GSA) cleanup criterion), which was 2,800 ppb under the 3rd CJ. With the lowered GSI criterion, GSI investigations to determine whether the contamination is entering surface

[1] Gelman heavily relies on an alleged agreement it says that it previously reached with the State of Michigan prior to the intervention. Such an agreement, however, is not part of the record and was never submitted for entry to the Trial Court. On the contrary, when the Trial Court provided the parties the opportunity to make whatever proposal they wanted, neither the State nor Gelman advocated for entry of the alleged, pre-intervention agreement. Each argued for very different approaches and the Trial Court resolved the dispute by selecting the State's approach. The Trial Court recently denied Gelman's tardy motion to add the alleged agreement to the record yet Gelman inexplicably has included it in its appendix to its Application. This Court should not consider the alleged agreement; it is not part of the record and constitutes inadmissible settlement discussions. See MRE 408.

> water above the criterion have become necessary and EGLE supports inclusion of the proposed 4th CJ requirements that Gelman submit GSI investigation workplans to EGLE for approval prior to implementation." (**Exhibit 4** – State of Michigan Trial Court Brief at p. 8) (Emphasis Added)

It is interesting to note, that Gelman within its Application does not even acknowledge that the State of Michigan argued for the adoption of the proposed Fourth Amended Consent Judgment, likely because that fact is fatal to Gelman's Application.

The Trial Court, pursuant to the State of Michigan's request, initially adopted the State's position reserving quarterly Court conferences to receive and hear updates by the parties. The Trial Court's June 1, 2021 Response Activity Order states that Gelman shall immediately implement and conduct all requirements and activities stated in the previously proposed Fourth Amended Consent Judgment.

> "**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." (**Exhibit 5** – June 1, 2021 Response Activity Order) (Emphasis Added)

The proposed Fourth Amended Consent Judgment states that it reflects the State of Michigan's revision of the generic state-wide residential and non-residential generic drinking water cleanup criteria for 1,4 dioxane in groundwater

> " **Among other things, the Parties enter this Consent Judgment to reflect EGLE's revision of the generic state-wide residential and non-residential generic drinking water cleanup criteria for 1,4 dioxane in groundwater to 7.2 micrograms per liter ('ug/L") and 350 ug/L, respectively, and of the generic groundwater-surface water interface cleanup criterion for 1,4 dioxane in groundwater to 280 ug/L.**" (4th Amended Consent Judgment – Gelman's Appendix at p. 1327-1328) (Emphasis Added)

In other words, Gelman is now required to implement and conduct all requirements and activities stated in the previously proposed Fourth Amended Consent Judgment.

The point is relatively simple. The Consent Judgment states that Gelman's conduct, pursuant to the Consent Judgment, shall be in accordance with all laws and regulations. There is no dispute that the cleanup criteria for 1,4 dioxane changed and the Consent Judgment needs to be updated to reflect the new cleanup criteria. The Consent Judgment further states that the State of Michigan has the right to ask the Trial Court to effectively update the Consent Judgment when the cleanup criteria change. The State of Michigan made it clear to the Trial Court that updating the requirements that apply to Gelman was needed to bring the Gelman Site documents up to date and to document the applicability of the more protective cleanup criteria to this site.

It makes no sense to allow an appeal process to determine whether the Trial Court had authority to implement the new cleanup standards. That authority is clear and concise in the controlling order. While Gelman may not like the process selected by the Trial Court, that process is the result of extensive briefing and detailed expert reports. Gelman's submittal was not selected. Intervenors' submittal was not selected. The State's support of the previously proposed Fourth Amended Consent Judgment was selected as the process the Trial Court believes best implements the new cleanup standards.

B. The Trial Court's Order And Process Are Consistent With Prior Orders In This Case.

Although Gelman suggests that its cleanup obligations have never been altered without its consent, the history of this case proves otherwise. For example, in 2000 the Trial Court entered a Remediation and Enforcement Order ("REO") after briefing and a hearing in order to address disputes between the parties concerning Gelman's compliance with the Consent Judgment. The REO imposed significant additional obligations on Gelman with tight timeframes, including

submission of a detailed plan to reduce 1,4-dioxane in all affected water supplies below legally acceptable levels within five years. Even though Gelman did not consent to entry of the REO, notably it did not challenge the substance of the order or the procedure the Trial Court followed.

Shortly after entry of the REO, the Trial Court again had to resolve a significant dispute between the parties, this time over how to handle Gelman's discovery that contamination had migrated into a deeper aquifer designated "Unit E." After briefing and hearing, the Trial Court entered the "Unit E Order" in which the Trial Court made significant changes to the cleanup regime, including finding that the contamination in the Unit E aquifer was subject to the Trial Court's jurisdiction and determining that it was appropriate to restrict groundwater use to address the plume of contamination. Neither the State nor Gelman appealed the Trial Court's ruling or challenged the procedure.

Put in this context, the Trial Court's June 1, 2021 Order is not an anomaly; it is the next logical step in the progression of this long-running environmental cleanup matter, which the Trial Court has effectively supervised for decades. As the nature of the plume and the science change, it is reasonable to expect the cleanup requirements to change, whether by consent of the parties or by order of the Trial Court in the event of a dispute.

VIII. CONCLUSIONS AND RELIEF REQUESTED

The parties could not agree on the scope of Response Activities necessary to implement the new cleanup standards. However, all of the parties do agree that the new cleanup standards must be implemented. In a post judgment process, the Trial Court decided that issue based on an order requiring legal briefs and supporting expert reports. The Trial Court made a decision on what it needed to receive and review to make a decision. The Trial Court decided the process and has the authority to do so. Gelman's current challenge to the "process" and the "authority" has no

merit and Gelman makes no argument at all that a different process would have led to a different result. The Application should be denied accordingly.

WHEREFORE, the Intervenors respectfully request that this Michigan Court of Appeals enters an Order:

(I) Denying the Appellant's Application For Leave to Appeal; and

(II) Granting such other relief in favor of the Intervenors-Appellees as this Court deems just, equitable and appropriate under the circumstances presented.

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Dated: July 13, 2021

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PROOF OF SERVICE

I served the **Intervenors / Appellees' Answer in Opposition to The Defendant/Appellant's Application For Leave To Appeal** upon the attorneys of record and/or parties in this case on **July 13, 2021**. **I declare the foregoing statement to be true to the best of my information, knowledge and belief.**

☐ **U.S. Mail**	☐ Fax
☐ Hand Delivered	☐ Messenger
☐ Express Mail Private	**X Other: E-file**

/s/ William N. Listman
William N. Listman

EXHIBIT # 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY, Attorney General
for the State of Michigan, ex rel,
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION,
and MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

v

GELMAN SCIENCES, INC.,
a Michigan corporation,

Defendant.

OCT 3 1 392

File No. 88-34734-CE

Honorable Patrick J. Conlin

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CONSENT JUDGMENT

The Parties enter this Consent Judgment in recognition of, and with the intention of, furtherance of the public interest by (1) addressing environmental concerns raised in Plaintiffs' Complaint; (2) expediting remedial action at the Site; and (3) avoiding further litigation concerning matters covered by this Consent Judgment. The Parties agree to be bound by the terms of this Consent Judgment and stipulate to its entry by the Court.

EXHIBIT 136

The Parties recognize that this Consent Judgment is a compromise of disputed claims. By entering into this Consent Judgment, Defendant does not admit any of the allegations of the Complaint, does not admit any fault or liability under any statutory or common law, and does not waive any rights, claims, or defenses with respect to any person, including the State of Michigan, its agencies, and employees, except as otherwise provided herein. By entering into this Consent Judgment, Plaintiffs do not admit the validity or factual basis of any of the defenses asserted by Defendant, do not admit the validity of any factual or legal determinations previously made by the Court in this matter, and do not waive any rights with respect to any person, including Defendant, except as otherwise provided herein. The Parties agree, and the Court by entering this Judgment finds, that the terms and conditions of the Judgment are reasonable, adequately resolve the environmental issues covered by the Judgment, and properly protect the public interest.

NOW, THEREFORE, upon the consent of the Parties, by their attorneys, it is hereby ORDERED and ADJUDGED:

I. JURISDICTION

A. This Court has jurisdiction over the subject matter of this action. This Court also has personal jurisdiction over the Defendant.

B. This Court shall retain jurisdiction over the Parties and the subject matter of this action to enforce this Judgment and to resolve disputes arising under the Judgment.

II. PARTIES BOUND

This Consent Judgment applies to, is binding upon, and inures to the benefit of Plaintiffs, Defendant, and their successors and assigns.

III. DEFINITIONS

Whenever the terms listed below are used in this Consent Judgment or the Attachments which are appended hereto, the following definitions shall apply:

A. "Consent Judgment" or "Judgment" shall mean this Consent Judgment and all Attachments appended hereto. All Attachments to this Consent Judgment are incorporated herein and made enforceable parts of this Consent Judgment.

B. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday, or a State legal holiday. In computing any period of time under this Consent Judgment, where the last day would fall on a Saturday, Sunday, or State legal holiday, the period shall run until the end of the next working day.

C. "Defendant" shall mean Gelman Sciences, Inc.

D. "Evergreen Subdivision Area" shall mean the residential subdivision generally located north of I-94 and between Wagner and Maple Roads, bounded on the west by Rose Street, on the north by Dexter Road, and on the south and east by Valley Drive.

E. "Gelman" or "GSI" shall mean Gelman Sciences, Inc.

F. "GSI Property" shall mean the real property described in Attachment A, currently owned and operated by GSI in Scio Township, Michigan.

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 3 micrograms per liter ("ug/l") determined by the sampling and analytical method(s) described in Attachment B.

H. "MDNR" shall mean the Michigan Department of Natural Resources.

I. "Parties" shall mean Plaintiffs and Defendant.

J. "Plaintiffs" shall mean Frank J. Kelley, Attorney General of the State of Michigan, ex rel, Michigan Natural Resources Commission, Michigan Water Resources Commission, and Michigan Department of Natural Resources.

K. "Redskin Well" means the purge well currently located on the Redskin Industries property.

L. "Remedial Action" or "Remediation" shall mean removal, treatment, and proper disposal of groundwater and soil contaminants pursuant to the terms and conditions of this Consent Judgment and work plans approved by the MDNR under this Judgment.

M. "Site" shall mean the GSI Property and other areas affected by the migration of groundwater contamination emanating from the GSI Property.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 60 ug/kg, as determined by the sampling and analytical method(s) described in Attachment C, or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5711(2) or R 299.5717.

O. "Spray Irrigation Field" shall mean that area of the GSI site formerly used for spray irrigation of treated process wastewater, as depicted on the map included as Attachment D.

P. "Unit C3 Aquifer" means the aquifer identified as the C3 Unit in reports prepared for Defendant by Keck Consulting.

IV. IMPLEMENTATION OF REMEDIAL ACTION BY DEFENDANT

Defendant shall implement the Remedial Action to address groundwater and soil contamination at, and emanating from, the GSI Property in accordance with (1) the terms and conditions of this Consent Judgment; and (2) work plans approved by the MDNR pursuant to this Consent Judgment.

V. GROUNDWATER REMEDIATION

Defendant shall design, install, operate, and maintain the systems described below to remove, to treat (as required), and to dispose properly of contaminated groundwater. The objectives of these systems shall be to contain the plumes of groundwater contamination emanating from the GSI Property as described below and to extract the contaminated groundwater from the aquifers at designated locations for treatment (as required) and disposal. Defendant also shall implement a monitoring program to verify the effectiveness of these systems.

A. Evergreen Subdivision Area System (hereinafter "Evergreen System")

1. Objectives. The objectives of this system shall be: (a) to intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area; (b) to remove the contaminated

groundwater from the affected aquifer; and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that is not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section VI.

2. Investigation and Design of System.

a. Pump Test Report. Defendant has constructed a purge/test well in the Evergreen Subdivision and conducted a pump test. No later than five days after entry of this Consent Judgment, Defendant shall submit to MDNR a report showing the well construction details and containing pump test and aquifer performance data.

b. Treatment Equipment. Within five days after entry of this Consent Judgment, Defendant shall submit to MDNR specifications for equipment for the treatment of purged groundwater using ultraviolet light and oxidating agents sufficient to remove 1,4-dioxane from goundwater to levels of 3 ug/l or lower. Defendant shall order such equipment within ten days after receiving approval from MDNR.

c. Obtaining Authorization for Groundwater Reinjection. Within 90 days after entry of the Consent Judgment, Defendant shall do one of the following: (i) submit a complete application to the Water Resources Commission for a groundwater discharge permit or permit exemption to authorize the reinjection

of purged, treated groundwater from the Evergreen System; or (ii) submit a plan to MDNR for reinjection of purged, treated groundwater from the Evergreen System that will assure compliance with and be authorized by the generic Exemption for Groundwater Remediation Activites issued by the Water Resources Commission on August 20, 1992.

d. Work Plan. Within 90 days after entry of the Consent Judgment, Defendant shall submit to MDNR for its review and approval a work plan for continued investigation of the Evergreen Subdivision and design of the Evergreen System. At a minimum, the work plan shall include, without limitation, installation of at least one purge well and associated observation well(s) and a schedule for implementing the work plan. The work plan shall specify the treatment and disposal options to be used for the Evergreen System as described in Section V.A.5. The existing test/purge well can be incorporated into the work plan if appropriate.

3. Implementation. Within 14 days after receipt of the MDNR's written approval of the work plan described in Section V.A.2., Defendant shall implement the work plan. Defendant shall submit the following to MDNR according to the approved time schedule: (a) the completed Evergreen System design; (b) a schedule for implementing the design; (c) an operation and maintenance plan for the Evergreen System; and (d) an effectiveness monitoring plan.

4. Operation and Maintenance. Upon approval of the Evergreen System design by the MDNR, Defendant shall install the Evergreen System according to the approved schedule and thereafter, except for temporary shutdowns pursuant to Section V.A.6. of this Consent Judgement, continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate purge well operations pursuant to Section V.D.

5. Treatment and Disposal. Groundwater extracted by the purge well(s) in the Evergreen System shall be treated as necessary using ultraviolet light and oxidizing agents and disposed of in accordance with the Evergeen System design approved by the MDNR. The options for such disposal are the following:

a. Groundwater Discharge. The purged groundwater shall be treated to reduce 1,4-dioxane concentrations to the level required by the Water Resources Commission, and discharged to groundwaters in the vicinity of the Evergreen Subdivision in compliance with the permit or exemption authorizing such discharge referred to in Section V.A.2.c.

b. Sanitary Sewer Discharge. Use of the sanitary sewer leading to the Ann Arbor Wastewater Treatment Plant is conditioned upon approval of the City of Ann Arbor. If discharge is made to the sanitary sewer, the Evergreen System shall be operated and monitored in compliance with the terms

and conditions of the Industrial User's Permit to be issued by the City of Ann Arbor, a copy of which is attached hereto as Attachment G, and any subsequent written amendment of that Permit made by the City of Ann Arbor. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment.

c. Storm Drain Discharge. Use of the storm drain is conditioned upon approval of such use by the City of Ann Arbor and the Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with NPDES Permit No. MI-008453 and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than 21 days after permission is granted by the City and the Drainage District to use the storm drain for continuous disposal of purged groundwater, Defendant shall submit to MDNR, the City of Ann Arbor, and the Drainage District for their review and approval a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain; and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

6. Monitoring Plan. Defendant shall implement the approved monitoring plan required by Section V.A.3.d. The monitoring plan shall include collection of data to measure the effectiveness of the System in: (a) hydraulically containing groundwater contamination; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring plan shall be continued until terminated pursuant to Section V.E.

B. Core Area System
(hereinafter "Core System")

1. Objectives. For purposes of the Consent Judgment, the "Core Area" means that portion of the Unit C3 aquifer containing 1,4-dioxane in a concentration exceeding 500 ug/l. The objectives of the Core System are to intercept and contain the migration of groundwater from the Core Area and remove contaminated groundwater from the Core Area until the termination criterion for the Core System in Section V.D.1. is satisfied. The Core System shall also prevent the discharge of contaminated groundwater into the Honey Creek Tributary in concentrations in excess of 100 ug/l or in excess of a concentration which would cause groundwater contamination at any location along or adjacent to the entire length of Honey Creek or the Honey Creek Tributary.

2. Evaluation of Groundwater Reinjection Alternative. No later than 35 days after entry of the Consent Judgment, Defendant will complete and submit to MDNR a report on a pilot test for the treatment system using ultraviolet light and oxidizing agent(s) to be used for treatment of extracted groundwater prior to reinjection. No later than 90 days after entry of this Consent Judgment, Defendant may apply to the Michigan Water Resources Commission for authorization for Defendant to reinject treated groundwater extracted from the Core Area. A reinjection program shall consist of the following: (a) installation of a series of purge wells that will control groundwater flow as described in Section V.B.1. and extract water from the Core Area to be treated and reinjected; (b) the system described in the application shall include a groundwater treatment system using ultraviolet light and oxidizing agent(s) to reduce 1,4-dioxane concentrations in the purged groundwater to the level required for a discharge by the Water Resources Commission; (c) the discharge level for 1,4-dioxane in groundwater to be reinjected in the Core Area shall be established based upon performance of further tests by Defendant on the treatment technology and shall in any event be less than 60 ug/l.

3. Groundwater Reinjection. Defendant shall, no later than 120 days after entry of this Consent Judgment: (a) select, verify, and calibrate a model for the groundwater reinjection system; (b) prepare a final report on the model;

and (c) submit to MDNR for review and approval the final report on the model, Defendant's proposed final design for the Core System, a schedule for implementing the design, an operation and maintenance plan for the system, and an effectiveness monitoring plan for the system.

The Groundwater Reinjection System, including the discharge level for 1,4-dioxane, shall be subject to the final approval of the Water Resources Commission and the MDNR. At a minimum, the System shall be designed and operated so as to ensure that: (a) the purged groundwater is reinjected only into portions of the aquifer(s) where groundwater contamination is already present; (b) the concentration of 1,4-dioxane in the aquifer(s) is not increased; and (c) the areal extent of groundwater contamination is not increased.

4. Surface Water Discharge Alternative. In the event that Defendant elects not to proceed with groundwater reinjection as provided in Section V.B.2., or in the event Defendant is denied permission to install such a system, no later than 90 days after the election or denial, Defendant shall submit to the MDNR for its review and approval Defendant's proposed final design of the Core System, a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan for the System. The Core System shall include groundwater purge wells as necessary to meet the

objectives described in Section V.B.1. The Core System also shall include a treatment system using ultraviolet light and oxidizing agent(s) to reduce 1,4-dioxane concentrations in the purged groundwater to the levels required for a discharge described below and facilities for discharging the treated water into local surface waters or sanitary sewer line(s). Discharge to local surface waters shall be in accordance with NPDES Permit No. MI-008453 and any subsequent amendment of that Permit. Use of the sanitary sewer is conditioned upon and subject to an Industrial Users Permit to be obtained from either the City of Ann Arbor or Scio Township, as required by law. If discharge is made to the sanitary sewer, the Core Treatment System shall be operated and monitored to assure compliance with the terms and conditions of the required Industrial User's Permit and any subsequent amendment of that permit. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment.

5. Implementation of Program. Upon approval by the MDNR, Defendant shall install the Core System according to the approved schedule and thereafter continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate operation pursuant to Section V.D. Defendant may, thereafter and at its option, continue purge operations as provided in this Section.

6. Monitoring Plan. Defendant shall implement the approved monitoring plan required by Section V.B. The monitoring plan shall include collection of data to demonstrate the effectiveness of the Core System in: (a) hydraulically containing the Core Area; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring plan shall be continued until terminated pursuant to Section V.E.

C. Western Plume System
(hereinafter "Western System")

1. Objectives. The objectives of the Western System are: (a) to contain downgradient migration of any plume(s) of groundwater contamination emanating from the GSI Property that are located outside the Core Area and to the northwest, west, or southwest of the GSI facility; (b) to remove groundwater contaminants from the affected aquifer(s); and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that are not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section IV.

2. Design of System. The Western System shall include a series of groundwater test/purge wells placed and operated so as to create overlapping capture zones preventing the downgradient migration of groundwater contaminants. The System

also may incorporate one or more existing artesian wells with overlapping capture zones preventing the downgradient migration of groundwater contaminants. The System also may incorporate one or more existing artesian wells with overlapping capture zones to prevent the downgradient migration of groundwater contaminated with 1,4-dioxane. Defendant shall apply for authorization to reinject purged groundwater or for a permit for discharge of the purged groundwater into the Honey Creek if facilities are constructed for such discharge as part of the Western System. The Western System shall also include facilities for treating purged groundwater as necessary to meet applicable permit requirements and facilities for monitoring the effectiveness of the System.

3. Remedial Investigation. No later than 60 days after the effective date of this Consent Judgment, Defendant shall submit to the MDNR for its review and approval a work plan for remedial investigation and design of the Western System and a schedule for implementing the work plan. The work plan shall include plans for installation of a series of test/purge wells, conduct of an aquifer performance test(s), groundwater monitoring operations and maintenance plan, and system design.

4. Implementation of Remedial Investigation. Defendant shall implement the approved work plan according to the approved schedule.

5. Installation of System. Upon approval by the MDNR, Defendant shall install the Western System and thereafter continuously operate and maintain the system according to the approved plans and schedules until Defendant is authorized to terminate operation pursuant to Section V.D. of this Consent Judgment.

6. Monitoring. Defendant shall implement the approved monitoring plan to verify the effectiveness of the Western System in meeting the objectives of Section V.C.1. The monitoring plan shall include collection of data to demonstrate the effectiveness of the Western System in: (a) hydraulically containing groundwater contamination; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring program shall be continued until terminated pursuant to Section V.E.

D. Termination Of Groundwater Purge Systems Operation

1. Evergreen System. Except as otherwise provided pursuant to Section V.D.2., Defendant shall continue to operate the Evergreen System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s), including all upgradient monitoring wells in the Core Area, fail to detect the presence

of 1,4-dioxane in groundwater at a concentration which exceeds 3 ug/l.

Western System. Except as otherwise provided pursuant to Section V.D.2., Defendant shall continue to operate the Western System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s), including all upgradient monitoring wells in the Core Area, fail to detect the presence of 1,4-dioxane in groundwater at a concentration which exceeds 3 ug/l.

Core System. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to operate the Core System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration which exceeds 60 ug/l if the Groundwater Reinjection Alternative is selected, or 500 ug/l if Surface Water Discharge Alternative is selected.

2. The termination criteria provided in Section V.D.1. may be modified as follows:

a. At any time two years after entry of this Consent Judgment, Defendant may propose to the MDNR that the termination criteria be modified based upon either or both of the following:

i. a change in legally applicable or relevant and appropriate regulatory criteria since the entry of this Consent Judgment; for purposes of this subparagraph, "regulatory criteria" shall mean any promulgated standard criterion or limitation under federal or state environmental law specifically applicable to 1,4-dioxane; or

ii. scientific evidence newly released since the entry of this Consent Judgment, which, in combination with the existing scientific evidence, establishes that different termination criteria for 1,4-dioxane are appropriate and will assure protection of public health, safety, welfare, the environment, and natural resources.

b. Defendant shall submit any such proposal in writing, together with supporting documentation, to the MDNR for review.

c. If the Parties agree to a proposed modification, the agreement shall be made by written Stipulation filed with the Court pursuant to Section XXIV of this Judgment.

d. If MDNR disapproves the proposed modification, Defendant may invoke the Dispute Resolution procedures contained in Section XVI of this Consent Judgment. Alternatively, if MDNR disapproves a

proposed modification, Defendant and Plaintiffs may agree to resolve the dispute pursuant to subparagraph V.D.3.

