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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,

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

and

THE 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.

/

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

REPLY BRIEF IN SUPPORT OF GELMAN SCIENCES, INC.'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

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/

REPLY BRIEF IN SUPPORT OF MOTION FOR STAY OF ORDER SETTING HEARING ON MODIFICATION OF CONSENT AGREEMENT

Defendant Gelman Sciences, Inc. ("Gelman") files this reply brief in support of its motion for a stay of the proceedings outlined in the January 27, 2021 Fourth Amended Scheduling Order.[1]

[1] As noted in Gelman's motion for reconsideration, Gelman's first and preferred form of relief is for the Court to vacate the January 27, 2021 Scheduling Order and dismiss the intervention without

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Each of Intervenors' procedural objections to Gelman's motion lacks merit. First, Intervenors argue that a stay should be denied because Gelman's motion for reconsideration was untimely. This argument is incorrect. Gelman timely sought reconsideration of this Court's January 27, 2021 Order scheduling the remedy hearing. Each of the three proceeding orders regarding the remedy hearing was vacated within 21 days of its entry. A vacated order cannot be reconsidered or appealed from, because it is a legal nullity. See, e.g., *Smith v MEEMIC Ins Co*, 285 Mich App 529, 532-533; 776 NW2d 408 (2009) (collecting cases holding that judgments that have been set aside or vacated are nullities). The language in each amended Scheduling Order specified that the Order vacated all previous Scheduling Orders, precisely to avoid any ambiguity as to which Scheduling Order was in effect and thus subject to appeal.

Gelman has always been forthright regarding its intent to appeal the Court's decision to hold the remedy hearing, and this Court should not entertain Intervenors' spurious arguments that Gelman is not entitled to a stay simply because the appeal has been delayed by the numerous modifications to the order setting that hearing. Gelman's January 28, 2021 motion for reconsideration of the January 27, 2021 Fourth Amended Scheduling Order was timely, and any application for leave to appeal will be timely filed within 21 days of an order denying that motion. Alternatively, Gelman is prepared to file an application for leave to appeal within 21 days of the Fourth Amended Scheduling Order if no decision on the motion for reconsideration has been issued by that time.[2]

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prejudice, or to order the Intervenors to file their complaints so that the merits of their claims can be litigated.

[2] Although Gelman filed its reconsideration motion to provide the Court with the opportunity to reconsider its decision to hold a remedy hearing, there is no requirement that Gelman wait for a ruling on that motion before seeking interlocutory review.

Intervenors also incorrectly argue that Gelman's motion for stay is premature because it was filed before the Application. Litigants routinely file motions for stay in advance of the anticipated filing of an application for leave to appeal because a request for stay must first be made in the trial court. MCR 7.209(A)(2). Gelman followed this same sequence in 2017—without objection—when it sought to stay this Court's intervention decisions prior to filing its application for leave to appeal: Motion for Stay filed 4/3/17 ("pending a decision on Gelman's *forthcoming Application* . . ."); Application for Leave to Appeal filed 4/6/17. If the trial court denies a motion for stay, a transcript of the motion hearing must be filed with the Court of Appeals along with the motion for stay. MCR 7.209(A)(3). This process takes time, and an appellant prosecuting a time-sensitive interlocutory appeal cannot wait until after the application is filed to file, argue, and obtain the transcript of a motion for stay in the trial court. Indeed, the 21-day automatic stay provided for appeals as of right is expressly designed to allow the appealing party to obtain a stay or appeal bond in order to protect themselves against proceedings on a judgment while an appeal is pending. MCR 7.209(E); MCR 2.614(A)(1). Absent a stay, a party must comply with the order pending the appeal, even if it believes that the order is incorrect. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). These procedural realities underscore why Intervenors' opposition to Gelman's motion as premature is baseless.

Intervenors' remaining arguments are similarly frivolous and without merit. For example, Intervenors argue that Gelman cannot request a stay of proceedings for the duration of appellate proceedings. This is standard language for any appellate stay and is intended to further the interests of judicial economy, as it would be an immense waste of private, public and judicial resources to revisit a stay of proceedings at every step in the appellate process.

EGLE, for its part, does not take a position with regard to the requested stay. However, its

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pleading suggests a path to entry of a bilateral Fourth Amended Consent Judgment that bears weighty consideration. Gelman's motion for reconsideration asked this Court to dismiss the intervention without prejudice because the intervention failed to accomplish the desired result: a resolution that would be accepted by the community. Indeed, far from bringing the parties closer to such a resolution, this process has made clear that it is impossible to craft any remedy that is both realistic and achievable and that will be acceptable to Ann Arbor's politicians and activists. That is because, as EGLE points out in its response, the elected officials that rejected the carefully negotiated settlement are unlikely to be satisfied by anything other than aquifer restoration—which the Intervenors' own experts recognize is not technically feasible or required by applicable law—or by having EPA take over the site. In the face of this reality, continuation of the intervention serves no purpose; as a result, the intervention should be dismissed.

But even if this Court is unwilling to dismiss the intervention, Gelman agrees with EGLE that entry of a bilateral Fourth Amended Consent Judgment would accomplish what is long overdue: the prompt implementation of a fully protective remedy tied to the more stringent statewide cleanup standards. As evidence of its good faith, Gelman will agree to enter into a bilaterally negotiated Fourth Amended Consent Judgment based on the response activities Gelman and EGLE agreed upon four years ago, without requiring dismissal of the intervention and without prejudice to Intervenors' ability to seek additional relief. As made clear in its February 1, 2021 filing, EGLE is in agreement with Gelman on this immediate path forward, which is both in the public interest and would not require further delay.

For the foregoing reasons, and in order to conserve public, private and judicial resources, Gelman respectfully asks this Court to:

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A. Grant its motion for reconsideration and either dismiss the intervention without prejudice, or cancel the hearing and require Intervenors to file their complaints so the merits of their claims can be litigated; or alternatively

B. Grant Gelman's motion pursuant to MCR 2.614(D) and MCR 7.209(A), to stay the January 27, 2021 Order scheduling the remedy hearing pending the Court of Appeals' decision on Gelman's Application for Leave to Appeal, and, if the Application is granted, until all appellate proceedings are complete.

Respectfully submitted,

ZAUSMER, P.C.

/s/ Michael L. Caldwell
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Dated: February 3, 2021

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as directed on the pleadings on February 3, 2021, by:

☒ E-FILE ☐ US MAIL ☐ HAND DELIVERY ☐ UPS
☐ FEDERAL EXPRESS ☐ OTHER

/s/Holly Hood
Holly Hood