

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,

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

Plaintiff,

And

THE CITY OF ANN ARBOR,
Intervenor,

And

WASHTENAW COUNTY,
Intervenor,

And

WASHTENAW COUNTY HEALTH
DEPARTMENT,
Intervenor,

And

WASHTENAW COUNTY HEALTH OFFICER,
JIMENA LOVELUCK,
Intervenor,

And

THE HURON RIVER WATERSHED COUNCIL,
Intervenor,

And

SCIO TOWNSHIP,
Intervenor,

V.

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

**INTERVENORS' RESPONSE
IN OPPOSITION TO GELMAN'S
MOTION FOR STAY OF ORDER
SCHEDULING HEARING ON
MODIFICATION OF THE
CONSENT AGREEMENT**

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**INTERVENORS' RESPONSE IN OPPOSITION TO GELMAN'S MOTION FOR STAY
OF ORDER SCHEDULING HEARING ON MODIFICATION OF
CONSENT AGREEMENT**

The Intervenors, by their counsel of Record, for their Response In Opposition To Gelman's Motion For Stay Of Order Scheduling Hearing On Modification Of Consent Agreement, state the following:

I. INTRODUCTION

On November 19, 2020, this Court conducted a Court ordered status conference with all attorneys of Record. Because it was a status conference, no arguments were heard and no pleadings, testimony or evidence were submitted. This Court did not issue any rulings for the Record. Rather, this Court exercised its broad and unquestioned authority to manage its docket and issued a scheduling order (“Scheduling Order”). The Michigan Supreme Court is crystal clear that trial courts have the express authority to “direct and control the proceedings before them”:

We further acknowledge that our trial courts also have express authority to direct and control the proceedings before them. MCL 600.611 provides that “[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments.” Additionally, MCR 2.504(B)(1) provides that “[i]f the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant. *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 376; 719 NW2d 809, 811 (2006). (Emphasis Added)

The Michigan Court of Appeals also has ruled that a trial court has the inherent authority to control its own docket. A trial court’s exercise of its inherent power 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.” *Baynesan v. Wayne State Univ.*, 316 Mich. App. 643, 651; 894 NW2d 102, 106 (2016). (Emphasis Added)

This Court did not abuse its discretion when it issued its Scheduling Order and Gelman does not argue that it did. Here, the Scheduling Order at issue set a hearing and a briefing

schedule. The dates in that Scheduling Order have since been modified by stipulation of the parties, but no other element of the Scheduling Order such as setting a hearing and requiring briefs from the parties has been modified. The Scheduling Order does not contain any substantive rulings. The briefs related to the hearing set by the Scheduling Order are not yet due. The hearing has not been conducted. No oral arguments have been presented.

On January 7, 2021, 49 days after the Court issued the Scheduling Order, Gelman filed a Motion for Reconsideration of the Scheduling Order. Gelman did not appeal the Scheduling Order to the Michigan Court of Appeals. Gelman did not seek clarification of the Scheduling Order by motion or otherwise. Gelman did not file a motion to set aside the Scheduling Order.

Since the issuance of the Scheduling Order, and starting long before Gelman filed its Motion for Reconsideration, the Intervenors and their attorneys have worked diligently and expended significant time and resources with their retained experts to prepare the Brief requested by this Court. That Brief, as requested, provides both legal and scientific support for the Intervenors' positions. That Brief, and its exhibits, are now due to this Court on February 12, 2021.

II. LEGAL ARGUMENTS

Gelman's current Motion for a Stay has no legal support. In its Brief, Gelman relies solely on MCR 2.614(D) and MCR 7.209(A). No case law is presented or argued. The cited Michigan Court Rules do not support Gelman's position as outlined below. Overall, Gelman's current Motion for a Stay is just a masquerade for its intent to ask this Court to rule quickly on the Motion for Reconsideration. In fact, Gelman's request for relief in its brief (and again in its Supplemental Brief filed on January 27, 2021) is explicit that it wants this Court either to grant

its Motion for Reconsideration or to grant its request for a stay. Gelman does not -- and cannot -- provide any authority to support that position.

Gelman's relief is cast in its Motion in three (3) requests.¹ Intervenors address each separately.

A. Without Authority, Gelman Seeks “this stay pending the Court’s ruling on Gelman’s motion for reconsideration, filed January 7, 2021, . . .”

First, Gelman seeks a stay pending this Court's ruling on Gelman's Motion for Reconsideration. This stay request is inconsistent as Gelman asks this Court to stay proceedings even as it asks this Court to issue rulings during the period of the stay. Gelman cannot have it both ways.

In support, Gelman cites MCR 2.614(D) and MCR 7.209(A). MCR 2.614 (D) applies to a “Stay on Appeal.” This Court Rule does not apply here. There is no pending appeal at issue. MCR 7.209 (A) is entitled “Effect of Appeal; Prerequisites” and states that an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. Again, as is evident from its plain language, this Court Rule also does not apply here. There is no pending appeal at issue.