3. If the parties do not agree to a proposed modification, Defendant and Plaintiffs may prepare a list of the items of difference to be submitted to a scientific advisory panel for review and recommendations. The scientific advisory panel shall be comprised of three persons with scientific expertise in the discipline(s) relevant to the items of difference. No member of the panel may be a person who has been employed or retained by either party, except persons compensated solely for providing peer review of the Hartung Report, in connection with the subject of this litigation.

a. If this procedure is invoked, each party shall, within 14 days, select one member of the panel. Those two members of the panel shall select the third member. Defendant shall, within 28 days after this procedure is invoked, establish a fund of at least $10,000.00, from which each member of the panel shall be paid reasonable compensation for their services, including actual and necessary expenses. If the parties do not agree concerning the qualifications, eligibility, or compensation of panel members, they may invoke the Dispute Resolution procedures contained in Section XVI of this Consent Judgment.

b. Within a reasonable period of time after selection of all panel members, the panel shall confer and establish a schedule for acceptance of submissions from the parties completing review and making recommendations on the items of difference.

c. The scientific advisory panel shall make its recommendations concerning resolution of the items of difference to the parties. If both parties accept those recommendations, the termination criteria shall be modified in accordance with such recommendations. If the parties disagree with the recommendations, the MDNR's proposed resolution of the dispute shall be final unless Defendant invokes the procedures for judicial Dispute Resolution as provided in Section XVI of the Judgment. The recommendation of the scientific advisory panel and any related documents shall be submitted to the Court as part of the record to be considered by the Court in resolving the dispute.

4. Notification of Termination. At least 30 days prior to the date Defendant proposes to terminate operation of a purge well pursuant to the criteria established in subparagraph V.D.1., or a modified criterion established through subparagraph V.D.2., Defendant shall send written notice to the MDNR identifying the proposed action and the test data demonstrating compliance with the termination criterion.

5. Termination. Within 30 days after the MDNR's receipt of the notice and supporting documentation, the MDNR shall approve or disapprove the proposed termination in writing. Defendant may terminate operation of the well system(s) in question upon: (a) receipt of written notice of approval from the MDNR; or (b) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of the Consent Judgment.

E. Post-Termination Monitoring

1. For systems with a termination criterion of 3 ug/l, for a period of five years after cessation of operation of any purge well, Defendant shall continue monitoring of the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify the MDNR and shall collect a second sample within 14 days of such finding. If the second sample confirms the presence of 1,4-dioxane in excess of the termination criterion:

a. if the confirmed concentrations are in excess of 6 ug/l, Defendant shall restart the associated purge well system; or

b. if the confirmed concentrations are between 3 ug/l and 6 ug/l, Defendant may continue to monitor the well bi-weekly for two months without restart of the associated purge well. At the end of the monitoring period, if concentrations in the monitoring well meet the termination criterion of 3 ug/l, Defendant shall continue to monitor as required by the approved monitoring program; if concentrations do not meet the termination criterion, Defendant shall restart the associated purge well.

2. For all other groundwater systems, for a period of five years after ceasing operation of any purge well, Defendant shall continue monitoring of the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDNR and shall collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, Defendant shall immediately restart the purge well system.

VI. GSI PROPERTY REMEDIATION

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat (as required) soil contamination at the GSI Property. The overall objective of these systems shall be to: (1) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause groundwater contamination; (2) to prevent venting of groundwater contamination into Honey Creek Tributary; and (3) to prevent venting of groundwater contamination to Third Sister Lake. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

A. Marshy Area System
(hereinafter "Marshy Area System")

1. Objectives. The objectives of this System are to: (a) remove contaminated groundwater from the Marshy Area located north of former Ponds I and II; (b) reduce the migration of contaminated groundwater from the Marshy Area into other aquifers; and (c) to prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in concentrations in excess of 100 ug/l or in excess of a concentration which would cause groundwater contamination along or adjacent to the entire length of Honey Creek or Honey Creek Tributary.

2. Design. No later than 150 days after the effective date, Defendant shall submit its proposed design of the Marshy Area System a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan to MDNR for its review and approval.

3. Treatment and Disposal. The Marshy Area System shall include: (a) facilities for the collection of contaminated groundwater (either an interceptor trench or sumps); (b) facilities for disposing of the contaminated groundwater (including disposal to local surface waters in accordance with NPDES Permit MI-008453, Defendant's deep well, or in any other manner approved by MDNR and/or the Water Resources Commission); and (c) if the water is to be discharged to the sanitary sewer for ultimate disposal at the City of Ann Arbor Wastewater Treatment Plant, treatment facilities to ensure that discharge to the sanitary sewer complies with the terms and conditions of the Industrial User's Permit authorizing such discharge, and any subsequent amendment to that Permit. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment. Use of the sanitary sewer is conditioned on approval of the City of Ann Arbor and Scio Township.

4. Installation and Operation. Upon approval by the MDNR, Defendant shall install the Marshy Area System and thereafter continuously operate and maintain the System according to the approved plans until it is authorized to shut down the System pursuant to Section VI.D. of this Consent Judgment.

5. Monitoring. Defendant shall implement the approved monitoring plan to verify the effectiveness of the Marshy Area System in meeting the requirements of this Remedial Action Consent Judgment. The monitoring plan shall be continued until terminated pursuant to Section VI.D. of this Consent Judgment.

B. Spray Irrigation Field

1. Objectives. The objectives of this program shall be to meet the overall objective of Section VI upon completion of the program and to prevent the discharge of groundwater contamination into Third Sister Lake.

2. Remedial Investigation. Defendant shall, no later than 180 days after the effective date, submit to MDNR for review and approval a work plan for determining the distribution of soil contamination in the former spray irrigation area. Soil characteristics for the area may be extrapolated from results of samples taken from representative spray head locations.

3. Soil Flushing System. Defendant shall, no later than 240 days after the effective date, submit to MDNR for review and approval a work plan for the installation of a system to flush the former spray irrigation field with clean water to enhance removal of 1,4-dioxane from contaminated soils. The work plan shall include Defendant's proposed design of the system, a time schedule for implementation of the system, an operating and maintenance plan, and effectiveness monitoring plan.

4. Structures in the Spray Field. The following structures have been constructed over portions of the former spray irrigation area: (a) the Defendant's warehouse; (b) the parking area south of the Defendant's warehouse; and (c) the parking lot between the Medical Device Division Building and the Defendant's warehouse. These structures are identified in Attachment D. With respect to these structures, during such time as they are kept in good maintenance and repair, the soils beneath such structures need not be sampled nor directly addressed in the soils systems remediation plan. In the event that the structures are not kept in good maintenance or repair, or are scheduled to be replaced or demolished, Defendant shall notify MDNR of such a circumstance, and take the following actions:

a. Defendant shall, within 21 days after notification, submit to MDNR for approval a work plan for investigating the extent of contamination (if any) of the soils beneath the structure, along with a schedule for implementation of the work plan.

b. Within 14 days after approval of the work plan by MDNR, Defendant shall implement the work plan and submit a report of the results to MDNR within the time specified in the approved schedule.

c. If soil contamination is identified in any of the areas investigated, Defendant shall submit, together with the report required in Section VI.B.4.b., a remediation plan for that area that provides for induced flushing of contaminants from the impacted soils. The plan shall include a proposed schedule for implementation. The remediation system shall be installed, operated, and terminated in accordance with the approved plan.

5. Installation, Operation, and Monitoring. Upon approval by MDNR, Defendant shall install, operate, maintain, and monitor the Spray Irrigation Field System in accordance with the approved plans and the termination criteria established in Section VI.D.

C. Soils System

1. Objectives. The objectives of this program are to: (a) evaluate the feasibility and effectiveness of available options for remediation of identified source areas; (b) design and implement remedial systems to achieve the overall objectives of Section VI; and (c) verify the effectiveness of those systems.

2. Soils Remediation Plan. Defendant shall, no later than 210 days after the effective date, submit to MDNR for review and approval a soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the former Lift Station area; and Pond III. These areas are depicted on Attachment E. As part of the remediation plan, Defendant may make a demonstration that with respect to any of these areas, cleanup to a level established under Mich Adm Code R 299.5717 ("Type C") is appropriate by addressing the factors set forth in Mich Adm Code R 299.5717(3). Defendant's proposal for the preferred remedial alternative(s) to be implemented to address each area of soil contamination shall be identified in the soils remediation plan. The proposed remedial alternative(s) to be implemented must attain the overall objectives of Section VI. Based upon their review, the MDNR shall either: (a) approve Defendant's proposed remedial alternative(s); or (b) disapprove the proposed remedial

alternative(s) and select the other remedial alternative(s) to be implemented. A decision by MDNR to disapprove Defendant's remedial proposal is subject to Defendant's rights under the Dispute Resolution provisions of Section XVI of the Consent Judgment.

3. Design. Defendant shall, not later than 60 days after: (a) the MDNR's decision approving the proposed remedial alternative(s); or (b) the final decision in Dispute Resolution pursuant to Section XVI of the Consent Judgment, submit the following to the MDNR for review and approval: Defendant's proposed design of each selected remedial system, a time schedule for implementation of the system, an operating and maintenance plan, and effectiveness monitoring plan.

4. Installation, Operation, and Monitoring. Upon approval by MDNR, Defendant shall install, operate, maintain, and monitor the systems in accordance with the approved plans, and the termination criteria established in Section VI.D. of the Consent Judgment.

D. Termination Criteria for GSI Property Remediation

1. Remedial Systems Collecting or Extracting Contaminated Groundwater.

a. Except as otherwise provided pursuant to Section VI.D.3., Defendant shall continue to operate the Marshy Area System and any groundwater remediation program developed as part of the Soils System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. Notwithstanding this criterion, Defendant shall continue to operate the portions of the such systems necessary to assure that contaminated groundwater does not vent into surface waters in concentrations in excess of 100 ug/l until such time as Defendant demonstrates to Plaintiff that venting in excess of 100 ug/l is not occurring from the Marshy Areas or Soils Systems and Defendant demonstrates that venting into surface waters will not cause groundwater contamination along or adjacent to the entire length of Honey Creek or the Honey Creek Tributary. These Systems shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

b. Except as otherwise provided pursuant to Section VI.D.3., Defendant shall continue to operate the purge wells for the Spray Irrigation Field System until six consecutive monthly tests of samples from the purge well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. Notwithstanding this criterion, Defendant

shall continue to operate such purge wells as necessary to assure that contaminated groundwater does not vent into Third Sister Lake. These Systems shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

2. All Other GSI Property Remedial Systems. Except as provided in Section VI.D.3., each GSI Property Remedial System not subject to termination pursuant to Section VI.D.1. shall be operated until Defendant demonstrates, through representative soil sampling and analysis in accordance with the effectiveness monitoring plan approved by the MDNR, that the concentration of 1,4-dioxane in soils in the area in question does not exceed 60 ug/kg or other higher concentration derived by means consistent with Mich Admin Code R 299.5711(2) or R 299.5717.

3. The termination criteria provided in Section VI.D. may be modified in the same manner as specified in Sections V.D.2. and V.D.3.

4. At least 30 days prior to the date Defendant proposes to terminate operation of a system pursuant to Section VI.D., Defendant shall send a written notice to the MDNR identifying the proposed action and shall send test data demonstrating compliance with the termination criterion.

5. Within 30 days after the MDNR's receipt of the written notice and supporting documentation, the MDNR shall approve or disapprove the proposed termination in writing. Defendant may terminate operation of the system(s) in question upon: (a) receipt of written notice of approval from Plaintiffs; or (b) if the Dispute Resolution procedures of Section XVI are invoked, receipt of a final decision pursuant to that Section.

VII. COMPLIANCE WITH OTHER LAWS AND PERMITS

A. Defendant shall undertake all activities pursuant to this Consent Judgment in accordance with the requirements of all applicable laws, regulations, and permits.

B. Defendant shall apply for all permits necessary for implementation of the Consent Judgment including, without limitation, surface water discharge permit(s) and air discharge permit(s).

C. Defendant shall include in all contracts entered into by the Defendant for Remedial Action required under this Consent Judgment (and shall require that any contractor include in all subcontract(s), a provision stating that such contractors and subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with and all applicable laws, regulations, and permits. Defendant shall provide a copy of relevant approved workplans to any such contractor or subcontractor.

D. The Parties agree to provide reasonable cooperation and assistance to the Defendant in obtaining necessary approvals and permits for Remedial Action. Plaintiffs shall not unreasonably withhold or delay any required approvals or permits for Defendant's performance of the Remedial Action. Plaintiffs expressly acknowledge that one or more of the following permits and approvals may be necessary for Remedial Action:

1. NPDES Permit No. MI-008453.
2. An Air Permit for discharges of contaminants to the atmosphere for vapor extraction systems, if such systems are part of the remedial design;
3. A Wetlands Permit if necessary for construction of the Marshy Area System or the construction of facilities as part of the Core or Western Systems;
4. An Industrial User's Permit to be issued by the City of Ann Arbor for use of the sewer to dispose of treated or untreated purged groundwater. Plaintiffs have no objection to receipt by the Ann Arbor Wastewater Treatment Plant of the purged groundwater extracted pursuant to the terms and conditions of this Judgment, and acknowledge that receipt of the purged groundwater would not necessitate any change in current and proposed residual management programs of the Ann Arbor Wastewater Treatment Plant;

5. Permit(s) or permit exemptions to be issued by the Water Resources Commission to authorize the reinjection of purged and treated groundwater in the Evergreen, Core, and Western System Areas;

6. Surface water discharge permit(s) for discharge into surface waters in the Western System area, if necessary;

7. Approval of the City of Ann Arbor and the Washtenaw County Drain Commissioner to use storm drains for the remedial programs; or

8. A permit for the use of Defendant's deep well for injection of purged groundwater from the remedial systems required under this Consent Judgment.

VIII. SAMPLING AND ANALYSIS

Defendant shall make available to Plaintiffs the results of all sampling, tests, and/or other data generated in the performance or monitoring of any requirement under this Consent Judgment. Sampling data generated consistent with this Consent Judgment shall be admissible in evidence in any proceeding related to enforcement of this Judgment without waiver by any Party of any objection as to weight or relevance. Plaintiffs and/or their authorized representatives, at their discretion, may

take split or duplicate samples and observe the sampling event. Plaintiffs shall make available to Defendant the results of all sampling, tests, and/or other data generated in the performance or monitoring of any requirement under this Consent Judgment. Defendant will provide Plaintiffs with reasonable notice of changes in the schedule of data collection activities included in the progress reports submitted pursuant to Section XII.

IX. ACCESS

A. From the effective date of this Consent Judgment, the Plaintiffs, their authorized employees, agents, representatives, contractors, and consultants, upon presentation of proper identification, shall have the right at all reasonable times to enter the Site and any property to which access is required for the implementation of this Consent Judgment, to the extent access to the property is owned, controlled by, or available to the Defendant, for the purpose of conducting any activity authorized by this Consent Judgment, including, but not limited to:

1. Monitoring of the Remedial Action or any other activities taking place pursuant to this Consent Judgment on the property;
2. Verification of any data or information submitted to the Plaintiffs;

3. Conduct of investigations related to contamination at the Site;

4. Collection of samples;

5. Assessment of the need for, or planning and implementing of, Response Actions at the Site; and

6. Inspection and copying of non-privileged documents including records, operating logs, contracts, or other documents required to assess Defendant's compliance with this Consent Judgment.

All Parties with access to the Site or other property pursuant to this paragraph shall comply with all applicable health and safety laws and regulations.

B. To the extent that the Site or any other area where Remedial Action is to be performed by the Defendant under this Consent Judgment is owned or controlled by persons other than the Defendant, Defendant shall use its best efforts to secure from such persons access for Defendant, Plaintiffs, and their authorized employees, agents, representatives, contractors, and consultants. Defendant shall provide Plaintiffs with a copy of each access agreement secured pursuant to this paragraph. For purposes of this Paragraph, "best efforts" includes, but is not limited to, seeking judicial assistance to secure such access. If access is not obtained within 30 days after the MDNR approves any work plan or design for which such access is necessary,

Defendant shall notify the Plaintiffs promptly. Plaintiffs thereafter shall assist Defendant in obtaining access. Plaintiffs agree to use appropriate authority available under state law, including authority provided under the Michigan Environmental Response Act, as amended, MCL 229.601 et seq, to obtain access to property on behalf of themselves and Defendant for the purpose of implementing Remedial Action under this Consent Judgment.

X. APPROVALS OF SUBMISSIONS

Upon receipt of any plan, report, or other item that is required to be submitted for approval pursuant to this Consent Judgment, as soon as practicable, but in no event later than 56 days after receipt of any such submission, the Plaintiffs will: (1) approve the submission; or (2) submit to Defendant changes in the submission that would result in approval of the submission. If Plaintiffs do not respond within 56 days after receipt of the submittal, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. Upon receipt of a notice of approval or changes from Plaintiffs, Defendant shall proceed to take any action required by the plan, report, or other item, as approved or as may be modified to address the deficiencies identified by Plaintiffs. If Defendant does not accept the changes proposed by Plaintiffs, Defendant may submit the matter to Dispute Resolution, Section XVI.

XI. PROJECT COORDINATORS

A. Plaintiffs designate Leonard Lipinski as Plaintiffs' Project Coordinator. Defendant designates James Fahrner, Vice President and Chief Financial Officer, as Defendant's Project Coordinator. Defendant's Project Coordinator shall have primary responsibility for implementation of the Remedial Action at the Site. Plaintiffs' Project Coordinator will be the primary designated representative for Plaintiffs with respect to implementation of the Remedial Action at the Site. All communication between Defendant and Plaintiffs, including all documents, reports, approvals, other submissions and correspondence concerning the activities performed pursuant to the terms and conditions of this Consent Judgment, shall be directed through the Project Coordinators. If any Party changes its designated Project Coordinator, that Party shall provide the name, address, and telephone number of the successor in writing to the other Party seven days prior to the date on which the change is to be effective. This paragraph does not relieve Defendant from other reporting obligations under the law.

B. Plaintiffs may designate other authorized representatives, employees, contractors, and consultants to observe and monitor the progress of any activity undertaken pursuant to this Consent Judgment. Plaintiffs' Project Coordinator shall provide Defendant's Project Coordinator

with the names, addresses, telephone numbers, positions, and responsibilities of any person designated pursuant to this section.

XII. PROGRESS REPORTS

Defendant shall provide to Plaintiffs written quarterly progress reports that shall: (1) describe the actions which have been taken toward achieving compliance with this Consent Judgment during the previous three months; (2) describe data collection and activities scheduled for the next three months; and (3) include all results of sampling and tests and other data received by the Defendant, its consultants, engineers, or agents during the previous three months relating to Remedial Action performed pursuant to this Consent Judgment. Defendant shall submit the first quarterly report to MDNR within 120 days after entry of this Consent Judgment, and by the 30th day of the month following each quarterly period thereafter, as feasible, until termination of this Consent Judgment as provided in Section XXV.

XIII. RESTRICTIONS ON ALIENATION

A. Defendant shall not sell, lease, or alienate the GSI Property unless the purchaser, lessee, or grantee provides prior written agreement with Plaintiffs that the purchaser, lessee, or grantee will not interfere with any term or condition of this

Consent Judgment. Notwithstanding any purchase, lease, or grant, Defendant shall remain obligated to comply with all terms and conditions of this Consent Judgment.

B. Any deed, title, or other instrument of conveyance regarding the GSI Property shall contain a notice that Defendant's Property is the subject of this Consent Judgment, setting forth the caption of the case, the case number, and the court having jurisdiction herein.

XIV. FORCE MAJEURE

Any delay attributable to a Force Majeure shall not be deemed a violation of Defendant's obligations under this Consent Judgment.

A. "Force Majeure" is defined as an occurrence or nonoccurrence arising from causes beyond the control of Defendant or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors. Such occurrence or nonoccurrence includes, but is not limited to: (1) an Act of God; (2) untimely review of permit applications or submissions; (3) acts or omissions of third parties for which Defendant is not responsible; (4) insolvency of any vendor, contractor, or subcontractor retained by Defendant as part of implementation of this Judgment; and (5) delay in obtaining necessary access agreements under Section IX

that could not have been avoided or overcome by due diligence. "Force Majeure" does not include unanticipated or increased costs, changed financial circumstances, or nonattainment of the treatment and termination standards set forth in Sections V and VI.

B. When circumstances occur that Defendant believes constitute Force Majeure, Defendant shall notify the MDNR by telephone of the circumstances within 48 hours after Defendant first believes those circumstances to apply. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the MDNR, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the timetable for implementation of such measures. Failure of Defendant to comply with the written notice provisions of this paragraph shall constitute a waiver of Defendant's right to assert a claim of Force Majeure with respect to the circumstances in question.

C. A determination by the MDNR that an event does not constitute Majeure, that a delay was not caused by Force, or that the period of delay was not necessary to compensate for Force Majeure may be subject to Dispute Resolution under Section XVI of this Judgment.

D. The MDNR shall respond, in writing, to any request by Defendant for a Force Majeure extension within 30 days of receipt of the Defendant's request. If the MDNR does not respond within that time period, Defendant's request shall be deemed granted. If the MDNR agrees that a delay is or was caused by Force Majeure, Defendant's delays shall be excused, stipulated penalties shall not accrue, and the MDNR shall provide Defendant such additional time as may be necessary to compensate for the Force Majeure event.

E. Delay in achievement of any obligation established by the Consent Judgment shall not automatically justify or excuse delay in achievement of any subsequent obligation unless the subsequent obligation automatically follows from the delayed obligation.

XV. REVOCATION OR MODIFICATION OF LICENSES OR PERMITS

Any delay attributable to the revocation or modification of licenses or permits obtained by Defendant to implement remediation actions as set forth in this Consent Judgment shall not be deemed a violation of Defendant's obligations under this Consent Judgment, provided that such revocation or modification arises from causes beyond the control of Defendant or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors.

A. Licenses or permits that may need to be obtained or modified by Defendant to implement the Remedial Actions are those specified in Section VII.D. and licenses, easements, and other agreements for access to property or rights of way on property necessary for the installation of remedial systems required by this Consent Judgment.

B. A revocation or modification of a license or permit within the meaning of this section means withdrawal of permission, denial of permission, a limitation or a change in license or permit conditions that delays the implementation of all or part of a remedial system. Revocation or modification due to Defendant's violation of a license or permit (or any conditions of a license or permit) shall not constitute a revocation or modification covered by this section.

C. When circumstances occur that Defendant believes constitute revocation or modification of a license or permit, Defendant shall notify the MDNR by telephone of the circumstances within 48 hours after Defendant first believes those circumstances to apply. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the MDNR, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the

timetable for implementation of such measures. Failure of Defendant to comply with the written notice provisions of this paragraph shall constitute a waiver of Defendant's right to assert a claim of revocation or modification of a license or permit with respect to the circumstances in question.

D. A determination by the MDNR that an event does not constitute revocation or modification of a license or permit, that a delay was not caused by revocation or modification of a license or permit, or that the period of delay was not necessary to compensate for revocation or modification of a license or permit may be subject to Dispute Resolution under Section XVI of this Consent Judgment.

E. The MDNR shall respond, in writing, to any request by Defendant for a revocation or modification of a license or permit extension within 30 days of receipt of the Defendant's request. If the MDNR does not respond within that time period, Defendant's request shall be deemed granted. If the MDNR agrees that a delay is or was caused by revocation or modification of a license or permit, Defendant's delays shall be excused, stipulated penalties shall not accrue, and the MDNR shall provide Defendant such additional time as may be necessary to compensate for the revocation or modification of a license or permit.

F. Delay in achievement of any obligation established by the Consent Judgment shall not automatically justify or excuse delay in achievement of any subsequent obligation unless the subsequent obligation automatically follows from the delayed obligation.

XVI. DISPUTE RESOLUTION

A. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under this Consent Judgment and shall apply to all provisions of this Consent Judgment, whether or not particular provisions of the Consent Judgment in question make reference to the dispute resolution provisions of this Section. Any dispute that arises under this Consent Judgment initially shall be the subject of informal negotiations between the Parties. The period of negotiations shall not exceed ten working days from the date of written notice by any Party that a dispute has arisen. This period may be extended or shortened by agreement of the Parties.

B. Immediately upon expiration of the informal negotiation period (or sooner if upon agreement of the parties), the MDNR shall provide to Defendant a written statement setting forth the MDNR's proposed resolution of the dispute. Such resolution shall be final unless, within 15 days after receipt of the MDNR's proposed resolution (clearly identified as such

under this Section), Defendant files a petition for resolution with the Washtenaw County Circuit Court setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Judgment.

C. Within ten days of the filing of the petition, Plaintiffs may file a response to the petition, and unless a dispute arises from the alleged failure of MDNR to timely make a decision, MDNR will submit to the Court all documents containing information related to the matters in dispute, including documents provided to MDNR by Defendant. In the event of a dispute arising from the alleged failure of MDNR to timely make a decision, within ten days of filing of the petition, each party shall submit to the Court correspondence, reports, affidavits, maps, diagrams, and other documents setting forth facts pertaining to the matters in dispute. Those documents and this Consent Judgment shall comprise the record upon which the Court shall resolve the dispute. Additional evidence may be taken by the Court on its own motion or at the request of either party if the Court finds that the record is incomplete or inadequate. Review of the petition shall be conducted by the Court and shall be confined to the record. The review shall be independent of any factual or legal conclusions made by the Court prior to the date of entry of the Consent Judgment.

D. The Court shall uphold the decision of MDNR on the issue in dispute unless the Court determines that the decision is any of the following:

1. Inconsistent with this Consent Judgment;
2. Not supported by competent, material, and substantial evidence on the whole record;
3. Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion; and
4. Affected by other substantial and material error of law;

E. The filing of a petition for resolution of a dispute shall not by itself extend or postpone any obligation of Defendant under this Consent Judgment, provided, however, that payment of stipulated penalties with respect to the disputed matter shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue as provided in Section XVII. Stipulated penalties that have accrued with respect to the matter in dispute shall not be assessed by the Court and shall be dissolved if Defendant prevails on the matter. The Court may also direct that stipulated penalties shall not be assessed and paid as provided in Section XVII upon a determination that there was a substantial basis for Defendant's position on the disputed matter.

XVII. STIPULATED PENALTIES

A. Except as otherwise provided, if Defendant fails or refuses to comply with any term or condition in Sections IV, V, VI, VII, or VIII, or with any plan, requirement, or schedule established pursuant to those Sections, then Defendant shall pay stipulated penalties in the following amounts for each working day for every failure or refusal to comply or conform:

Period of Delay	Penalty Per Violation Per Day
1st through 15th Day	$ 1,000
15th through 30th Day	$ 1,500
Beyond 30 Days	$ 2,000

B. Except as otherwise provided if Defendant fails or refuses to comply with any other term or condition of this Consent Judgment, Defendant shall pay to Plaintiffs stipulated penalties of $500.00 per working day for each and every failure to comply.

C. If Defendant is in violation of this Consent Judgment, Defendant shall notify Plaintiffs of any violation no later than five working days after first becoming aware of such violation, and shall describe the violation.

D. Stipulated penalties shall begin to accrue upon the next day after performance was due or other failure or refusal to comply occurred. Penalties shall continue to accrue until the final day of correction of the noncompliance. Separate penalties

shall accrue for each separate failure or refusal to comply with the terms and conditions of this Consent Judgment. Penalties may be waived in whole or in part by Plaintiffs or may be dissolved by the Court pursuant to Section XVII.

E. Stipulated penalties shall be paid no later than 14 working days after receipt by Defendant of a written demand from Plaintiffs. Defendant shall make payment by transmitting a check in the amount due, payable to the "State of Michigan", addressed to the Assistant Attorney General in Charge, Environmental Protection Division, P.O. Box 30212, Lansing, Michigan 48909.

F. Plaintiffs agree that, in the event that an act or omission of Defendant constitutes a violation of this Consent Judgment subject to stipulated penalties and a violation of other applicable law, Plaintiffs will not impose upon Defendant for that violation both the stipulated penalties provided under this Consent Judgment and the civil penalties permitted under other applicable laws. Plaintiffs reserve the right to pursue any other remedy or remedies to which they may be entitled under this Consent Judgment or any applicable law for any failure or refusal of the Defendant to comply with the requirements of this Consent Judgment.

XVIII. PLAINTIFFS' COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

A. Except as otherwise provided in this Consent Judgment, Plaintiffs covenant not to sue or take administrative action for Covered Matters against Defendant, its officers, employees, agents, directors, and any persons acting on its behalf or under its control.

B. "Covered Matters" shall mean any and all claims available to Plaintiffs under federal and state law arising out of the subject matter of the Plaintiffs' Complaint with respect to the following:

1. Claims for injunctive relief to address soil, groundwater, and surface water contamination at or emanating from the GSI Property;
2. Claims for civil penalties and costs;
3. Claims for natural resource damages;
4. Claims for reimbursement of response costs incurred prior to entry of this Consent Judgment or incurred by Plaintiffs for provision of alternative water supplies in the Evergreen Subdivision; and
5. Claims for reimbursement of costs incurred by Plaintiffs for overseeing the implementation of this Consent Judgment.

C. "Covered Matters" does not include:

1. Claims based upon a failure by Defendant to comply with the requirements of this Consent Judgment;
2. Liability for violations of federal or state law which occur during implementation of the Remedial Action; and
3. Liability arising from the disposal, treatment, or handling of any hazardous substance removed from the Site.

D. With respect to liability for alleged past violations of law, this covenant not to sue shall take effect on the effective date of this Consent Judgment. With respect to future liability for performance of response activities required to be performed under this Consent Judgment, the covenant not to sue shall take effect upon issuance by MDNR of the Certificate of Completion in accordance with Section XXV.

E. Notwithstanding any other provision in this Consent Judgment: (1) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to require Defendant to perform any additional response activity at the Site; and (2) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to reimburse Plaintiffs for response costs incurred by the State of Michigan relating to the Site. Plaintiffs' rights in D.1. and D.2. apply if and only

if the following conditions are met:

1. For proceedings prior to Plaintiffs' certification of completion of the Remedial Action concerning the Site,
   a. conditions at the Site, previously unknown to the Plaintiffs, are discovered after the entry of this Consent Judgment, or new information previously unknown to Plaintiffs is received after the effective date of the Consent Judgment; and
   b. these previously unknown conditions indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment; and
2. For proceedings subsequent to Plaintiffs' certification of completion of the Remedial Action concerning the Site,
   a. conditions at the Site, previously unknown to the Plaintiffs, are discovered or new information previously unknown to Plaintiffs is received after the certification of completion by Plaintiffs; and

b. these previously unknown conditions indicate that the remedial action is not protective of the public health, safety, welfare, and the environment.

F. Nothing in this Consent Judgment shall in any manner restrict or limit the nature or scope of response actions that may be taken by Plaintiffs in fulfilling their responsibilities under federal and state law, and this Consent Judgment does not release, waive, limit, or impair in any manner the claims, rights, remedies, or defenses of Plaintiffs against a person or entity not a party to this Consent Judgment.

G. Except as expressly provided in this Consent Judgment, Plaintiffs reserve all other rights and defenses that they may have, and this Consent Judgment is without prejudice, and shall not be construed to waive, estop, or otherwise diminish Plaintiffs' right to seek other relief with respect to all matters other than Covered Matters.

XIX. DEFENDANT'S COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

A. Defendant hereby covenants not to sue and agrees not to assert any claim or cause of action against Plaintiffs or any other agency of the State of Michigan with respect to environmental contamination at the Site or response activities relating to the Site arising from this Consent Judgment.

B. Notwithstanding any other provision in this Consent Judgment, for matters that are not Covered Matters as defined in Section XVIII.E., or in the event that Plaintiffs institute proceedings as allowed under Section XVIII.E., Defendant reserves all other rights, defenses, or counterclaims that it may have with respect to such matters and this Consent Judgment is without prejudice, and shall not be construed to waive, estop, or otherwise diminish Defendant's right to seek other relief and to assert any other rights and defenses with respect to such other matters.

C. Nothing in this Consent Judgment shall in any way impair Defendant's rights, claims, or defenses with respect to any person not a party to this Consent Judgment.

XX. INDEMNIFICATION AND INSURANCE

A. Defendant shall indemnify and save and hold harmless the State of Michigan and its departments, agencies, officials, agents, employees, contractors, and representatives from any and all claims or causes of action arising from, or on account of, acts or omissions of Defendant, its officers, employees, agents, and any persons acting on its behalf or under its control in carrying out Remedial Action pursuant to this Consent Judgment. Plaintiffs shall not be held out as a party to any contract entered into by or on behalf of Defendant in carrying out

activities pursuant to this Consent Judgment. Neither the Defendant nor any contractor shall be considered an agent of Plaintiffs. Defendant shall not indemnify or save and hold harmless Plaintiffs from their own negligence pursuant to this paragraph.

B. Prior to commencing any Remedial Action on the Gelman Property, Defendant shall secure, and shall maintain for the duration of the Remedial Action, comprehensive general liability insurance with limits of $1,000,000.00, combined single limit, naming as an additional insured the State of Michigan. If Defendant demonstrates by evidence satisfactory to Plaintiffs that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then with respect to that contractor or subcontractor, Defendant need provide only that portion, if any, of the insurance described above that is not maintained by the contractor or subcontractor.

XXI. RECORD RETENTION

Defendant, Plaintiffs, and their representatives, consultants, and contractors shall preserve and retain, during the pendency of this Consent Judgment and for a period of ten years after its termination, all records, sampling or test results, charts, and other documents that are maintained or

generated pursuant to any requirement of this Consent Judgment, including, but not limited to, documents reflecting the results of any sampling or tests or other data or information generated or acquired by Plaintiffs or Defendant, or on their behalf, with respect to the implementation of this Consent Judgment. After the ten year period of document retention, the Defendant and its successors shall notify Plaintiffs, in writing, at least 90 days prior to the destruction of such documents or records, and upon request, the Defendant and/or its successor shall relinquish custody of all records and documents to Plaintiffs.

XXII. ACCESS TO INFORMATION

Upon request, Plaintiffs and Defendant shall provide to the requesting Party copies of or access to all nonprivileged documents and information within their possession and/or control or that of their employees, contractors, agents, or representatives, relating to activities at the Site or to the implementation of this Consent Judgment, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Remedial Action. Upon request, Defendant shall also make available to Plaintiffs, their employees, contractors, agents, or representatives with knowledge of relevant facts concerning the performance of the Remedial Action. The

Plaintiffs shall treat as confidential all documents provided to Plaintiffs by the Defendant marked "confidential" or "proprietary."

XXIII. NOTICES

Whenever under the terms of this Consent Judgment notice is required to be given or a report, sampling data, analysis, or other document is required to be forwarded by one Party to the other, such notice or document shall be directed to the following individuals at the specified addresses or at such other address as may subsequently be designated in writing:

For Plaintiffs:

Leonard Lipinski
Project Manager
Michigan Deptartment
of Natural Resources
Environmental Response Division
301 East Louis Glick Highway
Jackson, MI 49201

For Defendants:

James Fahrner
Vice President
Gelman Sciences, Inc.
600 South Wagner Road
Ann Arbor, MI 48106

and

David B. Fink
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334

Any party may substitute for those designated to receive such notices by providing prior written notice to the other parties.

XXIV. MODIFICATION

This Consent Judgment may not be modified unless such modification is in writing, signed by all Parties, and approved and entered by the Court. Remedial Plans, work plans, or other submissions made pursuant to this Consent Judgment may be modified by mutual agreement of the Parties.

XXV. CERTIFICATION AND TERMINATION

A. When Defendant determines that it has completed all Remedial Action required by this Consent Judgment, Defendant shall submit to the MDNR a Notification of Completion and a draft final report. The draft final report must summarize all Remedial Action performed under this Consent Judgment and the performance levels achieved. The draft final report shall include or refer to any supporting documentation.

B. Upon receipt of the Notification of Completion, the MDNR will review the Notification of Completion and the accompanying draft final report, any supporting documentation, and the actual Remedial Action performed pursuant to this Consent Judgment. After conducting this review, and not later than three months after receipt of the Notification of Completion, the MDNR shall issue a Certificate of Completion upon a determination by the MDNR that Defendant has completed satisfactorily all requirements of this Consent Decree, including, but not limited

to, completion of all Remedial Action, achievement of all termination and treatment standards required by this Consent Judgment, compliance with all terms and conditions of this Consent Judgment, and payment of any and all stipulated penalties owed to Plaintiffs. If the MDNR does not respond to the Notification of Completion within three months after receipt of the Notification of Completion, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. This Consent Judgment shall terminate upon motion and order of this Court after issuance of the Certificate of Completion. Upon issuance, the Certificate of Completion may be recorded.

XXVI. RELATED SETTLEMENT

The Parties' agreement to be bound by this Consent Judgment is contingent upon the stipulation by the Parties to, and the entry by the Court of, the proposed Consent Judgment in the related case State of Michigan v Gelman Sciences, Inc. (E.D. Mich. No. 90-CV-72946-DT), a copy of which is attached hereto as Attachment F. In the event that the related Consent Judgment in Michigan v Gelman Sciences, Inc. is not entered, this Consent Judgment shall be without force and effect.

XXVII. EFFECTIVE DATE

The effective date of this Consent Judgment shall be the date upon which this Consent Judgment is entered by the Court.

XXVIII. SEVERABILITY

The provisions of this Consent Judgment shall be severable. Should any provision be declared by a court of competent jurisdiction to be inconsistent with federal or state law, and therefore unenforceable, the remaining provisions of this Consent Judgment shall remain in full force and effect.

XXIX. SIGNATORIES

Each undersigned representative of a Party to this Consent Judgment certifies that he or she is fully authorized by the Party to enter into this Consent Judgment and to legally bind such Party to the respective terms and conditions of this Consent Judgment.

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

FRANK J. KELLEY
Attorney General for
the State of Michigan
Attorney for Plaintiffs

Robert P. Reichel

A. Michael Leffler (P24254)
Robert P. Reichel (P31878)
Assistant Attorneys General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780

Dated: 10/23/92

DEFENDANT

GELMAN SCIENCES, INC.

Approved as to form:
Cooper, Fink & Zausmer, P.C.
Attorneys for Defendant
Gelman Sciences, Inc.

David H. Fink (P28235)
Alan D. Wasserman (P39509)
Thomas A. Biscup (P40380)
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334

Dated: 10/16/92

IT IS SO ORDERED AND ADJUDGED this _____ day of OCT 26 1992 _____, 1992.

HONORABLE PATRICK J. CONLIN
Circuit Court Judge

A TRUE COPY

EXHIBIT # 2

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,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable Donald E. Shelton

Celeste R. Gill (P52484)
Assistant Attorney General
Environment, Natural Resources and Agriculture Division
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(313) 963-3873
Attorneys for Defendant

THIRD AMENDMENT TO CONSENT JUDGMENT

A Consent Judgment was entered in this case on October 26, 1992. The Consent Judgment requires Defendant, Gelman Sciences, Inc., to implement various response activities to address environmental contamination in the vicinity of Defendant's property in Scio Township, subject to the approval of the Michigan Department of Environmental Quality ("MDEQ").

The Consent Judgment was amended by stipulation of the parties and Order of the Court on September 23, 1996 ("Amendment to Consent Judgment") and October 20, 1999 ("Second Amendment to Consent Judgment").

The Court has also supplemented the Consent Judgment with several cleanup related orders, based on information about the nature and extent of contamination acquired after the Consent Judgment and the Amendments were entered, including, Remediation and Enforcement Order (REO) dated July 17, 2000, the Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer ("Unit E Order"), dated December 17, 2004, and the Order Prohibiting Groundwater Use, dated May 17, 2005.

Since entry of the Second Amendment to Consent Judgment, Executive Order No. 2009-45 was signed and effective January 2010, the MDEQ was abolished as an agency of the State, the Michigan Department of Natural Resources (MDNRE) was created, and all of the authority, powers, duties, functions, responsibilities, and personnel relevant to this action were transferred to the MDNRE.

THEREFORE, the Parties agree to this Third Amendment to the Consent Judgment ("Third Amendment") and such Third Amendment is ordered, adjudged, and decreed as follows:

FIRST, modify Sections III.F G, H, J, and N to read as follows:

F. "GSI Property" shall mean the real property described in Attachment A, currently owned and operated by Defendant in Scio Township, Michigan.

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 85 micrograms per liter ("ug/l") (subject to approval by the Court of the application of a new criteria) determined by the sampling and

analytical method(s) described in Attachment B to this Consent Judgment, subject to review and approval by MDNRE.

H. "MDNRE" shall mean the Michigan Department of Natural Resources and Environment, the successor to the Michigan Department of Environmental Quality ("MDEQ"), the Michigan Department of Natural Resources ("MDNR"), and to the Water Resources Commission. All references to the "MDEQ," "MDNR," or to the "Water Resources Commission" in this Consent Judgment, as amended, shall be deemed to refer to the MDNRE or any successor agency.

J. "Plaintiffs" shall mean the Attorney General of the State of Michigan, ex rel, Michigan Department of Natural Resources and Environment.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 1700 ug/kg as determined by the sampling and analytical method(s) described in Attachment C, or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5718 or MCL 324.20120a.

SECOND, delete Section III.P and insert new Sections III.P., Q., R., S., T, and U.:

P. "Prohibition Zone Order" shall mean the Court's Order Prohibiting Groundwater Use, dated May 17, 2005, which established a judicial institutional control.

Q. "Prohibition Zone" shall mean the area that is subject to the institutional control established by the Prohibition Zone Order.

R. "Expanded Prohibition Zone" shall mean the area that shall be subject to the institutional control established by the Prohibition Zone Order pursuant to this Third Amendment to the Consent Judgment. A map depicting the Prohibition Zone and the Expanded Prohibition Zone is attached as Attachment E.

S. "Unit E Order" shall mean the Court's Opinion and Order Regarding Remediation of the Contamination of the Unit E Aquifer dated December 17, 2004.

T. "Eastern Area" shall mean the part of the Site that is located east of Wagner Road and the areas encompassed by the Prohibition Zone and Expanded Prohibition Zone.

U. "Western Area" shall mean that part of the Site located west of Wagner Road, excepting the Little Lake Area System described in Section V.C.

THIRD, modify the first paragraph of Section V to read as follows:

Defendant shall design, install, operate, and maintain the systems described below. The objectives of these systems shall be to extract the contaminated groundwater from the aquifers at designated locations for treatment (as required) and proper disposal to the extent necessary to prevent the plumes of groundwater contamination emanating from the GSI Property from expanding beyond the current boundaries of such plumes, except into and within the Prohibition Zone and Expanded Prohibition Zone (subject to paragraph 9 of the Prohibition Zone Order, as modified by Section V.A.2.b., of this Consent Judgment with regard to the northern boundaries of the Prohibition Zone and Expanded Prohibition Zone), as described below. Defendant also shall implement a monitoring program to verify the effectiveness of these systems.

FOURTH, modify Section V.A. to read as follows:

A. Eastern Area System

1. Objectives. The remedial objectives of the Eastern Area System ("Eastern Area Objectives") shall be:

a. Maple Road Containment Objective. The current Unit E objective set forth in the Unit E Order of preventing contaminant concentrations above the groundwater-surface water interface criterion of 2,800 ug/l (subject to approval by the Court of

the application of a new criteria) from migrating east of Maple Road shall apply to the Eastern Area System, regardless of the aquifer designation, or depth of groundwater or groundwater contamination.

b. Prohibition Zone Containment Objective. Use of groundwater in the Prohibition Zone and Expanded Prohibition Zone will be governed by the Prohibition Zone Order regardless of the aquifer designation or the depth of the groundwater or groundwater contamination. MDNRE-approved legal notice of the proposed Prohibition Zone expansion shall be provided at Defendant's sole expense.

2. Eastern Area Response Activities. The following response actions shall be implemented:

a. Maple Road Extraction. Defendant shall continue to operate TW-19 as necessary to meet the Maple Road containment objective.

b. Verification Plan. Defendant shall implement its June 3, 2009 Plan for Verifying the Effectiveness of Proposed Remedial Obligations ("Verification Plan"), as modified by this Sections V.A.2.b. and c., to ensure that any potential migration of groundwater contamination outside of the Expanded Prohibition Zone is detected before such migration occurs. Defendant shall install four additional monitoring well clusters in the Evergreen Subdivision area at the approximate locations indicated on the map attached as Attachment F. If concentrations of 1,4-dioxane in one or more of the three new monitoring wells installed at the perimeter of the Expanded Prohibition Zone or the existing MW-120s, MW-120d, MW-121s, and MW-121d exceed 20 ug/l, Defendant shall conduct a hydrogeological investigation to determine the fate of any groundwater contamination in this area as described in the Verification Plan. This investigation will be conducted pursuant to a MDNRE-approved work plan. The

work plan shall be submitted within 45 days after the first exceedence. If concentrations in any of the perimeter wells exceed 85 ug/l (or any other criteria approved by the Court) or if the Defendant's investigation or monitoring indicates that the plume of groundwater contamination will migrate outside of the Prohibition Zone or Expanded Prohibition Zone, Defendant shall conduct a Feasibility Study of available options for addressing the situation pursuant to a MDNRE-approved format. The Feasibility Study shall be submitted within 90 days after a determination by the Defendant or a written notification by the MDNRE that one is required. This Feasibility Study shall include options other than simply expanding the Prohibition Zone or Expanded Prohibition Zone, although that option may be included in the analysis. The parties agree that any further expansion of the northern boundaries of the Prohibition Zone or Expanded Prohibition Zone to address migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone should be avoided, unless there are compelling reasons to do so. The Defendant's Feasibility Study shall identify a preferred alternative. The MDNRE shall review the Feasibility Study and either approve the Defendant's preferred alternative or submit changes as provided in Section X of the Consent Judgment. The Defendant shall implement the approved alternative, or any changes submitted by the MDNRE unless the Defendant initiates Dispute Resolution under Section XVI of the Consent Judgment.

c. Additional Evergreen Monitoring Wells. Defendant shall install the new well clusters described in Section V.A.2.b. according to a schedule to be approved by the MDNRE . Each of the new well clusters will include two to three additional monitoring wells, and the determination of the number of wells shall be based on the Parties' evaluation of the geologic conditions present at each location, consistent with past practice. The easternmost of these well clusters shall be installed last and the data obtained from the other newly installed

well clusters and existing wells will be used to determine the location of the easternmost well cluster. The easternmost well cluster will be installed approximately one year after the other well clusters are installed and after the Parties have been able to evaluate at least four quarters of data from the new wells and existing well, unless the Parties agree that it should be installed sooner.

d. Drilling Techniques. Borings for new wells installed pursuant to Section V.A.2. shall be drilled to bedrock unless a different depth is approved by MDNRE or if conditions make such installation impracticable. The MDNRE reserves the right to require alternate drilling techniques to reach bedrock if standard methods are not able to do so. If the Defendant believes that drilling one or more of these wells to bedrock is not practical due to the geologic conditions encountered and/or that such conditions do not warrant the alternative drilling technique required by the MDNRE, Defendant may initiate dispute resolution under Section XVI of the Consent Judgment. The wells shall be installed using Defendant's current vertical profiling techniques, which are designed to minimize the amount of water introduced during drilling, unless the MDNRE agrees to alternate techniques.

e. Downgradient Investigation. The Defendant shall continue to implement its Downgradient Investigation Work Plan as approved by the MDNRE on February 4, 2005, to track the groundwater contamination as it migrates to ensure any potential migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone is detected before such migration occurs.

f. Continued Evergreen Subdivision area Groundwater Extraction as Necessary. The Defendant shall continue to operate the Evergreen Subdivision area extraction wells LB-1 and LB-3 (the "LB Wells") at a combined purge rate of 100 gallons per minute

(gpm), in order to reduce the migration of 1,4-dioxane, until such time as it determines that the Eastern Area cleanup objectives will be met at a reduced extraction rate or without the need to operate these extraction wells. Before significantly reducing or terminating extraction from the LB Wells, the Defendant shall consult with Plaintiffs and provide a written analysis, together with the data that supports its conclusion. MDNRE will review the analysis and data and provide a written response to Defendants within 56 days after receiving Defendant's written analysis and data. If the MDNRE disagrees with the Defendant's decision to reduce or terminate extraction, it may dispute the decision in Court within 15 days of its written response. Within 15 days of the filing of MDNRE's dispute, Defendant may file a response to the petition. The Parties may agree to extend these time frames to facilitate resolution of the dispute. The Defendant shall not significantly reduce or terminate extraction from the LB Wells while MDNRE is reviewing or disputing the Defendant's determination. MDNRE will make all reasonable efforts to have the motion resolved in a reasonable timeframe. If extraction from the LB Wells is terminated either by the agreement of the Parties or an order of the Court, the Defendant shall continue to maintain the LB Wells in an operable condition until such time as the Parties agree (or the Court decides) that the well(s) may be abandoned. Defendant shall abandon the Allison Street (AE-3) extraction well operation upon entry of this Third Amendment.

g. Well Identification. Defendant shall implement the Expanded Prohibition Zone Well Identification Work Plan as approved by MDNRE on February 4, 2011, pursuant to the approved schedule, unless Defendant files a Petition with the Court by March 16, 2011, seeking clarification of the scope of this Court's Prohibition Zone Order.

h. Plugging of Private Water Supply Wells. The Prohibition Zone Order's requirement that Defendant plug and replace any private drinking water wells by connecting those properties to municipal water shall apply to the Expanded Prohibition Zone. Defendant shall also properly plug non-drinking water wells in the Expanded Prohibition Zone unless it petitions the Court to clarify whether the Prohibition Zone Order requires Defendant to plug such wells and the Court determines it does not.