Gelman has yet to file an appeal to the Michigan Court of Appeals. Instead of filing an application for leave to appeal within 21 days of the Scheduling Order, Gelman decided to file a Motion for Reconsideration. MCR 7.205(A)(1)(a) and (b) require an application for leave to appeal to be filed within 21 days after entry of the judgment or order appealed **or** 21 days after entry of an order deciding a motion for reconsideration **if** the motion for reconsideration was filed within the initial 21-day appeal period.

¹ Gelman also presents an unsupported argument relating to the EPA's potential involvement at the site. The EPA has not yet acted. Gelman states incorrectly and without authority that EPA involvement will divest this Court of jurisdiction. Gelman is wrong. The controlling state statute that governs this case applies independent of any actions by the EPA.

Gelman did not file an application for leave to appeal within 21 days of this Court issuing its Scheduling Order. Instead, Gelman filed a Motion for Reconsideration. As a result, Gelman's current pursuit of a "Stay on Appeal" pursuant to MCR 2.614(D) has no basis.

B. Without Authority, Gelman Seeks a Stay "pending Gelman's Forthcoming Application For Leave To Appeal to the Michigan Court Of Appeals from the Third Amended Scheduling Order..."

Second, Gelman seeks a stay pending Gelman's alleged forthcoming filing of an Application for Leave to Appeal to the Michigan Court of Appeals. This is a request for a stay from this Court pending future events that have not occurred -- and may never occur. Gelman does not cite any Michigan Court Rule or any other legal authority that allows Gelman to seek a stay prior to this Court ruling on Gelman's Motion for Reconsideration and prior to Gelman filing its Application for Leave to Appeal. This request is speculative at best and lacks merit. There is no support for this argument in any of the Court Rules that govern the grounds and procedure for a stay to be heard or granted. The lack of authority in Gelman's brief is also grounds to reject this request. A party cannot simply announce in its brief a position and leave it to the Court to search for authority either to sustain or reject the position taken. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

C. Without Authority, Gelman Seeks a Stay "until all appellate proceedings are complete."

Third, Gelman seeks a stay until all future appellate proceedings are complete. This request is even more problematic because it seeks a stay conditioned on a sequence of multiple future events that have yet to occur and/or ripen. These future events include: this Court denying Gelman's Motion for Reconsideration, Gelman Filing an Application for Leave to Appeal to the Michigan Court of Appeals, and the Michigan Court of Appeals granting Gelman's Application for Leave to Appeal. Gelman does not cite a Michigan Court Rule or any other legal authority

that allows Gelman to seek a stay prior to this Court ruling on Gelman's Motion for Reconsideration, prior to Gelman filing its Application for Leave to Appeal and prior to the Michigan Court of Appeals granting that Application for Leave to Appeal if it is filed. In addition to the request being speculative and without merit, the failure to provide authority for the position taken dooms this request. See *Mitcham, supra*.

D. Gelman's Requests Are Premature at Best.

Gelman's request for multiple stays is premature and improvident. When Gelman filed its Motion for Reconsideration, it selected a path premised on this Court ruling on the Motion for Reconsideration. This Court has not yet done so. Once this Court rules on the Motion for Reconsideration, Gelman will then have to consider its options which may -- or may not -- include the filing an Application for Leave to Appeal to the Michigan Court of Appeals and/or seeking a stay at that time.

III. CONCLUSIONS AND RELIEF REQUESTED

This Court maintains jurisdiction over the Consent Judgment now in place between Gelman and the State of Michigan. The Intervenors were granted Intervention, in significant part, because that Consent Judgment must now be revised to implement the significant changes made by the State with respect to the applicable cleanup levels for 1,4 dioxane in both groundwater and soils. The Emergency Rules promulgated on the 1,4 dioxane cleanup levels in late 2016 said, in pertinent part, the following:

“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 1** -- Emergency Rules)

This Court set a hearing and requested legal briefing, supported by science, on the issue of what is appropriate to fully and fairly implement the new cleanup standards and protect public health

and environment. These matters are critical and impact public health, welfare and the environment and should proceed as scheduled by this Court.

The stay now sought by Gelman is premature and not supported. Gelman's Motion for Stay of Order Scheduling Hearing on Modification of Consent Agreement should be denied.

WHEREFORE, the Intervenor respectfully request that this Court enter an Order:

- (I) Denying Gelman's Motion for Stay of Proceedings; and
- (II) Granting such other relief in favor of the Intervenor as this Court deems just, equitable and appropriate under the circumstances presented.

Dated: January 29, 2021

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PROOF OF SERVICE

I served the **Intervenors' Response In Opposition To Gelman's Motion For Stay Of Order Scheduling Hearing On Modification Of Consent Agreement** upon the attorneys of record and/or parties in this case on **January 29, 2021**. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

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/s/ William N. Listman
William N. Listman