3. Future Inclusion of Triangle Property in the Expanded Prohibition Zone. MDNRE may request that the triangle piece of property located along Dexter/M-14 (Triangle Property) be included in the Expanded Prohibition Zone if the data obtained from the monitoring wells installed pursuant to Section V.A.2.c., above, (specifically, the Wagner Road and Ironwood/Henry monitoring wells) and other nearby wells indicate that the chemical and hydraulic data does not support Defendant's conceptual model regarding groundwater and contaminant flow in the area. Defendant may dispute such request pursuant to Section XVI of this Consent Judgment.

a. If the Triangle Property is later included in the Expanded Prohibition Zone, any further expansion beyond the Triangle Property shall be subject the same Feasibility Study requirements of Section V.A.2.b.

b. If a drinking water supply well is installed on the Triangle Property in the future, Defendant shall take the necessary steps to obtain permission to sample the well on a schedule approved by the MDNRE. Defendant shall monitor such wells on the MDNRE-approved schedule unless or until that property is included in the Expanded Prohibition Zone, at which time, the water supply well(s) shall be addressed as part of the well identification process.

4. Operation and Maintenance. Subject to Section V.A.2.f and V.A.7., Defendant shall operate and maintain the Eastern Area System as necessary to meet the Eastern Area Objectives. Defendant shall continuously operate, as necessary, and maintain the Eastern Area System according to MDNRE-approved operation and maintenance plans until Defendant is authorized to terminate extraction well operations pursuant to SectionV.D.1.a.

5. Treatment and Disposal. Groundwater extracted by the extraction well(s) in the Eastern Area System shall be treated (as necessary) using methods approved by the MDNRE and disposed of using methods approved by the MDNRE, including, but not limited to, the following options:

a. Groundwater Discharge. The purged groundwater shall be treated to reduce 1,4-dioxane concentrations to the level required by the MDNRE, and discharged to groundwaters at locations approved by MDNRE in compliance with a permit or exemption authorizing such discharge.

b. Sanitary Sewer Discharge. Use of the sanitary sewer leading to the Ann Arbor Wastewater Treatment Plant is conditioned upon approval of the City of Ann Arbor. If discharge is made to the sanitary sewer, the Eastern Area System shall be operated and monitored in compliance with the terms and conditions of an Industrial User's Permit from the City of Ann Arbor, and any subsequent written amendment of that permit made by the City of Ann Arbor. The terms and conditions of any such permit and any subsequent amendment shall be directly enforceable by the MDNRE against Defendant as requirements of this Consent Judgment.

c. Storm Drain Discharge. Use of the storm drain is conditioned upon issuance of an NPDES permit and approval of such use by the City of Ann Arbor and the

Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with the NPDES Permit and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than twenty-one (21) days after permission is granted by the City and the Drainage District to use the storm drain for disposal of purged groundwater, Defendant shall submit to MDNRE, the City of Ann Arbor, and the Drainage District for their review and approval, a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

d. Existing or Additional/Replacement Pipeline to Wagner Road Treatment Facility. Installation of an additional pipeline or a pipeline replacing the existing pipeline to the Wagner Road Treatment Facility is conditioned upon approval of such installation by the MDNRE. If the pipeline is proposed to be installed on public property, the pipeline installation is conditioned upon approval of such installation by the City of Ann Arbor, Scio Township, and the Washtenaw County Road Commission, if required by statute or ordinance, or by Order of the Court pursuant to the authority under MCL 324.20135a. Defendant shall design the pipeline in compliance with all state requirements and install the pipeline with monitoring devices to detect any leaks. If leaks are detected, the system will automatically shut down and notify an operator of the condition. In the event that any leakage is detected, Defendant shall take any measures necessary to repair any leaks and perform any remediation that may be necessary. To reduce the possibility of accidental damage to the pipeline during any future construction, the location of the pipeline will be registered with MISS DIG System, Inc. Nothing

in this subsection shall relieve Defendant of its obligations to properly treat and dispose of contaminated groundwater in compliance with the Consent Judgment and applicable permit(s), using one or more of the other options for disposal, as necessary.

e. Additional Pipeline from Maple Road Extraction Well(s).

Installation and operation of a proposed pipeline from the Maple Road Area to Evergreen area is conditioned upon approval of such installation and operation by the MDNRE. If the pipeline is proposed to be installed on public property, the pipeline installation is conditioned upon approval of such installation by the appropriate local authorities, if required by statute or ordinance, or Order of the Court pursuant to the authority under MCL 324.20135a. Defendant shall design any such pipeline in compliance with all state requirements and install it with monitoring devices to detect any leaks. In the event any leakage is detected, Defendant shall take any measures necessary to repair any leaks and perform any remediation that may be necessary. The pipeline shall be registered with the MISS DIG System, Inc., to reduce the possibility of accidental damage to the pipeline. Defendant may operate such pipeline to, among other things, convey groundwater extracted from TW-19 to the Wagner Road treatment systems, where it can be treated and disposed via the Defendant's permitted surface water discharge (capacity permitting).

6. Monitoring Plans. Defendant shall implement a MDNRE-approved monitoring plan for the Eastern Area. The monitoring plans shall include the collection of data to measure the effectiveness of the System in (a) ensuring that any potential migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone is detected before such migration occurs; (b) tracking the migration of the groundwater contamination to determine the need for additional investigation to ensure that there are adequate monitoring points to meet objective in Subsection (a) of this Section, including the determination

of the fate of groundwater contamination when and if it reaches the portion of the Huron River that is the easternmost extent of the Prohibition Zone; (c) verifying that concentrations of 1,4-dioxane greater than the groundwater-surface water interface criterion of 2800 ug/l (or any other criterion approved by the Court) does not migrate east of Maple Road; (d) complying with the applicable limitations on the discharge of the purged groundwater; and (e) evaluating capture areas for extraction wells and potential changes in groundwater flow from changes in extraction rates and locations.

To satisfy the objectives of this Section V.A.6, Defendant shall implement the following monitoring plans:

a. The portion of Defendant's Comprehensive Groundwater Monitoring Plan, May 4, 2009, amended June 2, 2009 (ACGMP), relevant to the Eastern Area, upon approval of the MDNRE as provided in Section X. Defendant shall continue to implement the currently approved monitoring plan until MDNRE approves the final ACGMP for the Eastern Area.

b. Defendant's Performance Monitoring Plan for Maple Road, which shall include the existing MW-84d as a monitoring point in lieu of the previously requested additional monitoring well closer to Maple Road, which shall be incorporated into the ACGMP for the Eastern Area.

The monitoring plans shall be continued until terminated pursuant to Section V.E.

7. Wagner Road Extraction. TW-18 and TW-21 (the "Wagner Road Wells") shall be considered part of the Eastern Area System even though they are located just West of Wagner Road. The Defendant shall initially operate the Wagner Road Wells at a combined 200 gallons per minute (gpm) extraction rate (with a minimum extraction rate of 50 gpm for each of

the wells). The Defendant shall continue to operate its Wagner Road Wells in order to reduce the migration of 1,4-dioxane east of Wagner Road at this rate until such time as it determines that the Eastern Area cleanup objectives will be met with a lower combined extraction rate or without the need to operate these wells. Before significantly reducing or terminating extraction from the Wagner Road Wells, Defendant shall consult with Plaintiffs and provide a written analysis, together with the data that supports its conclusion. MDNRE will review the analysis and data and provide a written response to Defendants within 56 days after receiving Defendant's written analysis and data. If the MDNRE disagrees with the Defendant's decision to reduce or terminate extraction, it may dispute the decision in Court within 15 days of the date of its written response. Within 15 days of the filing of MDNRE's dispute, Defendant may file a response to the petition. The Parties may agree to extend these time frames to facilitate resolution of the dispute. The Defendant shall not significantly reduce or terminate the Wagner Road extraction while MDNRE is reviewing or disputing the Defendant's determination. MDNRE will make all reasonable efforts to have the motion resolved in a reasonable timeframe.

8. Options Array for Transmission Line Failure/Inadequate Capacity.

The Defendant has provided the MDNRE with documentation regarding the life expectancy of the deep transmission line and an Options Array (attached as Attachment G). The Options Array describes the various options that may be available if the deep transmission line fails or the 200 gpm capacity of the existing deep transmission line that transports groundwater from the Eastern Area System to the treatment system located on the GSI Property proves to be insufficient to meet the Eastern Area Objectives.

FIFTH, delete the existing Section V.B. and replace with the following:

B. Western Area System

1. Western Area System Non-Expansion Cleanup Objective. The Defendant shall prevent the horizontal extent of the groundwater contamination in the Western Area from expanding. The horizontal extent shall be the maximum horizontal areal extent of groundwater contamination regardless of the depth of the groundwater contamination (as established under Section V.B.2.c. of this Consent Judgment). Continued migration of groundwater contamination into the Prohibition Zone or Expanded Prohibition Zone shall not be considered expansion and is allowed. A change in the horizontal extent of groundwater contamination resulting solely from the Court's application of a new cleanup criterion shall not constitute expansion. Nothing in this Section prohibits the Plaintiffs from seeking additional response activities pursuant to Section XVIII.E of this Consent Judgment. Compliance with the Non-Expansion Cleanup Objective shall be established and verified by the Compliance Well Network to be developed by the Parties as provided in Sections V.B.2.c and d., below ("Compliance Well Network"). There is no independent mass removal requirement or a requirement that the Defendant operate any particular extraction well(s) at any particular rate beyond what is necessary to prevent the prohibited expansion, provided that Defendant's ability to terminate all groundwater extraction in the Western Area is subject to Section V.D.1.c. and the establishment of property use restrictions as required by Section V.B.2.e. If prohibited expansion occurs, Defendant shall undertake additional response activities to return the groundwater contamination to the boundary established by the Compliance Well Network (such response activities may include recommencement of extraction at particular locations).

Plaintiffs agree to modify the remedial objective for the Western Area as provided herein to a no expansion performance objective in reliance on Defendant's agreement to comply with a no expansion performance objective for the Western Area. To ensure compliance with this

objective, Defendant acknowledges that in addition to taking further response action to return the horizontal extent of groundwater contamination to the boundary established by the Compliance Well Network, Defendant shall be subject to stipulated penalties for violation of the objective as provided in Section XVII. Nothing in this paragraph shall limit Defendant's ability to contest the assessment of such stipulated penalties as provided in this Consent Judgment.

2. Western Area Response Activities. The following response activities shall be implemented:

a. Extraction Wells. The Western Area response activities shall include the operation of groundwater extraction wells as necessary to meet the objective described in Section V.B.1. Purged groundwater from the Western Area System shall be treated with ozone/hydrogen peroxide or ultraviolet light and oxidizing agent(s), or such other method approved by the MDNRE to reduce 1,4-dioxane concentrations to the level as required by NPDES Permit No. MI-0048453, as amended or reissued. Discharge to the Honey Creek tributary shall be in accordance with NPDES Permit No. MI-0048453, as amended or reissued.

b. Decommissioning Extraction Wells. Within 14 days after entry of this Third Amendment, Defendant shall submit to MDNRE a list of Western Area extraction wells that it intends to decommission (take out-of-service) in 2011. The MDNRE has the right to petition the Court to stop the Defendant from taking such extraction well(s) out-of-service within 60 days of receiving the list identifying such extraction well(s). The Defendant shall maintain all other extraction wells, including, but not limited to, TW-2 (Dolph Park) and TW-12, in operable condition even if it subsequently terminates extraction from the well(s) until such time as the Parties agree (or the Court decides) that the well(s) may be abandoned.

c. Western Area Delineation Investigation. Defendant shall complete the following investigation, as may be amended by agreement of the Parties to reflect data obtained during the investigation, to address gaps in the current definition of the plume and to further define the horizontal extent of groundwater contamination in the Western Area:

i. Install monitoring wells screened to monitor the intermediate (Unit D2) and deep (Unit E) zones at/near the existing MW-20. An additional monitoring well at or near existing MW-36 will not be necessary unless the results from the wells installed at/near MW-20 are inconsistent with the Defendant's conceptual flow model (that the contamination in the shallower unit does not continue migrating to the west, but instead drops into the deeper unit and flows east into the Prohibition Zone or Expanded Prohibition Zone).

ii. Install a monitoring well cluster just west of Wagner Road and South of I-94.

iii. Install a monitoring well cluster in the Nancy Drive/MW-14d area, to define the extent of groundwater contamination from surface to bedrock, with final placement of the cluster to be determined after the Wagner Road/I-94 well cluster is installed or as otherwise agreed.

iv. Install a monitoring well screened to monitor the deep (Unit E) zone near/at MW-125, with location to be approved by MDNRE. PLS will vertically profile every ten feet throughout the deep (Unit E) saturated interval.

Defendant shall promptly provide the data/results from the investigation to the MDNRE so that the MDNRE receives them prior to Defendant's submission of the Monitoring Plan described in Subsection V.B.2.d, below. MDNRE reserves the right to request the installation of additional borings/monitoring wells, if the totality of the data from the wells to be installed indicate that the horizontal extent of groundwater contamination has not been completely defined.

d. Compliance Monitoring Well Network/Performance Monitoring Plan. Within 15 days of completing the investigation described in Subsection V.B.2.c , above, Defendant shall submit a Monitoring Plan, including Defendant's analysis of the data obtained during the investigation for review and approval by the MDNRE. The Monitoring Plan shall include the collection of data from a compliance monitoring well network sufficient to verify the

effectiveness of the Western Area System in meeting the Western Area objective set forth in Section V.B.1. The locations and/or number of the compliance monitoring wells for the Monitoring Plan will be determined based on the data obtained from the investigation Defendant shall conduct pursuant to Section V.B.2.c. The MDNRE shall approve the Monitoring Plan, submit to Defendant changes in the Monitoring Plan that would result in approval, or deny the Monitoring Plan within 35 days of receiving the Monitoring Plan. Defendant shall either implement the MDNRE-approved Monitoring Plan, including any changes required by MDNRE, or initiate dispute resolution pursuant to Section XVI of this Consent Judgment. Defendant shall implement the MDNRE (or Court)-approved Monitoring Plan to verify the effectiveness of the Western Area System in meeting the Western Area objective. Defendant shall continue to implement the current MDNRE-approved monitoring plan(s) until MDNRE approves the Monitoring Plan required by this Section. The monitoring program shall be continued until terminated pursuant to Section V.E.

e. Property Restrictions. The Defendant shall have property use restrictions that are sufficient to prevent unacceptable exposures in place for any properties affected by Soil Contamination or Groundwater Contamination before completely terminating extraction in the Western Area.

3. Internal Plume Characterization. Additional definition within the plume and/or characterization of source areas, except as may be required under Section VI of this Consent Judgment, is not necessary based on the additional monitoring wells to be installed as provided in Section V.B.2.c. MDNRE reserves the right to petition the Court to require such work if there are unexpected findings that MDNRE determines warrants additional characterization.

SIXTH, modify Section V.C. to read as follows:

C. Little Lake Area System

1. Little Lake Area System Non-Expansion Objective. The objective of the Little Lake Area System is to prevent expansion of the horizontal extent of any groundwater contamination located in this area.

2. Response Activities. Defendant shall implement some form of active remediation in this area until the termination criterion is reached under Section V.D.1.d. or appropriate land or resource use restrictions on the affected property(ies) approved by the MDNRE are in place. Defendant shall continue its batch purging program from the extraction well located on the Ann Arbor Cleaning Supply property pursuant to MDNRE-approved plans unless some other form of active remediation is approved by the MDNRE. Defendant may resubmit a proposal to temporarily reduce the frequency of the batch purging of this well so that the effects of batch purging can be evaluated. Defendant shall also have the option of obtaining appropriate land use or resource use restrictions on the affected property(ies) as an alternative to active remediation in this area, conditioned on MDNRE's approval.

3. Monitoring Plan. Within 45 days of entry of this Third Amendment, Defendant shall submit to the MDNRE for approval under Section X of this Consent Judgment a revised Monitoring Plan that identifies which of the existing monitoring wells will be used as compliance wells to verify the effectiveness of the Little Lake Area System in meeting the non-expansion objective of Section V.C.1. Defendant shall continue to implement the current MDNRE-approved monitoring plan until MDNRE approves the Monitoring Plan required by this Section. If a form of active remediation other than batch purging or land use or resource use

restrictions are approved by the MDNRE, Defendant shall submit a revised monitoring plan, modified as necessary to verify the effectiveness of such response activities.

The monitoring plan shall be continued until terminated pursuant to Section V.E.

SEVENTH, modify Section V.D.1 to read as follows:

D. Termination of Groundwater Extraction Systems

1. Defendant may only terminate the Groundwater Extraction Systems listed below as provided below:

a. Termination Criteria for LB Wells/Wagner Road Wells. Except as otherwise provided pursuant to Section V.D.2, Defendant may only significantly reduce or terminate operation of the LB Wells and the Wagner Road Wells as provided in Sections V.A.2.f. and V.A.7., respectively.

b. Termination Criteria for TW-19. Except as otherwise provided pursuant to Section V.D.2, Defendant shall maintain TW-19 in an operable condition and operate as needed to meet the groundwater-surface water interface criterion containment objective until all approved monitoring wells upgradient of Maple Road are below the groundwater surface water interface criterion for six consecutive months or until Defendant can establish to the satisfaction of MDNRE that additional purging from TW-19 is no longer necessary to satisfy the containment objective at this location. If Defendant requests to decommission TW-19, Defendant's request must be made in writing for review and approval pursuant to Section X of the Consent Judgment. The request must include all supporting documentation demonstrating compliance with the termination criteria. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the DNRE does not approve Defendant's request. Defendant may decommission TW-19 upon: (i) receipt of notice of approval from MDNRE; or

(ii) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of this Consent Judgment. Defendant shall not permanently plug TW-19 until completion of the post-termination monitoring pursuant to Section V.E.1.b.

c. Termination Criteria for Non-Expansion Objective for Western Area. Except as otherwise provided pursuant to Section V.D.2, and subject to Section V.B.1., Defendant shall not terminate all groundwater extraction in the Western Area until:

i. Defendant can establish to Plaintiffs' satisfaction that groundwater extraction is no longer necessary to prevent the expansion of groundwater contamination prohibited under Section V.B.1. Defendant's demonstration shall also establish that any remaining 1,4-dioxane contamination in the Marshy and Soil Systems will not cause any prohibited expansion of groundwater contamination; and

ii. Defendant has the land use or resource use restrictions described in Section V.B.2.e. in place.

Defendant's request to terminate extraction in the Western Area must be made in writing for review and approval pursuant to Section X of the Consent Judgment. The request must include all supporting documentation demonstrating compliance with the termination criteria. Defendant may initiate dispute resolution pursuant to Section XVI of the Consent Judgment if the MDNRE does not approve the Defendant's request/demonstration. Defendant may terminate Western Area groundwater extraction upon: (i) receipt of notice of approval from MDNRE; or (ii) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of this Consent Judgment.

d. Termination Criteria for Little Lake Area Well (a/ k/a Ann Arbor Cleaning Supply Well). Except as otherwise provided pursuant to Section V.D.2., Defendant

shall continue to operate the Ann Arbor Supply Well on a batch purging basis (or implement another form of MDNRE-approved active remediation) until six consecutive monthly tests of samples from the extraction well and associated monitoring wells, fail to detect the presence of groundwater contamination or until appropriate land use restrictions are placed on the affected property(ies).

EIGHTH, delete Sections V.D.4 and V.D.5 .

NINTH, modify Section V.E. to read as follows:

E. Post-Termination Monitoring

1. Eastern Area

a. Prohibition Zone Containment Objective. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to monitor the groundwater contamination as it migrates within the Prohibition Zone and Expanded Prohibition Zone until all approved monitoring wells are below 85 ug/l or such other applicable criterion for 1,4-dioxane for six consecutive months, or Defendant can establish to MDNRE's satisfaction that continued monitoring is not necessary to satisfy the Prohibition Zone containment objective. Defendant's request to terminate monitoring must be made in writing for review and approval pursuant to Section X of the Consent Judgment. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the MDNRE does not approve its termination request.

b. Groundwater/Surface Water Containment Objective. Except as provided in Section V.E.1.a., for Prohibition Zone monitoring wells, post-termination monitoring is required for Eastern Area wells for a minimum of 10 years after purging is terminated under Section V.D.1.b. with cessation subject to MDNRE approval. Defendant's request to terminate monitoring must be made in writing for review and approval pursuant to

Section X of the Consent Judgment. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the MDNRE does not approve its termination request.

c. Maple Road Extraction. If Defendant has decommissioned TW-19 based on monitoring well results showing that upgradient monitoring wells are below the groundwater/surface water interface criterion (rather than a demonstration) as provided in Section V.D.1.b and the monitoring conducted pursuant to Section V.E.1.b. reveal that the termination criterion is no longer being met, Defendant shall immediately notify MDNRE and collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, then Defendant shall take the steps necessary to put TW-19 in an operable condition and operate the well as necessary to satisfy the groundwater/surface interface water containment objective unless it can establish to Plaintiffs' satisfaction that such actions are not necessary to meet the groundwater/surface water interface containment objective.

2. Western Area. Post-termination monitoring will be required for a minimum of ten years after termination of extraction with cessation subject to MDNRE approval. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to monitor the groundwater in accordance with approved monitoring plan(s), to verify that it remains in compliance with the no expansion performance objective set forth in Section V.B.1. If any violation is detected, Defendant shall immediately notify MDNRE and take whatever steps are necessary to comply with the requirements of Section V.B.1.

3. Little Lake Area System. Post-termination monitoring will be required for a minimum of ten years after termination of active remediation in the Little Lake Area with cessation subject to MDNRE approval. Defendant shall continue to monitor the Ann Arbor

Cleaning Supply extraction well and/or associated monitoring wells, in accordance with approved monitoring plans to verify that:

a. the concentration of 1.4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDNRE and shall collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, Defendant shall immediately restart the previously-approved method of active remediation, unless Defendant has obtained appropriate land use or resource use restrictions on the affected property(ies) pursuant to Section V.C.2, (in which case subsection b, below shall apply); or

b. 1,4-dioxane in excess of the termination criterion is not migrating outside the MDNRE-approved area of land use or resource use restrictions.

TENTH, delete Section V.F.

ELEVENTH, modify the first paragraph of Section VI to read as follows:

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat Soil Contamination at the GSI Property and remove and treat groundwater from the Marshy Area located north of former Ponds I and II as necessary to: (a) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause the expansion of groundwater contamination in violation of Section V.B.1 of this Consent Judgment; (b) prevent venting of groundwater into Honey Creek Tributary with 1,4-dioxane in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2800 ug/l; and (c) prevent venting of groundwater to Third Sister Lake with 1,4-dioxane in quantities that cause of the concentration of 1,4-dioxane at

the groundwater-surface water interface of the Lake to exceed 2800 ug/l. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

TWELTH, modify Section VI.A. to read as follows:

1. Objectives. The objectives of this System are to: (a) prevent expansion of groundwater contamination prohibited under Section V.B.1.; and (b) prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2800 ug/1.

2. Response Activities. Defendant shall operate the Marshy Area System described in Defendant's May 5, 2000 Final Design and Effectiveness Monitoring Plan, as subsequently modified and approved by the MDNRE as necessary to meet the objectives of the Marshy Area System until its operation may be terminated under Section VI.D. of this Consent Judgment.

3. Monitoring. Defendant shall implement the MDNRE-approved monitoring plan to verify the effectiveness of the Marshy Area System in meeting the requirements of this Consent Judgment. The monitoring plan shall be continued until terminated pursuant to Section VI.D. of this Consent Judgment.

THIRTEENTH, modify Section VI.B.1 by replacing "2000 ug/l" with "2800 ug/l".

FOURTEENTH, renumber Sections VI.B.4 and VI.B.5 to VI.B.3 and VI.B.4, respectively, and modify new Section VI.B.3.c. to read as follows:

c. If Soil Contamination is identified in any of the areas investigated, Defendant shall submit, together with the report required in Section VI.B.3.b., an analysis of whether such Soil Contamination will cause the expansion of Groundwater Contamination prohibited under Section V.B.1. or venting of groundwater to Third Sister Lake with 1,4-dioxane

in quantities that cause of the concentration of 1,4-dioxane at the groundwater-surface water interface of the Lake to exceed 2800 ug/l. If either will occur, Defendant shall submit a remediation plan for that area that achieves the overall objectives of Section VI. The plan shall include a proposed schedule for implementation. The remediation system shall be installed, operated, and terminated in accordance with the approved plan.

FIFTEENTH, modify Section VI.C.1. to read as follows:

1. Objectives. The objectives of this program are to: (a) evaluate the necessity, feasibility and effectiveness of available options for remediation of identified source areas; (b) design and implement remedial systems, if necessary, to achieve the overall objectives of Section VI; and (c) verify the effectiveness of those systems.

SIXTEENTH, modify Section VI.C.2. to read as follows:

2. Soils Remediation Plan. Defendant shall, no later than November 30, 1996 submit to MDEQ for review and approval a revised soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the former Lift Station Area; and Pond III.

The Defendant's proposal must attain the overall objectives of Section VI.

SEVENTEENTH, modify Section VI.D.1 to read as follows:

1. Termination Criteria for GSI Property Remediation. Defendant shall continue to operate each of the GSI Property Remedial Systems, including the Marshy Area System until Defendant can make a demonstration to Plaintiffs' satisfaction that 1,4-dioxane remaining in any of the areas addressed would not cause: a) any expansion of groundwater

contamination in the Western Area as prohibited in Section V.B.1; or b) venting of groundwater into the Honey Creek Tributary or to the Third Sister Lake in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary or Lake to exceed 2800 ug/l. The demonstration described in this Section must be made in writing for review and approval by MDNRE pursuant to Section X of the Consent Judgment, and approved by MDNRE before Defendant terminates all groundwater extraction in the Western Area. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if MDNRE does not approve Defendant's demonstration. These Systems shall also be subject to the same post-termination monitoring as the Western Area System, described in Section V.E.2.

EIGHTEENTH, delete Sections VI.D.2., 4., and 5, and renumber VI.D.3 as VI.D.2

NINTEENTH, modify Section VII.D.1 by replacing "MI-008453" with MI-0048453"

TWENTIETH, modify Sections VII.D.5. and 6. to read as follows:

5. Permit(s) or permit exemptions to be issued by the MDNRE to authorize the reinjection of purged and treated groundwater in the Eastern Area, Western Area, and Little Lake Area;

6. Surface water discharge permit(s) for discharge into surface waters in the Little Lake System Area, if necessary;

TWENTY-FIRST, modify Section X to read as follows:

Upon receipt of any plan, report, or other items that is required to be submitted for approval pursuant to this Consent Judgment, as soon as practicable, but in no event later than 56 days after receipt of such submission, except for a feasibility analysis or plan that proposes a risk based cleanup or requires public comment submitted pursuant to Section V.A.2.b., of this Consent Judgment, the Plaintiff will: (1) approve the submission; or (2) submit to Defendant changes in the submission that would result in approval of the submission. Plaintiff will (1) approve a Feasibility Study or plan that proposes a risk based cleanup or a remedy that requires public comment; or (2) submit to Defendant changes in such submittal that would result in approval in the time provided under Part 201 of the Natural Resources and Environmental Protection Act, as amended, [MCL 324.20101 *et seq.*]. If Plaintiffs do not respond within 56 days, or 180 days, respectively, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. Upon receipt of a notice of approval or changes from the Plaintiffs, Defendant shall proceed to take any action required by the plan, report or other item, as approved or as may be modified to address the deficiencies identified by Plaintiffs. If Defendant does not accept the changes proposed by Plaintiffs, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI.

TWENTY-SECOND, modify the first two sentences of Section XI.A., to read as follows:

A. Plaintiffs designate Sybil Kolon as Plaintiffs' Project Coordinator. Defendant designates Farsad Fotouhi, Vice President of Corporate Environmental Engineering, as Defendant's Project Coordinator.

TWENTY-THIRD, modify Section XIII.A. as follows:

A. Defendant shall not sell, lease, or alienate the GSI Property until: (1) it places an MDNRE approved land use or resource use restrictions on the affected portion(s) of the GSI

Property; and (2) any purchaser, lessee, or grantee provides to Plaintiffs its written agreement providing that the purchaser, lessee, or grantee will not interfere with any term or condition of this Consent Judgment. Notwithstanding any purchase, lease, or grant, Defendant shall remain obligated to comply with all terms and conditions of this Consent Judgment.

TWENTY-FORTH, modify Section XVI.A. by adding the following clause to the beginning of the section:

A. Except as provided in Sections V.A.2.f., V.A.7., and V.D.1.a., the dispute resolution procedures of this Section shall ...

TWENTY-FIFTH, modify Section XVII.E as follows:

E. Stipulated penalties shall be paid no later than 14 working days after receipt by Defendant of a written demand from Plaintiffs. Defendant shall make payment by transmitting a check in the amount due, payable to the "State of Michigan", addressed to the Revenue Control Unit; Finance Section, Administration Division; Michigan Department of Natural Resources and Environment; P.O. Box 30657; Lansing, MI 48909-8157. Via Courier to the Revenue Control Unit; Finance Section, Administration Division; Michigan Department of Natural Resources and Environment; Constitution Hall, 5th Floor South Tower; 525 West Allegan Street; Lansing, MI 48933-2125. To ensure proper credit, include the settlement ID - ERD1902 on the payment.

TWENTY-SIXTH, modify Section XVIII.E to read as follows:

E. Notwithstanding any other provision in this Consent Judgment: (1) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to require Defendant to perform any additional response activity at the Site; and (2) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to reimburse Plaintiffs for

response costs incurred by the State of Michigan relating to the Site. Plaintiffs' rights in E.1. and E.2. apply if the following conditions are met:

1. For proceedings prior to Plaintiffs' certification of completion of the Remedial Action concerning the Site,

a. (i) conditions at the Site, previously unknown to the Plaintiffs, are discovered after entry of this Consent Judgment, (ii) new information previously unknown to Plaintiffs is received after entry of the Consent Judgment, or (iii) MDNRE adopts one or more new, more restrictive cleanup criteria for 1,4-dioxane pursuant to Part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 et seq., after entry of the Consent Judgment; and

b. these previously unknown conditions, new information, and/or change in criteria indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment; and

2. For proceedings subsequent to Plaintiffs' certification of completion of the Remedial Action concerning the Site,

a. (i) conditions at the Site, previously unknown to the Plaintiffs, are discovered after certification of completion by Plaintiffs, (ii) new information previously unknown to Plaintiffs is received after certification of completion by Plaintiffs, or (iii) MDNRE adopts one or more new, more restrictive cleanup criteria for 1,4-dioxane pursuant to Part 201 of NREPA, after certification of completion by Plaintiffs; and

b. these previously unknown conditions, new information, and/or change in criteria indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment.

If Plaintiffs adopt one of more new, more restrictive, cleanup criteria, Plaintiffs' rights in E.1. and E.2. shall also be subject to Defendant's right to seek another site specific criterion(ia) that is protective of public health, safety, welfare, and the environment and/or to argue that Plaintiffs have not made the demonstration(s) required under this Section.

TWENTY-SEVENTH, modify Section XX by changing the heading and adding new subsection C, as follows:

XX. INDEMNIFICATION, INSURANCE, AND FINANCIAL ASSURANCE

C. Financial Assurance

1. Defendant shall be responsible for providing and maintaining financial assurance in a mechanism approved by MDNRE in an amount sufficient to cover the estimated cost to assure performance of the response activities required, to meet, the remedial objectives of this Consent Judgment including, but not limited to investigation, monitoring, operation and maintenance, and other costs (collectively referred to as "Long-Term Costs"). Defendant shall continuously maintain a financial assurance mechanism (FAM) until MDNRE's Remediation Division (RD) Chief or his or her authorized representative notifies it in writing that it is no longer required to maintain a FAM. Defendant shall provide a FAM for MDNRE's approval within 45 days of entry of this Third Amendment.

2. Defendant may satisfy the FAM requirement set forth in this Section by satisfying the requirements of the financial test and/or corporate guarantee, attached as Attachment H, as may be amended by the Parties or by the Court upon the motion of either Party (Financial Test). Defendant shall be responsible for providing to the MDNRE financial information sufficient to demonstrate that Defendant satisfies the Financial Test. If Defendant utilizes the Financial Test to satisfy the financial assurance requirement of this Consent

Judgment, Long-Term Costs shall be documented, at Defendant's discretion, on the basis of either: a) an annual estimate of maximum costs for the response activities required by the Consent Judgment as if they were to be conducted by a person under contract to the MDNRE (MDNRE-Contractor Costs); or b) an annual estimate of maximum costs for the response activities required by the Consent Judgment as if they were to be conducted by employees of Defendant and/or contractors hired by Defendant, as applicable (Defendant's Internal Costs). In addition, Defendant shall resubmit the Financial Test and the associated required documents annually within 90 days of the end of its fiscal year or any Guarantor's fiscal year, subject to Section XX.C.4. Defendant is not required to provide another type of FAM so long as Defendant continues to meet the requirements for the Financial Test.

3. Ninety (90) days prior to the five (5)-year anniversary of the effective date of this Third Amendment to Consent Judgment, and each subsequent five (5)-year anniversary, Defendant shall provide to the MDNRE for its approval, a report (Long-Term Cost Report) containing the following:

a. If Defendant is required to provide a FAM other than the Financial Test or if Defendant's estimate of the long term costs for the Financial Test is based on Defendant's Internal Costs, then the Long-Term Cost Report shall contain the actual costs of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the previous five-year period and an estimate of the amount of funds necessary to assure the performance of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the following thirty (30)-year period given the financial trends in existence at the time of preparation of the report (Long-Term Cost Report). The Long-Term Cost Report shall also include all assumptions and calculations used in preparing the necessary

cost estimate and be signed by an authorized representative of Defendant who shall confirm the estimate is based upon actual costs. Defendant may only use a present worth analysis if an interest accruing FAM is selected; or

b. If Defendant's estimate of the Long Term Costs for the Financial Test is based on MDNRE-Contractor Costs, and the actual costs are less than the estimate, the Long-Term Cost Report shall contain a certification from Defendant that the total actual costs Defendant incurred to implement the required response activities for the previous five-year period was less than the previously provided cost estimate based on MDNRE-Contractor Costs. If actual costs are more than the estimate, then Defendant shall provide the actual cost incurred to meet the remedial objectives of this Consent Judgment for the previous five years. The Long-Term Cost Report shall also include an estimate of the amount of funds necessary to assure the performance of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the following thirty (30)-year period given the financial trends in existence at the time of preparation of the Long-Term Cost Report. The Long-Term Cost Report shall also include all assumptions and calculations used in preparing the necessary cost estimate and be signed by an authorized representative of Defendant.

4. Within 30 days of receiving MDNRE's approval of the Long-Term Cost Report, or within 90 days of the end of Defendant's (or any Guarantor's) fiscal year, whichever is later, Defendant shall resubmit its Financial Test, which shall reflect Defendant's (or, at its option, its parent corporation, Pall Corporation's) current financial information and the current estimate of the costs of the response activities required by the Consent Judgment. If this or any Financial Test indicates that Defendant (and its parent corporation, Pall Corporation if Defendant chooses to include Pall Corporation as a corporate guarantor) no longer satisfies the Financial

Test, Defendant will be required to provide to MDNRE for its approval a revised current estimate of the costs of the response activities required by the Consent Judgment to reflect the costs needed for the MDNRE to perform the necessary work using MDNRE contractors. The Parties shall negotiate a mutually acceptable alternative FAM. If the Parties are unable to reach an agreement, Plaintiffs shall provide Defendant with the FAM that will be required, which Defendant must provide unless Defendant initiates dispute resolution pursuant to Section XVI of the Consent Judgment, however during the dispute resolution process, Defendant may not challenge the underlying requirement that some type of FAM is required.

TWENTY-EIGHTH, modify Section XXIII by replacing the individual representatives of the Parties with the following individuals:

For Plaintiffs:

Sybil Kolon
Project Coordinator
Michigan Department
of Natural Resources
and Environment
Remediation Division
301 East Louis Glick Highway
Jackson, MI 49201

For Defendants:

Farsad Fotouhi
Vice President of Corporate Environmental
Engineering
Gelman Sciences, Inc.
600 South Wagner Road
Ann Arbor, MI 48106

and

Michael L. Caldwell
Zausmer, Kaufman, August, Caldwell & Tayler,
P.C.
31700 Middlebelt Road, Ste. 150
Farmington Hills, MI 48334

TWENTY-NINTH, modify Section XXVI by replacing "Attachment F" in the fourth line of that Section with "Attachment I".

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

Dan Wyant, Director
Michigan Department of Natural
Resources and Environment

Dated: 3.4.11

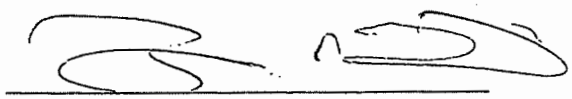
Approved as to form:

Celeste R. Gill (P52484)
Assistant Attorney General
Environment, Natural Resources and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorney for Plaintiffs

Dated: 3-4-11

IT IS SO STIPULATED AND AGREED:

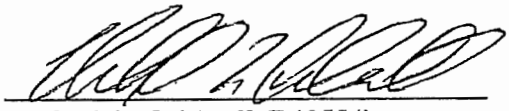
DEFENDANT



Dated: 3/3/11

Roberto Perez
President
Gelman Sciences, Inc.

Approved as to form:



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IT IS SO ORDERED AND ADJUDGED this ____ day of MAR - 8 2011.

/S/DONALD E. SHELTON

HONORABLE DONALD E. SHELTON
Circuit Court Judge

LF/Gelman/88-34734-CE/Third Amendments to Consent Judgment

EXHIBIT # 3

DEPARTMENT OF ENVIRONMENTAL QUALITY

REMEDIATION AND REDEVELOPMENT DIVISION

ESTABLISHMENT OF CLEANUP CRITERIA FOR 1,4-DIOXANE

EMERGENCY RULES

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State and shall remain in effect for 6 months.

(By the authority conferred on the Department of Environmental Quality by 1994 PA 451, 1969 PA 306, MCL 324.20104(1), MCL 324.20120a(17), and MCL 24.248)

FINDING OF EMERGENCY

These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment. Recent shallow groundwater investigations in the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes. The known area of 1,4-dioxane groundwater contamination in Ann Arbor covers several square miles defined by a boundary of 85 parts per billion, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings. The current cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.

These rules establish the 1,4-dioxane cleanup criterion for the drinking water ingestion pathway at 7.2 parts per billion and the vapor intrusion screening criterion at 29 parts per billion. These criteria are calculated using the latest United States Environmental Protection Agency toxicity data for the chemical 1,4-dioxane and the Department of Environmental Quality's residential exposure algorithms to protect both children and adults from unsafe levels of the chemical.

The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires

the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.

Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.

Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

C. Heidi Grether

C. Heidi Grether
Director

Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rule.

Governor

10-27-16

Date

EXHIBIT # 4

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 22ND JUDICIAL CIRCUIT
WASHTENAW COUNTY

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

Plaintiff,

and

THE CITY OF ANN ARBOR,

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

and

THE WASHTENAW COUNTY HEALTH DEPARTMENT,

Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,

Intervenor,

and

No. 88-34734-CE

HON. TIMOTHY P. CONNORS

DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S BRIEF ADDRESSING RESPONSE ACTIVITIES FOR THE GELMAN SITE

THE HURON RIVER WATERSHED COUNCIL,

Intervenor,

and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

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DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S BRIEF ADDRESSING RESPONSE ACTIVITIES FOR THE GELMAN SITE

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Dated: April 30, 2021

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs, the Attorney General for the State of Michigan and the Michigan Department of Environment, Great Lakes, and Energy (EGLE), submit this Brief and attached EGLE Expert Report (Exhibit 1) as directed by the Court's April 6, 2021 Order Denying Motion for Reconsideration and Scheduling Hearing Dates. As explained below, EGLE supports implementation of a remedy at the Gelman Site of 1,4-dioxane contamination in Scio Township and the City of Ann Arbor (Gelman Site) that requires additional investigation and response activities. The additional response activities are needed to establish compliance with the updated, lowered cleanup criteria for 1,4-dioxane under Part 201, Environmental Response, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.20101 *et seq.* (Part 201).

ARGUMENT

I. Background and Gelman Site History.

A. EGLE and Gelman Begin Negotiations to Modify Consent Judgment.

In late 2015, EGLE and Gelman began negotiations to revise the Third Amended Consent Judgment (3rd CJ)[1], that governs response activities at the Gelman Site in expectation of EGLE's promulgation of a substantially lowered revised drinking water cleanup criterion for 1,4-dioxane, the contaminant of concern for the Gelman Site. The revision of the 1,4-dioxane drinking water cleanup criterion (then 85 parts per billion (ppb)) to 7.2 ppb was established on October 27, 2016.[2] EGLE first utilized the emergency rulemaking authorities of the Administrative Procedures Act[3] to establish the new 7.2 ppb criterion, and acted to extend the emergency rule's effectiveness for six months.[4] On October 27, 2017, EGLE promulgated the 7.2 ppb drinking water cleanup criterion as a stand-alone final rule through the notice and participation/comment process under the Michigan Administrative Procedures Act, MCL 24.201 *et seq.*[5]

In late 2016, nearly a year before the revised drinking water cleanup criterion for 1,4-dioxane was promulgated as a final rule, EGLE and Gelman reached agreement on

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[1] Entered by this Court on March 8, 2011.

[2] 2016 MR 20, p 55 (Nov. 15, 2016).

[3] MCL 24.248(1).

[4] 2017 MR 8 (May 15, 2017).

[5] 2017 MR 20 (Nov. 15, 2017).

revisions to the Third Amended Consent Judgment providing for response activities to address the revised 7.2 ppb criterion.

B. Intervenors Join Negotiations for Revised Consent Judgment.

The City of Ann Arbor, Washtenaw County, and the Huron River Watershed Council separately moved to intervene in this case in late 2016. The Court granted their motions on January 18, 2017. Subsequently, Scio Township moved to intervene in the Gelman case, and the Court granted the motion in its Order dated February 6, 2017.[6] Collectively, the four entities are referred to as the "Intervenors." The proposed revisions to the Consent Judgment that EGLE and Gelman had been working on in late 2016 served as the starting point for negotiations with the Intervenors.

After nearly four years of negotiations, during an August 12, 2020 status conference, the parties (including the Intervenors) informed this Court that they had reached agreement on a proposed Fourth Amended and Restated Consent Judgment (4th CJ) (Exhibit 2), pending approval by the Intervenor local governments' elected officials. The proposed 4th CJ provided for substantial and important remedial activities and investigations and would have put into place additional safeguards to ensure continued protection of human health and the environment.[7] EGLE and the Intervenor

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[6] In the interest of allowing all involved to focus resources on the negotiations and not litigation, the January 18 and February 6, 2017 Orders granting the motions to intervene both provided that the Intervenors "shall refrain from filing their proposed complaints at this time" in order "to participate in negotiations concerning the proposed Fourth Amended Consent Judgment to be presented to the Court in this matter." (Exhibit 3.)

local governments followed through on their commitments during the status conference to hold separate public comment sessions for the proposed 4th CJ. EGLE's public comment period closed on September 21, 2020 and EGLE posted its Public Comment Responsiveness Summary on EGLE's Gelman Sciences, Inc. contamination information website on November 12, 2020.[8]

Disappointingly, the elected officials of the Intervenor local governments rejected the proposed 4th CJ that had been negotiated by and agreed upon by counsel for all parties.

At this time, the Intervenors are asking the U.S. Environmental Protection Agency (USEPA) to identify the Gelman Site as a federal "Superfund" site by listing it on the National Priorities List (NPL).[9] Simultaneously, the Intervenor local governments continue to pursue litigation before this Court and have represented to their communities that they wish to obtain the best possible outcome for their communities

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[7] Although it recites the outdated 1,4-dioxane drinking water cleanup criterion (85 ppb), the remedy under the still-in-effect 3rd CJ remains protective of human health because no one is drinking well water that exceeds the 7.2 ppb drinking water cleanup criterion for 1,4-dioxane. Promptly after promulgation of the 7.2 ppb criterion on October 27, 2016, Gelman connected to the municipal water supply the sole residence and associated commercial buildings utilizing a well for drinking water that exceeded the new criterion.

[8] https://www.michigan.gov/egle/0,9429,7-135-3311_4109_9846-71595--,00.html (last visited on April 29, 2021.)

[9] On April 12, 2021, EGLE transmitted the letters and resolutions from Intervenor local governments seeking NPL listing of the Gelman Site to USEPA, asking USEPA to "[a]s requested by the communities, please reinitiate assessment of the site for the NPL listing process."

by pursuing a litigated outcome at the same time that they seek EPA involvement at the Gelman Site.

C. EGLE's Conceptual Site Model for the Gelman Site Supports Remedial Proposals.

EGLE's Expert Report introduces a virtual conceptual site model (VCSM) of the Gelman Site and plume produced by utilizing RockWorks software. The RockWorks VCSM of the Gelman Site will be in the future shared on EGLE's new geographic information system platform. EGLE's Expert Report is largely based on EGLE's RockWorks modeling of the Gelman Site's geology and plume and provides scientific support for the additional investigation and 1,4-dioxane removal response activities that would be required under the terms of the proposed 4th CJ. EGLE maintains its support for those additional investigation and contaminant removal activities as key elements of a remedy for the Gelman Site.

The RockWorks modeling provides a better understanding of the movement and location of the Gelman Site's contaminated groundwater. For example, there continue to be questions and differing hypotheses offered by different parties about how the 1,4-dioxane plume migrates through the eastern portion of the Gelman Site—i.e., whether there may be channels that provide preferential pathways for migration or whether the 2-dimensional plume drawings, such as the map published by Washtenaw County (Exhibit 4), sufficiently represent the plume. EGLE utilized the RockWorks model of the

Gelman Site to test whether the groundwater bearing sand and gravel units identified in Gelman Site borings/wells are connected, which it confirmed, concluding that: "In a hydogeologic sense, a geobody represents zones of hydraulic communication. . . . the largest geobody of sand and gravel (groundwater flow) constitutes 99.5% of the geologic static model. It is therefore accurate to say that almost all of the sand and gravel within the model are connected." EGLE Expert Report ¶ 39. That is, for practical purposes EGLE has concluded that it is appropriate to consider the aquifer as a single unit, consistent with the generalized Washtenaw County map. *Id.*, ¶¶ 40, 42, 43, 44.

II. Elements of a Remedy that EGLE Urges the Court to Include in any Order for the Gelman Site.

The Intervenors do not object to many of the revisions contained in the proposed 4th CJ, but are seeking additional investigations, monitoring and reporting, among other things. EGLE continues to support the revisions contained in the proposed 4th CJ. Among its many provisions, the proposed 4th CJ includes the following key requirements that EGLE urges the Court to include in any remedy required at the Gelman Site:

- Implementation of updated cleanup criteria.
- Additional investigations.
- Expanded monitoring.
- Increased pumping/remediation.

- Expansion of the existing "Prohibition Zone" (PZ) institutional control requiring municipal water use.

A. Proposed 4th CJ—Updated 1,4-Dioxane Cleanup Criteria Implementation.

The proposed 4th CJ implements the current Part 201 drinking water cleanup criterion of 7.2 ppb for 1,4-dioxane. As noted above, EGLE and Gelman have in practice implemented the 7.2 ppb criterion since October 2016. Updating the requirements that apply to Gelman (and all 1,4-dioxane cleanups) is needed to bring the Gelman Site documents up to date and to document the applicability of the more protective cleanup criteria to this site.

The proposed 4th CJ also implements the current 1,4-dioxane cleanup criterion of 280 ppb for groundwater venting into surface water (known as the "groundwater-surface water interface" (GSI) cleanup criterion), which was 2,800 ppb under the 3rd CJ. With the lowered GSI criterion, GSI investigations to determine whether the contamination is entering surface water above the criterion have become necessary and EGLE supports inclusion of the proposed 4th CJ requirements that Gelman submit GSI investigation workplans to EGLE for approval prior to implementation.

B. Proposed 4th CJ—Additional Investigations Through Expanded Monitoring Well Network.

The existing extensive monitoring well network (228 monitoring wells)[10] was proposed to significantly expand by installing up to 36 new monitoring wells in 14 key

[10] 2018 Gelman Grid Site Map. 374 wells and borings have been installed by Gelman since 1986. The deepest monitoring well is 301 feet deep. The average distance

locations to delineate the location of the newly defined plume boundaries based upon the 7.2 ppb criterion and to monitor the plume and the potential for migration outside of the PZ. The additional monitoring supported by EGLE and the Intervenors would ensure compliance with the goals of an updated remedy and would ensure that the remedy remains protective of human health and the environment under Part 201.

Additional monitoring wells proposed to be installed along the northern and southern PZ boundaries will further ensure that contamination will be detected before it can migrate out of the PZ toward private drinking water wells. EGLE Expert Report, ¶¶ 55, 56, 57 (wells A, B, C).

New monitoring wells proposed to be installed near West Park and the Allen Creek Drain area will help address issues concerning the venting of 1,4-dioxane into the Drain and are consistent with the existing downgradient investigation workplan. *Id.*, ¶¶ 59, 60, 61 (wells E, F, G, H).

In the Western Area, new monitoring wells as proposed in the 4th CJ would further define the horizontal extent of groundwater contamination based upon the much lower 7.2 ppb criterion and to determine the location of future compliance wells. These additional monitoring points will assist in detecting any prohibited expansion of the plume. *Id.*, ¶ 62 (wells I, J, K, L, M, N).

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between the wells is 473 feet. EGLE Expert Report at ¶ 27. In addition, EGLE, with assistance from the Washtenaw County Health Department, annually samples over 100 (130 proposed this year) private drinking water wells outside of the Prohibition Zone.

C. Proposed 4th CJ—Increased Remediation.

The proposed 4th CJ significantly increases the amount of pump-and-treat groundwater remediation to further reduce contamination, approximately doubling the pumping rate in the PZ (Prohibition Zone—the area covered by an institutional control precluding use of groundwater, see Section II.D, *infra*, for more details). At the "Parklake" site within the PZ, EGLE supports retaining the requirements included in the 4th CJ that would require Gelman to extract contaminated groundwater at a rate of approximately 200 gallons per minute and treat it with the same ozone/hydrogen peroxide chemical oxidation process utilized at its Wagner Road treatment plant. The Intervenors also support increased treatment in this vicinity.

Responding to community concerns, however, the Intervenors' elected officials rejected the Parklake proposal, bringing forth objections based on the proposed permitted discharge containing residual 1,4-dioxane[11] (below applicable criteria) and based on the increased water flow into First Sister Lake, which the community asserted could have adverse impacts on the lake's ecology and the function of a rain garden, among other things.

EGLE supports increased treatment in the area, but the treated water must have a discharge point. In evaluating a permit application for any discharge, EGLE must

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[11] The discharge would be below the 7.2 ppb drinking water criterion, like the NPDES-permitted discharge from Gelman's Wagner Road treatment plant downstream of First Sister Lake.

consider the potential adverse impacts of a requested discharge point, including levels of remaining contaminants and volume of the discharge. To the extent that the Intervenors oppose any discharge of treated water into First Sister Lake and seek to require Gelman to discharge the treated water elsewhere in a Court Order, EGLE notes that predetermination of a discharge point is contrary to EGLE's process for evaluating applications for effluent discharge from pump and treat systems. EGLE is prepared to evaluate any proposed discharge point in its normal permit evaluation process. EGLE believes it would be inappropriate to prohibit Gelman or any party from applying for an otherwise lawfully authorized permit, including on the basis of the proposed discharge location. If Gelman applies for and is ultimately denied a permit to discharge into First Sister Lake, then Gelman should still be required to install the Parklake extraction well and utilize another means of lawfully discharging the treated water.

Existing extraction wells in the "Evergreen" area in the PZ were proposed to be replaced or supplemented with new extraction in a nearby more highly contaminated portion of the plume. Additional source control was proposed to occur on the Gelman property with phytoremediation and additional pump and treat systems. EGLE supports a requirement for Gelman to propose performance monitoring criteria for the new onsite source control and would require the performance monitoring criteria to be submitted to EGLE for approval in Gelman's workplans for the additional onsite source control.

EGLE supports replacing the 500 ppb "termination" standard for the new Parklake and Gelman property extraction wells with the same narrative standard employed for other extraction wells under the 3rd CJ (and the proposed 4th CJ). Specifically, EGLE supports language requiring Gelman to operate the required extraction wells for a minimum of two years and to continue to operate them "until Defendant determines that the Eastern[/Western Area] Objectives will be met at a reduced extraction rate or without the need to operate the extraction well," and further requiring that EGLE approve Gelman's determination.

D. Proposed 4th CJ—Expansion of PZ Institutional Control.

The PZ is a judicial institutional control originally established by this Court's Order Prohibiting Groundwater Use, dated May 17, 2005. The PZ is located solely within the City of Ann Arbor and prohibits the use of drinking water wells and requires the use of the municipal drinking water system. The PZ has been geographically expanded in the past.[12]

The 4th CJ proposed to expand the PZ along its northern and southern boundaries because the extent of the 1,4-dioxane plume is now defined by the more restrictive 7.2 ppb drinking water cleanup criterion. The plume itself has not physically expanded to the north or south.[13] While EGLE understands that any proposed

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[12] For example, similar to the proposed 4th CJ, the March 8, 2011 Third Amendment To Consent Judgment added "Expanded Prohibition Zone" areas.

expansion of the PZ is a sensitive issue, the expansion was intentionally limited to only areas that are already connected to municipal water to ensure that affected residents' water use will not be affected by the changes. The proposed 4th CJ contains a new process for five-year reviews of the PZ to determine if a contraction may be warranted. EGLE continues to believe the five-year review process is the most effective way to consider and address issues and concerns related to the boundaries of the PZ.

E. Proposed 4th CJ—Continued Consultation With Intervenors.

The Intervenors originally agreed that they would not be parties to the proposed 4th CJ. The parties had worked out an enhanced involvement for the local government Intervenors in a separate proposed Order of Dismissal. Under those terms, EGLE agreed to affirmatively seek input from the local government Intervenors[14] prior to deciding on Gelman's requests regarding certain proposed 4th CJ obligations, including the right to engage in dispute resolution procedures under the Order if they disagreed with EGLE's decision on the following:

- Terminating or significantly reducing groundwater pump and treat response activities.
- Modification of termination criteria or cleanup criteria.

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[13] The plume has migrated further eastward/downgradient as envisioned and authorized by the remedy implemented under the Consent Judgment.

[14] The Huron River Watershed Council's intervention was limited to solely surface water issues and, therefore, was not included in the consultation/dispute resolution provisions.

- Termination of post-termination monitoring—Gelman is generally required to monitor for at least 10 years after all pump and treat response activities end.
- Groundwater-surface water interface workplans.
- Modification of provisions addressing: (i) Evergreen/Maple Road/Parklake pump and treat; (ii) Gelman property response activities; (iii) Prohibition Zone boundary changes; (iv) cleanup criteria; (v) termination of post-termination monitoring; and (vi) termination of the proposed 4th CJ.

Although unusual, EGLE does not oppose maintaining the consultation and dispute resolution rights previously agreed upon with the local government Intervenors set forth in the proposed Order of Dismissal and summarized above. These rights and processes provide Intervenors with a robust ability to remain involved in major decisions for the Gelman Site. If the Intervenors ask the Court to grant additional authorities that would delegate or cede EGLE's authority to implement Part 201 as granted to EGLE by the Legislature, EGLE will have to oppose their request. EGLE has previously agreed to create an active and unprecedented oversight role for the local government Intervenors going forward in this matter, which EGLE continues to support.

III. Allen Creek Drain Investigation.

The issue of groundwater contamination entering the Allen Creek Drain storm sewer is a matter that EGLE is addressing, but EGLE believes that specific language in a Court Order is not necessary to deal with this highly technical matter. EGLE prefers to employ an iterative workplan process which requires Gelman to submit workplans for

EGLE's review and approval for all investigations. Entering fixed, prescriptive mandates for borings or wells in a Court Order may result in requirements to place wells or conduct sampling in areas that may not align with the location(s) of infiltration.[15]

The Allen Creek Drain investigation is currently being addressed through the work plan submitted to EGLE on April 15, 2021, and EGLE prefers to continue to address this issue through that process. The proposed investigation employs an iterative approach utilizing sampling from within the Drain to determine approximate locations where 1,4-dioxane may be infiltrating before proposing locations for investigational borings and monitoring wells adjacent to the Drain.

EGLE also believes that this issue should continue to be addressed without specific Consent Judgment or Order provisions or mandates for specific investigational techniques because the Gelman Site remedy requires that where the plume ultimately "vents" to surface water, Gelman must achieve compliance with applicable criteria, whether the plume reaches surface water via the Drain or the Huron River or both.[16]

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[15] As part of their proposed approach to Allen Creek Drain, Intervenors have previously proposed 28 "high resolution" rotosonic borings to bedrock at predetermined locations every 200 feet along Maple Road and Westwood/Grandview/Glendale; EGLE recommends consideration of boring placement as part of a work plan, to avoid "locking in" the locations of borings roughly one mile and one-half mile away from the 1,4 dioxane detection in the Drain, which may not provide useful data. Similarly, Intervenors have proposed over 50 shallow temporary wells at fixed locations every 100 feet or less on both sides of the branch of the Drain with the 49 ppb detection, whereas EGLE would propose in-drain sampling to determine where the plume may be entering the Drain.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request the Court to consider EGLE's views regarding key elements of a remedy in any decision entered in this proceeding.

Respectfully submitted,

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Dated: April 30, 3021

LF: Gelman Science CIR/AG# 1989-001467-A/EGLE's Brief Addressing Response Activities for the Gelman Site 2021-04-30

[16] EGLE supports assigning responsibility for conducting surface water and Drain sampling to Gelman.

EXHIBIT # 5

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

/

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/

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**

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Dated: May 27, 2021

EXHIBIT # 6

Court of Appeals, State of Michigan

ORDER

Attorney General v Gelman Sciences Inc

Docket No. 337818

LC No. 88-034734-CE

Mark T. Boonstra
Presiding Judge

William B. Murphy

Jane E. Markey
Judges

The Court orders that the motions for immediate consideration are GRANTED.

The Court further orders that the motion for stay pending appeal is DENIED.

The Court orders that the motion for leave to exceed the page limit for combined reply to answers is GRANTED and the reply received on May 8, 2017 is accepted for filing.

The Court orders that the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

A true copy entered and certified by Jerome W. Zimmer Jr.. Chief Clerk, on

JUL 14 2017
Date

Chief Clerk

EXHIBIT # 7

Order

Michigan Supreme Court
Lansing, Michigan

January 12, 2018

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

156373 & (31)

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel DEPARTMENT OF NATURAL RESOURCES, NATURAL RESOURCES COMMISSION, and WATER RESOURCES COMMISSION,
Plaintiffs-Appellees,

and

CITY OF ANN ARBOR, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER, HURON RIVER WATERSHED COUNCIL, and SCIO TOWNSHIP,
Intervenors-Plaintiffs-Appellees,

v

SC: 156373
COA: 337818
Washtenaw CC: 88-034734-CE

GELMAN SCIENCES, INC.,
Defendant-Appellant.
_____/

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the July 14, 2017 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 12, 2018

Clerk

d1023

EXHIBIT # 8

STATE OF MICHIGAN WASHTENAW COUNTY TRIAL COURT	**FOURTH** **AMENDED SCHEDULING ORDER**	CASE NO. 88-034734-CE JUDGE Timothy P. Connors

Court address
101 E. HURON, P.O. BOX 8645, ANN ARBOR, MI 48107

Court telephone no.
734-222-3001

Kelley, Frank J/attorney vs Gelman Sciences Inc

Plaintiff's attorney, bar no.	Defendant's attorney, bar no.
Brian J. Negele; P41846	Michael L CaldwellP40554

There is a Hearing on Modification of the Consent Agreement set for March 22-23 , 2021 at 9:00 AM

Before commencement of the Hearing, counsel shall submit Briefs and Expert reports in accordance with the following schedule:

Intervenors by 2/12/2021

Gelman response by 2/26/2021

EGLE response/Intervenors' reply by 3/12/2021

The Court's previous Scheduling Orders regarding this hearing are vacated and replaced by this Amended Order.

Gelman agrees to this amended schedule, but maintains its previously stated objections to the decision to hold the hearing.

1/27/2021
Date

/s/ Timothy Connors 1/27/2021
Timothy P. Connors
Trial Court Judge

(NJTO 01)

EXHIBIT # 9

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

/

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William J. Stapleton (P38339)
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Robert Charles Davis (P41055)
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Erin E. Mette (P83199)
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Great Lakes Environmental Law Center
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(313) 782-3372

_____/

ORDER DENYING MOTION FOR RECONSIDERATION AND SCHEDULING HEARING DATES

At a session of said Court held in the Courthouse, City of Ann Arbor, County of Washtenaw, State of Michigan on 4/6/2021 [redacted]

PRESENT: Hon. _____
TIMOTHY P. CONNORS
Circuit Court Judge

This matter, having come before the court on Defendant Gelman Sciences, Inc.'s Motion for Reconsideration of the court's previous Order scheduling a hearing on modification of the Consent Judgment and briefs having been filed by the parties and Court having heard oral argument;

IT IS HEREBY ORDERED:

1. Gelman Sciences, Inc.'s Motion for Reconsideration is DENIED for the reasons state on the record.

2. A hearing on implementation of revised cleanup criteria and modification of response activity Orders and Judgments is set for May 3, 4 and 5, 2021 at 9:00 AM.

3. Before commencement of the hearing, counsel for all parties shall submit Briefs and Expert Reports on or before April 30, 2021.

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

SO ORDERED.

/s/ Timothy Connors 4/6/2021

Timothy P. Connors
Circuit Court Judge

EXHIBIT # 10

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
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,
v
GELMAN SCIENCES, INC., a Michigan Corporation,
Defendant.

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

ORDER DENYING DEFENDANT GELMAN SCIENCES, INC.'S MOTION FOR ENTRY OF ORDER SETTING BRIEFING/DEPOSITION SCHEDULE AND NEW HEARING DATES

/

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/

ORDER DENYING DEFENDANT GELMAN SCIENCES, INC'S MOTION FOR ENTRY OF ORDER SETTING BRIEFING/DEPOSITION SCHEDULE AND NEW HEARING DATES

At a session of said Court held in the
City of Ann Arbor, County of Washtenaw,
State of Michigan on 4/6/2021

PRESENT: Hon. Timothy P. Connors

Defendant Gelman Sciences, Inc. ("Gelman") having filed its March 30, 2021 Motion For Entry Of Order Setting Briefing/Deposition Schedule And New Hearing Dates, the above-listed Intervenors having filed their response, and the Court being otherwise advised in the premises;

IT IS HEREBY ORDERED that Gelman's Motion For Entry Of Order Setting Briefing/Deposition Schedule And New Hearing Dates is denied.

This Order does not resolve the last pending claim and does not close the case.

/s/ Timothy Connors 4/6/2021

CIRCUIT COURT JUDGE
Timothy P. Connors

APPROVED AS TO FORM

/s/Brian J. Negele

BRIAN J. NEGELE (P41846)
Attorney for Plaintiffs

/s/Michael L. Caldwell

MICHAEL L. CALDWELL (P40554)
Attorneys for Defendant

/s/Fredrick J. Dindoffer

FREDRICK J. DINDOFFER (P31398)
NATHAN D. DUPES (P75454)
Attorneys for City of Ann Arbor

/s/Robert C. Davis

ROBERT C. DAVIS (P40155)
Attorney for Washtenaw County,
Washtenaw County Health Department,
and Washtenaw County Health Officer

/s/Erin E. Mette

ERIN E. METTE (P83199)
Attorney for Huron River Watershed
Council

/s/William J. Stapleton

WILLIAM J STAPLETON (P38339)
Attorney for Scio Township

EXHIBIT # 11

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
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,
v
GELMAN SCIENCES, INC., a Michigan Corporation,
Defendant.

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

ORDER DENYING DEFENDANT GELMAN SCIENCES, INC.'S MOTION TO STAY

/

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/

ORDER DENYING DEFENDANT GELMAN SCIENCES, INC'S MOTION TO STAY

At a session of said Court held in the
City of Ann Arbor, County of Washtenaw,
State of Michigan on 4/6/2021

PRESENT: Hon. Timothy P. Connors

Defendant Gelman Sciences, Inc. ("Gelman") having filed its January 22, 2021 Motion to Stay Order Scheduling Hearing on Modification of Consent Agreement ("Motion to Stay"), the parties having filed responses, and the Court being otherwise advised in the premises;

IT IS HEREBY ORDERED that Gelman's Motion to Stay is denied.

This Order does not resolve the last pending claim and does not close the case.

/s/ Timothy Connors 4/6/2021

CIRCUIT COURT JUDGE
Timothy P. Connors

APPROVED AS TO FORM

/s/Brian J. Negele

BRIAN J. NEGELE (P41846)
Attorney for Plaintiffs

/s/Michael L. Caldwell

MICHAEL L. CALDWELL (P40554)
Attorneys for Defendant

/s/Fredrick J. Dindoffer

FREDRICK J. DINDOFFER (P31398)
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Attorneys for City of Ann Arbor

/s/Robert C. Davis

ROBERT C. DAVIS (P40155)
Attorney for Washtenaw County,
Washtenaw County Health Department,
and Washtenaw County Health Officer

/s/Erin E. Mette

ERIN E. METTE (P83199)
Attorney for Huron River Watershed
Council

/s/William J. Stapleton

WILLIAM J STAPLETON (P38339)
Attorney for Scio Township

EXHIBIT # 12

Court of Appeals, State of Michigan

ORDER

Attorney General v Gelman Sciences Inc

Docket No. 356859

LC No. 88-034734-CE

James Robert Redford
Presiding Judge

David H. Sawyer

Douglas B. Shapiro
Judges

The motions for immediate consideration are GRANTED.

The motion for a stay of proceedings pending appeal is DENIED.

The application for leave to appeal is DENIED without prejudice to Defendant-Appellant reasserting its substantive claims after the Washtenaw Circuit Court enters an order or a judgment amending the existing consent judgment. Nothing in this order precludes an interlocutory appeal from any order entered during or subsequent to the evidentiary hearing.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

April 29, 2021
Date

Chief Clerk

EXHIBIT # 13

Court of Appeals, State of Michigan

ORDER

Attorney General v Gelman Sciences Inc

Docket No. **357598**

LC No. **88-034734-CE**

Christopher M. Murray, Chief Judge, acting under MCR 7.203(F)(1), orders:

The claim of appeal and attendant "motion for partial stay of proceedings pending appeal" are DISMISSED for lack of jurisdiction because the June 1, 2021 postjudgment order is not a final order as defined in MCR 7.202(6). MCR 7.203(A)(1). Specifically, the June 1, 2021 order was not "*the first*" judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties; the October 26, 1992 consent judgment was "*the first*" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case. MCR 7.202(6)(a)(i) contemplates that only the first judgment or order meeting the definition will be considered final under that provision unless that judgment or order is reversed. See *Varran v Granneman (On Remand)*, 312 Mich App 591, 600-601; 880 NW2d 242 (2015). The postjudgment addition of intervening parties into the case does not change this outcome. *Id.* Moreover, although the October 26, 1992 consent judgment was amended or modified several times, it was not reversed and it remains the final order pursuant to MCR 7.202(6)(a)(i). Appellant's application for leave to appeal and attendant "motion for partial stay of proceedings pending appeal" remain pending in Docket No. 357599.

Christopher Murray

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

June 29, 2021
Date

Jerome W. Zimmer Jr.
Chief Clerk

EXHIBIT # 14

Baynesan v. Wayne State Univ.

Court of Appeals of Michigan

August 4, 2016, Decided

No. 326132

Reporter
316 Mich. App. 643 *; 894 N.W.2d 102 **; 2016 Mich. App. LEXIS 1477 ***

JOSEPH BAYNESAN, Plaintiff-Appellee, v WAYNE STATE UNIVERSITY, Defendant-Appellant.

Subsequent History: Leave to appeal denied by *Baynesan v. Wayne State Univ., 2017 Mich. LEXIS 923 (Mich., May 17, 2017)*

Prior History: **[***1]** Court of Claims. LC No. 14-000262-MZ.

Baynesan v. Wayne State Univ., 2015 Mich. App. LEXIS 2496 (Mich. Ct. App., July 7, 2015)

Counsel: For JOSEPH BAYNESAN, Plaintiff-Appellee: DEBORAH GORDON, BLOOMFIELD HILLS, MI.

For WAYNE STATE UNIVERSITY, Defendant-Appellant: DANIEL J BERNARD, CLINTON TOWNSHIP, MI.

Judges: Before: MARKEY, P.J., and K. F. KELLY and O'BRIEN, JJ.

Opinion

[103]** **[*645]** PER CURIAM.

Defendant Wayne State University (WSU) appeals by leave granted an order of the Court of Claims transferring plaintiff Joseph Baynesan's claim under the *Whistleblower's Protection Act (WPA), MCL 15.361 et seq.*, from the Court of Claims back to the Wayne Circuit Court. This Court limited the appeal to the issues raised in the application and supporting brief, "as well as the question whether the construction of the [C]ourt of [C]laims [A]ct as advocated by appellant violates plaintiff's jury trial right." *Baynesan v Wayne State Univ, unpublished order of the Court of Appeals, entered July 7, 2015 (Docket No. 326132), 2015 Mich. App. LEXIS 2496* We affirm the Court of Claims on the limited basis that it did not abuse its discretion by transferring this action back to the Wayne Circuit Court in the exercise of its inherent authority to control its docket and sanction litigants. See *Banta v Serban, 370 Mich 367, 368; 121 NW2d 854 (1963)*.

I. FACTS AND PROCEEDINGS

In December of 2012, plaintiff filed a two-count complaint in the Wayne Circuit Court that alleged a violation of the WPA, for which he sought money damages, and a public policy tort claim, for which he sought equitable relief. Regarding the latter claim, plaintiff **[***2]** sought to be returned to his former position with WSU, and he sought an injunction prohibiting **[*646]** WSU from committing any further actions of retaliation or discrimination. Defense counsel then notified plaintiff that the Court of Claims, and not the Wayne Circuit Court, had jurisdiction over his public policy tort claim. Upon stipulation of the parties and by order entered on March 18, 2013, the circuit court dismissed plaintiff's public policy tort claim.

Plaintiff subsequently filed his tort claim in the Court of Claims, then residing in the Ingham Circuit Court. Plaintiff also filed a motion to join

the tort action with the WPA action still pending in the Wayne Circuit Court. The Court of Claims, by order of June 19, 2013, granted the motion, directing that plaintiff's tort claim be joined with the WPA action in the Wayne Circuit Court.

In late 2013, 2013 PA 164 became law. The act amended several statutes pertaining to the Court of Claims, enlarging its jurisdiction and transferring the Court of Claims to the Michigan Court of Appeals. See *Fulicea v State of Michigan, 308 Mich App 230, 231; 863 NW2d 385 (2014)*; *Okrie v State of Michigan, 306 Mich App 445, 449; 857 NW2d 254 (2014)*. As amended, *MCL 600.6419(1)(a)* conferred jurisdiction on the Court of Claims, in part,

> [t]o hear and determine any claim or demand, statutory or constitutional, liquidated **[***3]** or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

Moreover, the act created a new mechanism for the transfer of cases pending before the circuit court to the Court of Claims. This mechanism is codified in *MCL 600.6404(3)*, and provides in part:

> **[*647]** Beginning on the effective date of the amendatory act that added this subsection [November 12, 2013], any matter within the jurisdiction of the court of claims described in *section 6419(1)* [*MCL 600.6419(1)*] pending or later filed in any court must, upon notice of the state or a department or officer of the state, be transferred to the court of **[**104]** claims described in *subsection (1)*. The transfer shall be effective upon the filing of the transfer notice. . . .

On December 18, 2013, 2013 PA 205 became law. This amendatory act preserved the rights of parties to secure jury trials in actions that now came within the jurisdiction of the Court of Claims in light of the expanded jurisdiction conferred on the Court of Claims by 2013 PA 164. As amended by 2013 PA 205, *MCL 600.6421* provides in part:

> (1) Nothing in this chapter **[***4]** eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue.
>
> (2) For declaratory or equitable relief or a demand for extraordinary writ sought by a party within the jurisdiction of the court of claims described in *section 6419(1)* and arising out of the same transaction or series of transactions with a matter asserted for which a party has the right to a trial by jury under *subsection (1)*, unless joined as provided in *subsection (3)*, the court of claims shall retain exclusive jurisdiction over the matter of declaratory or equitable relief or a demand for extraordinary writ until a final judgment has **[***5]** been entered, and the matter **[*648]** asserted for which a party has the right to a trial by jury under *subsection (1)* shall be stayed until final judgment on the matter of declaratory or equitable relief or a demand for extraordinary writ.
>
> (3) With the approval of all parties, any matter within the jurisdiction of the court of claims described in *section 6419(1)* may be joined for trial with cases arising out of the same transaction or series of transactions that are

pending in any of the various trial courts of the state. A case in the court of claims that has been joined with the approval of all parties shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge.

(4) Except as provided in *subsection (5)*[1]] the court of claims' jurisdiction in a matter within its jurisdiction as described in *section 6419(1)* and pending in any circuit, district, or probate court on November 12, 2013 is as follows:

(a) If the matter is not transferred under *section 6404(3)*, the jurisdiction of the court of claims is not exclusive and the circuit, district, or probate court may continue to exercise jurisdiction over that matter.

(b) If the matter is transferred to the court of **[***6]** claims under *section 6404(3)*, the court of claims has exclusive jurisdiction over the matter, subject to *subsection (1)*.

Despite these late 2013 changes in the law, the parties continued to litigate plaintiff's claims in the Wayne Circuit Court through most of 2014. Then, with a final **[**105]** pretrial conference scheduled for November 5, 2014, and a jury trial scheduled for December 1, 2014, WSU filed a "Notice of Transfer to Court of Claims" on November 3, 2014, notifying plaintiff and the circuit **[*649]** court that it was transferring the entire case to the Court of Claims "pursuant to *MCL 600.6404(3)*, as amended by 2013 PA 164."

On November 4, 2014, plaintiff filed an emergency motion in the Court of Claims to transfer the case back to the Wayne Circuit Court and for sanctions. The Court of Claims heard oral arguments on the motion on January 12, 2015, and granted plaintiff's motion for transfer by opinion and order entered on January 30, 2015. After relating the case's procedural history and the changes in the law made by **[***7]** 2013 PA 164 and 2013 PA 205, the Court of Claims opined in part:

> The parties continued to litigate the matter in the Wayne Circuit Court until November 3, 2014, when defendant filed a notice of transfer pursuant to *MCL 600.6404(3)*, transferring the matter to this Court. The Court finds that doing so was inappropriate and impermissible, for two reasons. First, although the Court recognizes, and plaintiff concedes, that *MCL 600.6404(3)* does not have a time limit, defendant's act of continuing to litigate the matter in the Wayne Circuit Court for *almost a year* after the option of transferring to this Court became possible and known constitutes an unequivocal act of approval to the matter being joined for trial in that court. *MCL 600.6421(3)* does not require any particular manner of expressing approval; under the circumstances, the Court finds that such approval was clearly and unambiguously expressed. That statute therefore provides that the action therefore "shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge." *MCL 600.6421(3)*.

The Court of Claims continued, making comments on the new legislation, and noting "that the Legislature could [not] have intended **[***8]** to permit parties to have an unrestricted ability to forum-shop at their convenience with no regard to the effect thereof on other **[*650]** parties, the efficient administration of the involved courts, [and] the pursuit of justice . . . ." The Court of Claims further stated:

> Having elected to remain in the Wayne Circuit Court for almost a year, defendant committed itself to that venue, and the notice of transfer was untimely and impermissible because by the

---

[1] *Subsection 5* refers to the transfer of cases pending in the Court of Claims, pursuant to *MCL 600.6404(2)*, at the time the Court of Claims was transferred from the Ingham Circuit Court to the Court of Appeals. This provision is not at issue in this case.

> time it was filed, MCL 600.6421(3) has already established that the matter *shall* be heard in the Wayne Circuit Court. Therefore, MCL 600.6421(4)(b) never became effective. The Court does not purport to be able to say with certainty "how long is too long" for a party to wait, but this was clearly beyond the pale. The Court declines, however, to speculate that defendant's transfer was motivated by any improper purpose under MCR 2.114(D)(3) and chooses instead to believe that defendant's counsel believed the transfer was allowed. The Court will not sanction an honest error, although the Court trusts that counsel is now fully apprised of the error and will not attempt to repeat it.

The Court of Claims went on to discuss the effect of a hypothetically timely filed request for a transfer to the Court of Claims, **[***9]** which we decline to address as a court should not decide hypothetical issues. See Huntington Woods v Detroit, 279 Mich App 603, 616; 761 NW2d 127 (2008). We address only the Court of Claims' determination that on the facts **[**106]** and circumstances in this case, WSU's request for transfer was untimely and ineffective.

II. STANDARDS OF REVIEW

Both jurisdictional issues and matters of statutory interpretation are reviewed de novo. Fulicea, 308 Mich App at 232. The Court also reviews constitutional issues de novo. Bonner v City of Brighton, 495 Mich 209, 221; 848 NW2d 380 (2014).

[*651] The goal of construction and interpretation of a statute is to discern and give effect to the intent of the Legislature. Id. at 222. "'[O]ur obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted.'" Fulicea, 308 Mich App at 232, quoting Koontz v Ameritech Servs, Inc, 466 Mich 304, 312; 645 NW2d 34 (2002).

In this case, the Court of Claims was acting as a trial court. A trial court has the inherent authority to control its own docket. Maldonado v Ford Motor Co, 476 Mich 372, 376; 719 NW2d 809 (2006) ("[T]rial courts possess the inherent authority . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); see also Brenner v Kolk, 226 Mich App 149, 158-160, n 5; 573 NW2d 65 (1997). "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there **[***10]** has been a clear abuse of discretion." Brenner, 226 Mich App at 160. An abuse of discretion occurs when a court chooses an outcome outside the range of principled outcomes. Maldonado, 476 Mich at 376.

A trial court's findings of fact are reviewed for clear error. MCR 2.613(C). "A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made." Loutts v Loutts, 298 Mich App 21, 26; 826 NW2d 152 (2012).

III. DISCUSSION

Pursuant to the plain terms of MCL 600.6419(1)(a), the Court of Claims has jurisdiction of **[*652]** both plaintiff's statutory WPA claim for money damages and his claim for equitable relief. In analyzing the jurisdictional issues of this case, we note that our Supreme Court has held that a plaintiff has a right to a jury trial regarding a WPA money damages claim, but no such right exists with respect to a claim for equitable relief. Anzaldua v Band, 457 Mich 530, 538 n 6, 541-543, 553-554; 578 NW2d 306 (1998). This is important because § 6419(1) provides that "[e]xcept as provided in [MCL 600.]6421 and [MCL 600.]6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive." But as noted already, § 6421 provides, "if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue." MCL 600.6421(1). Furthermore, " **[***11]** [w]ith the

approval of all parties, any matter within the jurisdiction of the court of claims described in section 6419(1) may be joined for trial with cases arising out of the same transaction or series of transactions that are pending in any of the various trial courts of the state." MCL 600.6421(3). Thus, under these statutory provisions and "[w]ith the approval of all parties," the Court of Claims and the Wayne Circuit Court had concurrent jurisdiction of both plaintiff's WPA damages claim and his claim for equitable relief. *Id.*

[107]** We agree with the Court of Claims that no formalistic approval is required to invoke joinder under § 6421(3), and that by continuing in the Wayne Circuit Court for almost a year with pretrial proceedings after the statutory right of removal under MCL 600.6404(3) came into existence, WSU tacitly and through its conduct approved of the continuing jurisdiction of the Wayne Circuit Court for a trial of both plaintiff's jury claim for money damages and his claim for equitable **[*653]** relief. This joinder under § 6404(3) defeated the exclusive jurisdiction of the Court of Claims as to plaintiff's claim for equitable relief. MCL 600.6419(1); MCL 600.6421(2).

When, on November 3, 2014, WSU filed a "Notice of Transfer to Court of Claims," the **[***12]** transfer of plaintiff's case became "effective upon the filing of the transfer notice." MCL 600.6404(3), as amended by 2013 PA 164. A transfer of a matter to the Court of Claims is mandated under the statute if (1) the matter is within the jurisdiction of the Court of Claims, (2) the matter was pending on or is filed after the effective date of the amendatory act, and (3) a notice of transfer is filed. MCL 600.6404(3). With regard to the first requirement, we note that § 6404(3) requires only that the matter subject to transfer be within the "jurisdiction of the court of claims," as opposed to within the "exclusive jurisdiction" of the Court of Claims, the latter phrase being employed in other sections of the Court of Claims Act but not in § 6404(3). Therefore, the first requirement may be satisfied so long as the matter is subject to the Court of Claims' concurrent jurisdiction, i.e., it is a matter subject to the Court of Claims' jurisdiction but also subject to a jury trial right. In this case, there is no dispute that plaintiff's claims were pending in the Wayne Circuit Court at the time the amendatory act became effective on November 12, 2013. There also can be no dispute that plaintiff's claims fall within the expanded jurisdiction of the Court of Claims as provided **[***13]** in the amended MCL 600.6419(1)(a) "[t]o hear and determine any claim or demand, *statutory* or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for *monetary*, *equitable*, or declaratory relief . . . against the state or any of its departments or officers . . . ." (Emphasis added.) Therefore, pursuant **[*654]** to the clear and unambiguous terms of § 6404(3), WSU's filing of its notice under that section transferred plaintiff's entire case to the Court of Claims, which then had jurisdiction over plaintiff's emergency motion to return the case to the Wayne Circuit Court.

If the notice of transfer were indeed valid, then the Court of Claims obtained "exclusive jurisdiction over the matter, subject to subsection (1)." MCL 600.6421(4)(b). Subsection (1) of § 6421, preserves the existing right to a jury trial that accompanies any claim now under the expanded jurisdiction of the Court of Claims, as well as the right of another court, such as the circuit court, to hear and determine those claims for which the right to a jury trial is authorized by law. Therefore, when a matter is transferred to the Court of Claims under § 6404(3), the otherwise exclusive jurisdiction of the Court of Claims, see § 6419(1) and § 6421(4)(b), becomes concurrent with the circuit court, among other courts, with respect to **[***14]** matters to which "a party has the right to a trial by jury and asserts that right as required by law . . . ." MCL 600.6421(1). Because plaintiff's WPA claim for damages is subject to the right of trial by jury, Anzaldua, 457 Mich at 554, which right plaintiff asserted, the circuit court would retain concurrent jurisdiction over that part of plaintiff's claim. But plaintiff's claim for equitable relief would remain in the exclusive **[**108]** jurisdiction of the Court of

Claims pursuant to MCL 600.6421(2). Furthermore, the claim for equitable relief in the Court of Claims must be resolved first. Until the equitable claim is resolved, the claim for damages pending a jury trial in the court of concurrent jurisdiction is stayed. *Id.* ("[T]he matter asserted for which a party has the right to a trial by jury . . . shall be stayed until final judgment on the matter of declaratory or equitable relief . . . .").

[*655] On the other hand, if WSU's notice of transfer pursuant to § 6404(3) was ineffective, then as already discussed, pursuant to MCL 600.6421(1) and (3), plaintiff's WPA claim for money damages and his claim for equitable relief remain joined and within the concurrent jurisdiction of the circuit court. Indeed, MCL 600.6421(4)(b) specifically provides, "If the matter is not transferred under section 6404(3), the jurisdiction **[***15]** of the court of claims is not exclusive and the circuit, district, or probate court may continue to exercise jurisdiction over that matter."

The Court of Claims ruled that WSU's notice was ineffective because it was not timely filed and would, if allowed to stand, foster gamesmanship and forum-shopping detrimental to the administration of justice. To the extent these findings are factual, we see they are supported by the record. Consequently, on appeal we are not left with the definite and firm conviction that a mistake was made. Loutts, 298 Mich App at 26. The Court of Claims' findings are thus not clearly erroneous. MCR 2.613(C).

We also conclude that the Court of Claims' determination that the transfer notice was ineffective was within the inherent authority of a court "to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice." Maldonado, 476 Mich at 375. "This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 376. While such cases often involve the dismissal of an action, see *id.*; Banta, 370 Mich at 368; Brenner, 226 Mich App at 154-155, in this case, there was no drastic sanction; the court merely ordered **[***16]** the case returned to the court that WSU had already, by its **[*656]** conduct, consented to have decide the litigation of all issues presented by plaintiff's complaint. Under these circumstances, we cannot conclude that the Court of Claims abused its discretion because the court's decision was within the range of principled outcomes. Maldonado, 476 Mich at 376.

We affirm.

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly

/s/ Colleen A. O'Brien

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EXHIBIT # 15

JASPER LEE TODD, Personal Representative of the Estate of DONNA TODD v. STEINER

Court of Appeals of Michigan

April 24, 2003, Decided

No. 234007

Reporter
2003 Mich. App. LEXIS 1037 *; 2003 WL 1950236

JASPER LEE TODD, Personal Representative of the Estate of DONNA ***TODD***, Deceased, Plaintiff-Appellant, v CHAMBERS ***STEINER*** and JEFFREY T. MEYERS, Defendants-Appellees, and MICHAEL MAZUR, Defendant.

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

Prior History: Wayne Circuit Court. LC No. 99-915891-NM.

Disposition: Affirmed.

Judges: Before: Saad, P.J., and Zahra and Schuette, JJ.

Opinion

PER CURIAM.

Plaintiff retained defendants to prosecute a medical malpractice action. A portion of the medical malpractice claim was dismissed because it was not filed within the applicable period of limitations. Plaintiff subsequently commenced this action against defendants for legal malpractice. After a jury was selected, but before the presentation of proofs, the trial court made several rulings that had the effect of precluding plaintiff from presenting evidence to establish the standard of professional care applicable to the health care providers in the medical malpractice action. As a result, plaintiff was unable to proceed with his case. The trial court consequently dismissed this action with prejudice. Plaintiff appeals as of right and we affirm.

I. Facts and Procedure

A. The Medical Malpractice Action

Donna Todd died of cancer on March 31, 1997. Ms. Todd had been examined at Pontiac Osteopathic **[*2]** Hospital (POH) by Dr. Robert Belf in May 1990, and by Dr. Carroll Knauss and Dr. Dennis Lynch in February 1991, for complaints relating to an enlarged lymph node. These three physicians examined Ms. Todd several more times before February 1995, when Ms. Todd was diagnosed with terminal malignant lymphoma. Plaintiff claims each of these physicians failed to act within the medical professional standard of care in diagnosing and treating Ms. Todd.

In February 1995, Ms. Todd retained defendants to represent her in a medical malpractice action premised upon a theory that her cancer was not timely diagnosed. Sometime thereafter, defendants initiated a suit against Dr. Belf, but not against POH, Dr. Lynch, or Dr. Knauss. Defendants maintain that at the time the initial suit was filed, they did not have sufficient reason to believe that anyone other than Dr. Belf breached the standard of

care relating to the diagnosis and treatment of Ms. Todd. After additional medical records were produced by POH and reviewed by defendants, defendants concluded they had a reasonable basis on which to base claims of medical malpractice against POH, Dr. Lynch and Dr. Knauss. Notices of intent to pursue such **[*3]** claims were filed and on March 26, 1996, defendants filed a separate suit against POH, Dr. Lynch and Dr. Knauss, asserting claims of medical malpractice.

On July 22, 1997, plaintiff discharged defendants as his attorneys in the underlying medical malpractice suits. On August 4, 1998, the trial court dismissed the complaint filed against POH, Dr. Lynch, and Dr. Knauss, because it was filed beyond the statutory limitation period. Thereafter, plaintiff settled the medical malpractice claims against Dr. Belf and Dr. Lynch. [1] Plaintiff did not appeal the trial court's dismissal order.

B. The Legal Malpractice Action

1. Pretrial Proceedings

On May 21, 1999, plaintiff filed the instant lawsuit alleging legal malpractice against defendants, for failing to timely pursue medical malpractice claims asserted in the March 26, 1996, medical malpractice lawsuit. [2] A **[*4]** scheduling conference was held by the court during which several pretrial procedure dates were established. The parties were ordered to exchange witness lists by January 4, 2000, and to submit their claim for case evaluation in February 2000.

While defendants complied with the scheduling order and timely filed a witness list on January 4, 2000, plaintiff did not. At no point in these proceedings did plaintiff seek leave of the court to file a late witness list.

Less than one week prior to the scheduled case evaluation date, plaintiff filed an unopposed **[*5]** emergency motion to adjourn the case evaluation. The court granted plaintiff's motion to adjourn case evaluation and set the matter for evaluation in May 2000, with a settlement conference to follow case evaluation.

On March 3, 2000, plaintiff filed a late witness list without leave of the court. Pursuant to *MCR 2.401(I)(a)*, the witness list must include "the name of each witness." This rule also requires disclosure of "whether the witness is an expert, and the field of expertise." *MCR 2.401(I)(b)*. Plaintiff did not name, as expert witnesses or otherwise, any of the putative experts that plaintiff subsequently attempted to call as expert witnesses during trial.

A settlement conference was held on August 17, 2000. No settlement was reached and the court set the matter for trial on January 8, 2001. The court issued an order (the first trial procedure order) that set forth the procedures to be followed through the conclusion of litigation. The litigants were required to prepare and file by December 18, 2000, a joint final pretrial order. The first trial procedure order also stated: "Counsel for plaintiff must assume the responsibility for convening a conference of all parties to confer **[*6]** and collaborate in formulating a . . . final pretrial order (FPTO) which is to be drafted by counsel for all parties, and submitted to the Court for approval and adoption." The first trial procedure order also required the litigants to list all witnesses who will or may be called at trial and to disclose whether the witness will offer lay or expert testimony. The first trial procedure order stated in bold print capital letters:

> **GENERALIZED DESCRIPTIONS OF WITNESSES SUCH AS "ALL OR ANY EMPLOYEES OF THE DEFENDANT" ARE NOT SATISFACTORY.**

The final page of the first trial procedure order

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[1] It appears that Dr. Lynch settled the claims against him, notwithstanding the fact that these claims were dismissed on statute of limitations grounds.

[2] According to plaintiff's complaint, the claims asserted against Dr. Lynch in the second medical malpractice suit were dismissed as time barred. Although the legal malpractice complaint sought damages for the failure to timely file suit against Dr. Lynch, Dr. Knauss, and POH, by the time the case was set for trial, plaintiff was not seeking damages for the failure to bring suit against Dr. Lynch, presumably because plaintiff settled the claims against him.

further warned, also in bold print capital letters:

> **THIS ORDER CONSTITUTES A DULY ENTERED ORDER OF THIS COURT, AND FAILURE TO COMPLY STRICTLY WITH ALL ITS TERMS MAY RESULT IN DISMISSAL, STRIKING OF ANSWERS AND AFFIRMATIVE DEFENSES, ENTRY OF DEFAULT, DEFAULT JUDGMENT, REFUSAL TO LET WITNESSES TESTIFY, REFUSAL TO ADMIT EXHIBITS OR OTHER ACTION, INCLUDING THE ASSESSMENT OF SPECIAL COSTS AND EXPENSES, INCLUDING ACTUAL ATTORNEY FEES.**

Plaintiff did nothing to timely prepare or file a final pretrial order. On January 4, 2001, just four days prior to **[*7]** the scheduled trial date, the trial court conducted a telephone conference with counsel. [3] The trial court was informed that plaintiff had not yet prepared any portion of the joint final pretrial order. Plaintiff alleged that his medical expert from California was not able to appear for trial on January 8, 2001. [4] Plaintiff requested an adjournment of the trial date. On January 5, 2001, defendants received what was purported to be plaintiff's contribution to the final pretrial order. In this document, plaintiff identified as an expert witness Terrance Baulch, CPA. This witness was never before disclosed by plaintiff. Consequently, defendants filed with the trial court a motion for dismissal of plaintiff's complaint for failure to timely file the joint final pretrial order. Defendants alleged plaintiff had engaged in a pattern of deliberate dilatory conduct prejudicial to defendants. Defendants asked the court to either strike Baulch as a witness, dismiss plaintiff's complaint, or both. Defendants also filed a motion to strike plaintiff's witness list. Defendants asserted that plaintiff failed to timely file his witness list and that plaintiff had engaged in a pattern of deliberate **[*8]** dilatory conduct prejudicial to defendants.

The trial court adjourned the trial to March 1, 2001, and ordered that the joint final pretrial order be filed with the court by February 15, 2001. [5] **[*10]** The trial court also denied defendants' motion to dismiss the complaint for failing to file a timely joint final pretrial **[*9]** order and defendants' motion to strike plaintiff's witness list. The trial court treated the late disclosure of Baulch in the untimely filed joint final pretrial order as a request to amend plaintiff's witness list and allowed plaintiff to add Baulch as an expert witness. The trial court denied the motion to dismiss, but acknowledged that there was merit to defendants' claims that plaintiff's counsel was dilatory in the prosecution of this litigation. [6] At the close of the January 12, 2001, hearing, the trial court indicated, "I just want to make it very clear, I intend to start this trial on [March 1, 2001] . . . . Everybody better be ready." Plaintiff's counsel replied, "I shall be ready, your Honor." The trial court also admonished counsel for both sides to pay strict attention to the trial court's recently issued second trial procedure order and final scheduling order. The second trial procedure order contained the same warnings found in the first trial procedure

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[3] It is not clear from the record whether the court or counsel initiated the telephone conference.

[4] Although plaintiff alleged that the medical expert who could not appear for the January 8, 2001, trial was from California, when the trial court ordered plaintiff to produce an affidavit from the expert to substantiate the conflict, it was disclosed that the expert, Dr. Singer, was from Pennsylvania. The three paragraph affidavit is woefully short on facts and merely concludes that Dr. Singer was "not available" to testify as a witness during the week of January 8, 2001. The trial court observed that the affidavit of Dr. Singer was "terse" but nonetheless granted an adjournment of the trial.

[5] In commenting on the reason for adjourning the trial, the trial judge indicated that it was a "gracious gesture" on her part not to disclose the basis for the adjournment on the record. Nonetheless, the trial judge noted at the conclusion of the January 12, 2001, hearing that plaintiff's counsel was not prepared to proceed to trial when all other parties and the court were prepared to go to trial. Further, before dismissing the case on the second scheduled trial date, the trial court reiterated that the first adjournment of trial was to accommodate plaintiff's counsel, who had failed to prepare the case for trial.

[6] The trial court stated, "well, the misconduct was, you not being ready for trial when everybody else was, Mr. Schwartz."

order regarding the need to disclose the specific identity of witnesses and the fact that witnesses not specifically disclosed by the litigants may be barred from testifying.

2. Trial Proceedings

On March 1, 2001, the parties appeared in court and began the jury selection process in anticipation of trial. During the voir dire process, the court asked counsel to identify their witnesses for the prospective jurors. Plaintiff's counsel identified two medical experts, Dr. David Balfour and Dr. Eugene Cooper, neither of whom were disclosed in plaintiff's witness list or in the joint final pretrial order. After the jury was selected, defendant moved to exclude Drs. Balfour and Cooper as experts. Plaintiff argued he should be permitted to call both witnesses because, in his untimely witness list of March 3, 2000, plaintiff generally identified as witnesses, "all witnesses listed on defendants' witness list" and both witnesses were listed on defendants' witness list of January 4, 2000. Plaintiff further argued that he should be permitted to call Dr. Cooper because defendants listed Dr. Cooper as an expert witness under defendants' portion of the final **[*11]** joint pretrial order. The trial court excluded both witnesses. The trial court stated:

> By grace that I still cannot believe . . . you had two months to correct any deficiencies in your final pretrial order, because this case was originally set for trial [on] January . . . 8th I think. You begged me to adjourn it, because you were not ready. Everyone else was ready, you were not ready. You hadn't even filed your final pretrial order. I let you add witnesses, I let you file your final pretrial order late. Two months have now passed, where have you been?
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> * * *
>
> Counsel, I don't know what more I can do. I do a very detailed final pretrial order. I give you, again, by the grace of my discretion, I adjourn your trial, let you call more witnesses and let you file a late final pretrial order, and you come to me two months later and say, oh, Judge, I meant to list him, I guess, but I didn't[. T]hat's just not credible, Mr. Schwartz.

Plaintiff then indicated his intent to call Dr. Feemster as an expert witness. Like Dr. Cooper, Dr. Feemster was not listed as an expert witness in plaintiff's untimely witness list of March 3, 2000, or in plaintiff's joint final pretrial order **[*12]** witness list, but he was listed on defendants' joint final pretrial order witness list. Like Dr. Cooper, the trial court precluded plaintiff from calling Dr. Feemster as an expert witness. The trial court elaborated on its reasoning:

> The whole point of the final pretrial order is to give the other side notice of who will be called at trial. There's a specific category for plaintiffs, a specific category for expert witnesses. As far as I'm hearing now, you're now saying, Judge[,] we've always intended to call these expert witnesses, we just didn't think we had to tell them?

Defendant then sought to limit or prohibit the testimony of Dr. Singer, the only medical expert listed in plaintiff's final pretrial order witness list. Dr. Singer is an oncologist. Defendants argued plaintiff would attempt to utilize Dr. Singer as an expert in general surgery. The trial court reviewed the deposition transcript of Dr. Singer and concluded that Dr. Singer was not qualified under *MCL 600.2169* or *MRE 702* to render expert medical testimony in the field of general surgery.

The trial court then considered whether plaintiff could place in evidence the affidavit **[*13]** of merit executed by Dr. Feemster in the underlying medical malpractice case. Plaintiff indicated an intent to use this affidavit to prove the standard of care and breach of that standard as it related to Dr. Knauss, a general surgeon. The trial court rejected admission of the affidavit of merit for that purpose. Plaintiff sought to dismiss his claims without prejudice, because plaintiff could not establish a prima facie case in light of the trial court's rulings. The trial court rejected plaintiff's request and entered a

dismissal with prejudice. This appeal followed.

II. Analysis

A. Standard of Review

The enforcement of a pretrial scheduling order and whether to allow a party to add expert witnesses not properly identified in a final pretrial order is a matter left to the sound discretion of the trial court. *Carmack v Macomb Co Community College, 199 Mich. App. 544, 546; 502 N.W.2d 746 (1993)*. Likewise, sanctions imposed for failing to comply with a court order are reviewed for an abuse of discretion. *Bass v Combs, 238 Mich. App. 16, 26; 604 N.W.2d 727 (1999)*. By definition, discretionary rulings may not be disturbed **[*14]** merely because the reviewing court would have ruled differently. Discretionary rulings may only be disturbed when the lower court is found to have committed an abuse of discretion. An abuse of discretion "occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich. 219, 227-228; 600 N.W.2d 638 (1999)*, quoting *Marrs v Bd of Medicine, 422 Mich. 688, 694; 375 N.W.2d 321 (1985)*, and *Spalding v Spalding, 355 Mich. 382, 384-385; 94 N.W.2d 810 (1959)*. Factual determinations made by a trial court in conjunction with discretionary rulings are reviewed for clear error. *MCR 2.613(C)*. Clear error exists where a reviewing court is left with a definite and firm conviction that a mistake was made. *Boyd v Civil Service Comm, 220 Mich. App. 226, 235; 559 N.W.2d 342 (1996)*.

B. Expert witness

In this appeal, plaintiff does not take **[*15]** issue with the trial court's order precluding Dr. Balfour and Dr. Cooper from testifying at trial. However, plaintiff maintains the trial court abused its discretion by precluding Dr. Feemster from testifying as an expert witness at trial. [7] Although plaintiff did not name Dr. Feemster as an expert on his witness list, he contends that he should have been permitted to call Dr. Feemster because Dr. Feemster was named on defendants' witness list. Further, defendant named Dr. Feemster in defendants' final pretrial witness list. The factors a court should consider before sanctioning a party for not timely disclosing witnesses include:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff 's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, **[*16]** and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [*Bass, supra at 26-27*, citing *Dean v Tucker, 182 Mich. App. 27, 32-33; 451 N.W.2d 571 (1990)*.]

Considering the above listed factors that are applicable to the present case, we cannot conclude the trial court abused its discretion by precluding plaintiff from calling Dr. Feemster or any other **[*17]** witness plaintiff failed to expressly identify in his joint final pretrial order witness list. The trial court found that plaintiff's counsel's claims of inadvertence and neglect lacked credibility. We cannot conclude that the trial court's credibility determination was clearly erroneous, given that the

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[7] Although plaintiff's statement of question presented generically states, "the trial court erred in denying plaintiff the opportunity to call expert witnesses listed by defendant and in the joint final pretrial order as part of plaintiffs' [sic] case to establish the merits of the underlying medical malpractice case," plaintiff's brief argues only that the trial court erred by precluding Dr. Feemster from testifying at trial. Plaintiff's brief makes no mention of the propriety of the trial court's ruling relating to Dr. Balfour and Dr. Cooper.

court allowed plaintiff to add an expert witness on the eve of the first scheduled trial date, adjourned the trial to allow plaintiff's counsel to prepare for trial, and warned all of the attorneys to be prepared for the second scheduled trial date and to adhere strictly to the requirements of the court's orders relating to pretrial procedures.

Plaintiff's discovery and litigation history also support the action taken by the trial court. Plaintiff failed to file a timely witness list and never sought leave of the court to file a witness list. The witness list eventually filed by plaintiff failed to comport with the requirements of *MCR 2.401(I)*. Plaintiff's conduct of filing an emergency motion to adjourn case evaluation when no emergency was evident and plaintiff's failure to convene a final pretrial conference to prepare or file a joint final pretrial order prior to the first scheduled **[*18]** trial date supports the conclusion that plaintiff did not diligently prosecute this action and also supports the trial court's conclusion that plaintiff was not prepared for trial on the first scheduled trial date.

Plaintiff did not disclose to defendants the identity of their intended experts until the litigants were in trial and plaintiff was instructed by the court to disclose the identity of his witnesses to the jury. Contrary to plaintiff's claims, this in-trial disclosure of plaintiff's experts did indeed prejudice defendants. Granted, defendants were familiar with the identity of Dr. Feemster (as well as Dr. Balfour and Dr. Cooper), but it was very clear that defendants had no intention of calling these witnesses during their case. Defendants also disclosed the identity of their witnesses to the jury and defendants did not inform the jury that they intended to call as witnesses Dr. Feemster, Dr. Cooper or Dr. Balfour. Thus, defendants' trial preparation did not include review of the possible testimony of these witnesses nor preparation to cross-examine them. Under these circumstances, we cannot conclude the trial court abused its discretion by precluding plaintiff from calling **[*19]** witnesses. Plaintiff did not disclose his intent to call these witnesses in his case until the first day of trial. Further, there is no indication from the record that defendants intended to call these witnesses in defendants' case or otherwise prepared themselves to address these witnesses as part of plaintiff's case.

Plaintiff's argument that he should have been able to call Dr. Feemster as an adverse witness is also without merit. Even where a party intends to rely on the adverse party statute, *MCL 600.2161*, the litigant/witness is still entitled to notice that he will be called as a witness for the opposing party by including the litigant/witness's name on the opposing party's witness list. *Moy v Detroit Receiving Hosp, 169 Mich. App. 600, 607; 426 N.W.2d 722 (1988)*; *Beattie v Firnschild, 152 Mich. App. 785, 794; 394 N.W.2d 107 (1986)*. If a party to litigation is entitled to notice that he will be required to testify in the adverse party's case under the adverse party statute, then it stands to reason that any witness that an opposing party intends to call as an adverse witness must be listed **[*20]** on that party's witness list to provide proper notice and to prevent unfair surprise. Plaintiff's reliance on *Rice v Jaskolski, 412 Mich. 206; 313 N.W.2d 893 (1981)*, *Porter v Henry Ford Hosp, 181 Mich. App. 706, 710-711; 450 N.W.2d 37 (1989)*, and *Niemi v Upper Peninsula Orthopedic Associates, Ltd, 173 Mich. App. 326; 433 N.W.2d 363 (1988)*, is misplaced because those cases do not address the issue of notice.

In sum, given the extensive history of this case and the fact that the trial court had previously adjourned trial at the last moment to accommodate plaintiff, who was not prepared for trial, we cannot find that the trial court abused its discretion in refusing to allow plaintiff to amend his witness list to include Dr. Feemster or any of the other witnesses barred by the trial court.

C. Exhibits-Affidavit of Merit

After the trial court refused to allow Dr. Feemster to testify, leaving plaintiff with no available experts, plaintiff argued that he should be permitted to establish the standard of care for Dr. Knauss (the

surgeon in the underlying case) by offering into evidence the affidavit **[*21]** of merit prepared by Dr. Feemster in the underlying medical malpractice case. We agree with the trial court that the affidavit was not admissible as substantive evidence on the standard of care.

An affidavit of merit must accompany a complaint for medical malpractice. *MCL 600.2912d*. The affidavit need only be "signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under" *MCL 600.2169*. Nothing in *MCL 600.2912d* requires that the health professional set forth his credentials. Here, Dr. Feemster's affidavit, while complying with *MCL 600.2912d*, does not include any discussion of his credentials. As discussed in section E of this opinion, *MCL 600.2169* is applicable to this case and required plaintiff to produce expert testimony in accordance with the standards prescribed by that statute. Dr. Feemster's affidavit lacks any information about his background, other than that he is a medical doctor. Thus, the affidavit itself was inadmissible to establish the standard of care because plaintiff **[*22]** could not show, from the affidavit, that Dr. Feemster was qualified as an expert, pursuant to *MCL 600.2169*. See *Watts v Canady, 253 Mich. App. 468; 655 N.W.2d 784 (2002)* (the Legislature has set a lower threshold for evaluating the adequacy of an affidavit of merit and it was premature to determine if the plaintiff's expert witness would be qualified to testify at trial under *MCL 600.2169*). Therefore, the trial court properly excluded the affidavit for this reason. [8]

D. Respondent's Brief to Defendant's Motion in Limine

Next, plaintiff argues that the trial court should have adjourned the trial to give him time to respond to the motion in limine to preclude certain exhibits, including the Feemster affidavit, **[*23]** brought by defendants on the first day of trial. We disagree.

The grant or denial of a motion for an adjournment is within the trial court's discretion. *Tisbury v Armstrong, 194 Mich. App. 19, 20; 486 N.W.2d 51 (1991)*. Typically, a trial court does not abuse its discretion by denying a motion for an adjournment where past continuances have been granted, the moving party failed to exercise due diligence, or there is a lack of injustice to the moving party. *Id.*

It is apparent that defendants did not file their motion in limine sooner because the grounds for the motion did not become apparent until the time of trial, after plaintiff disclosed what evidence he intended to produce at trial. Defendants prepared a written memorandum to accompany their motion, but it was only four pages long and discussed only a single case. Plaintiff asked the court to adjourn the trial to give him additional time to respond to the motion. Instead, the trial court allowed plaintiff time to review the relevant law during a break. Considering the circumstances and the brief nature of defendants' memorandum, the trial court afforded plaintiff sufficient time in which to properly **[*24]** respond to the motion. Given plaintiff's earlier request for an adjournment and his failure to show prejudice as a result of the trial court's decision, the trial court did not abuse its discretion by refusing to grant an adjournment. *Tisbury, supra at 20*.

E. Applicability of *MCL 600.2169*

Plaintiff also argues that the trial court erred in applying *MCL 600.2169*, thereby barring Dr. Singer from testifying as an expert. We disagree.

Contrary to plaintiff's argument, because this case involved allegations that the underlying suit was lost because the period of limitations was allowed to run, the "suit within a suit" theory applied. *Coleman v Gurwin, 443 Mich. 59, 63; 503 N.W.2d 435 (1993)*. As a result, plaintiff was required to offer proper expert testimony on the applicable standard of care for the underlying medical

[8] We find it unnecessary to decide whether an affidavit of merit is admissible as a party admission under *MRE 801(d)(2)*, or whether an affidavit of merit should be excluded as substantive evidence on public policy grounds.

malpractice case.

The 1993 amendments to MCL 600.2169 were also required to be satisfied. The amended version of the statute applies to cases filed after April 1, 1994. Tobin v Providence Hosp, 244 Mich. App. 626, 663, 666; [*25] 624 N.W.2d 548 (2001). Plaintiff alleged in his complaint that plaintiff's decedent did not discover the alleged medical malpractice until 1995. Thus, the malpractice action could not have been filed before 1995 and, therefore, the malpractice action would have been subject to the amended version of MCL 600.2169. Accordingly, pursuant to that statute, plaintiff was required to show that Dr. Singer specialized in the same area as Dr. Knauss. [9]

At his deposition, Dr. Singer stated that he was board certified in internal medicine, **[*26]** hematology and oncology. However, he admitted that he had never practiced in the area of surgery. Because it was undisputed that Dr. Knauss was a surgeon, Dr. Singer was not qualified to offer expert testimony on the standard of care for Dr. Knauss. MCL 600.2169(1)(a). Whether Dr. Singer was qualified to testify under MRE 702 was irrelevant because plaintiff was required to show that Dr. Singer was qualified under both MCL 600.2169 and MRE 702. Tate v Detroit Receiving Hosp, 249 Mich. App. 212, 215; 642 N.W.2d 346 (2002).

Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette

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[9] We also find no merit to plaintiff's argument that the amended version of MCL 600.2169 would not have applied because this Court held in 1996 that the statute, before it was amended in 1993, was unconstitutional. See Nippa v Botsford General Hosp, 251 Mich. App. 664, 679; 651 N.W.2d 103 (2002); Kirkaldy v Rim, 251 Mich. App. 570, 579; 651 N.W.2d 80 (2002).

EXHIBIT # 16

Granger v. Naegele Advertising Cos.

Court of Appeals of Michigan

February 8, 1973, Submitted Division One ; April 25, 1973, Decided

Docket No. 13538

Reporter
46 Mich. App. 509 *; 208 N.W.2d 575 **; 1973 Mich. App. LEXIS 1227 ***

GRANGER v. NAEGELE ADVERTISING COMPANIES, INC

Subsequent History: [*1]** Leave to appeal denied, *390 Mich 751.*

Leave to appeal denied by *Granger v. Naegele Adver. Cos., 390 Mich. 751, 1973 Mich. LEXIS 488 (1973)*

Prior History: Appeal from Wayne, Harry J. Dingeman, Jr., J.

Disposition: Reversed and remanded.

Syllabus

Complaint by Joseph Granger against Naegele Advertising Companies, Inc., for salary due under an employment contract. Judgment for defendant. Plaintiff appeals.

Counsel: *John L. Kadella* and *Richard C. Tripp*, for plaintiff.

Walter A. Paruk and *Roger Peterson*, for defendant.

Judges: T. M. Burns, P. J., and Bashara and Adams, * JJ. All concurred.

Opinion by: BASHARA

Opinion

[*510] [576]** This case involves an action by plaintiff, a former employee of defendant, arising from a contract entered into between the parties dated December 14, 1964. The terms of the agreement commenced August 1, 1963 and terminated July 31, 1968. Prior to the date of the contract, plaintiff was a commission salesman for defendant, or it's predecessor. The contract in question put plaintiff on a specific salary of $ 25,000 per year, which included all expenses. However, paragraph **[***3]** 8 recognized that plaintiff had produced sales of approximately $ 500,000 per year, and that:

> "If the billing from said accounts increases or decreases by more than ten percent (10%) in any calendar year during the existance *[sic]* of this contract Granger's [plaintiff's] salary for the next succeeding year shall be reviewed and shall be subject to adjustment upward or downward by an amount determined by multiplying the percentage of increase or decrease times $ 25,000."

A supplemental letter of December 21, 1964 from defendant and "attested to" by plaintiff recited that "[n]o sales since August 1, 1963 are commissionable under any circumstances".

[*511] During the life of the contract, plaintiff's

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

sales, as computed by defendant, were as follows: [1]

Go to table1

[*4]** The transcript further showed that in November of 1964, plaintiff's annual salary was raised to $ 28,000. He received no further increases during the life of the contract.

At the conclusion of proofs, the trial judge found for the defendant on the grounds that the language of paragraph 8 of the contract was permissive and not mandatory; further that plaintiff, by continuing to work for defendant, had waived rights to any further compensation.

[577]** It appears to this Court that the language of the contract is clear and unambiguous. Therefore, the parol evidence admitted by the trial court need not be considered to determine the meaning of the contract. *Edoff v Hecht, 270 Mich 689, 695-696, (1935)*; *New Amsterdam Casualty Co v Sokolowski, 374 Mich 340 (1965)*.

It is patently clear, on the face of the contract, that defendants did not want plaintiff employed on a commission basis and set a flat salary for him. A "norm" or standard of performance of $ 500,000 worth of gross billings per year was contemplated by the parties and that plaintiff would perform to that standard. It is equally clear that defendants intended to reward plaintiff or act punitively against him **[***5]** if his production should exceed or **[*512]** diminish in an amount equal to more than 10% of the "norm".

In recognition that the contract did not call for commissions, particularly as shown by the December 21st addendum, it was the succeeding year's salary which was subject to adjustment. This was to be based on the preceding year's performance.

We cannot agree with the trial judge that the language of section 8 was permissive in nature. It appears that he has placed the emphasis on the words "subject to", rather than the word "shall". "Shall" is equivalent to the word "must". *Bateman v Smith, 183 Tenn 541; 194 SW2d 336 (1946)*. Black's Law Dictionary (4th ed), p 1541, states that "shall" implies a word of command, and is generally imperative or mandatory. On the other hand, the words "subject to" imply only a qualification or limitation, which must be subservient to the word "shall".

The last sentence of paragraph 8 states that:

> "There shall be no increase or decrease in said salary if the percentage of increase or decrease in gross billings for such calender year period shall be less than 10 per cent (10%)."

This sentence is clearly mandatory. When it is read **[***6]** with the preceding sentence, it definitely fixes the succeeding year's salary adjustment, taking all contingencies into consideration.

Defendant suggests, as does the trial court, that plaintiff did not attempt to assert any rights which he may have had until he felt that defendant company might be liquidated and sold. It is claimed that when plaintiff continued his employment at the same salary it amounted to a waiver of those rights.

However, the record indicates that plaintiff periodically **[*513]** asserted his claim. The administrative vice-president and the chief accounting officer of defendant testified that plaintiff indicated over the five-year term of the contract that substantial sums were due him. The transcript reveals that both these gentlemen, who clearly represented the management of the company, told plaintiff that sums were due him. The only question appeared to be that of the exact amount due. Under these circumstances we cannot find a waiver by the plaintiff. There appears to have been no dispute between plaintiff and his superiors that sums were due him under the

[1] It is to be noted that these figures include billings for the Detroit metropolitan area only. The transcript shows that plaintiff was paid under separate agreement for his billings in other areas of the state. Therefore, they will not be considered further in this controversy.

contract, only the question of the exact amount.

In summary, then, we conclude that the [***7] language in paragraph 8 of the contract is mandatory. Plaintiff is entitled to his salary which accrued under paragraph 8 during the contract years. We therefore remand to the trial court for findings with respect to the amount of salary owed plaintiff by defendant, consistent with this opinion.

Reversed and remanded.

Table1 (*Return to related document text*)

8/1/1963-7/31/64	S 590,255
8/1/1964-7/31/65	S 893,955
8/1/1965-7/31/66	S 851,527
8/1/1966-7/31/67	S 927,832
8/1/1967-7/31/68	S 1,057,074

Table1 (*Return to related document text*)

End of Document

STATE OF MICHIGAN
MI Court of Appeals

Proof of Service

Case Title:	Case Number:
ATTORNEY GENERAL V GELMAN SCIENCES INC	357599

1. Title(s) of the document(s) served:

Filing Type	Document Title
Appearance	Appearance
Answer	Answer In Opposition To Application
Exhibits	Exhibit # 1
Exhibits	Exhibit # 2
Exhibits	Exhibit # 3
Exhibits	Exhibit # 4
Exhibits	Exhibit # 5
Exhibits	Exhibit # 6
Exhibits	Exhibit # 7
Exhibits	Exhibit # 8
Exhibits	Exhibit # 9
Exhibits	Exhibit # 10
Exhibits	Exhibit # 11
Exhibits	Exhibit # 12
Exhibits	Exhibit # 13
Exhibits	Exhibit # 14
Exhibits	Exhibit # 15
Exhibits	Exhibit # 16

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/s/ William Listman

Signature

DBS Attorneys