

**STATE OF MICHIGAN  
IN THE 46<sup>TH</sup> JUDICIAL CIRCUIT  
COUNTY OF OTSEGO**

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MICHIGAN DEPARTMENT OF  
ENVIRONMENTAL QUALITY,  
and STEVEN E. CHESTER, Director  
of the Michigan Department of  
Environment Quality,

Case No.: 09-12933-CE

Hon. Dennis F. Murphy

MICHIGAN DEPARTMENT OF  
NATURAL RESOURCES and  
REBECCA HUMPHRIES, Director  
of the Michigan Department of  
Natural Resources,

Plaintiffs,

vs.

GOLDEN LOTUS, Incorporated,

Defendant,

and

MICHIGAN COUNCIL OF TROUT  
UNLIMITED, a Michigan non-profit  
Corporation, and PIGEON RIVER COUNTRY  
ASSOCIATION, a Michigan non-profit  
Corporation,

Intervening Plaintiffs,

vs.

Golden Lotus, Incorporated,

Defendant.

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### **COMPLAINT OF INTERVENORS**

1. Intervening Plaintiffs Michigan Council of Trout Unlimited (“MCTU”) and Pigeon River Country Association (“PRCA”) join in the original Complaint in this action filed by Plaintiffs Michigan Department of Environmental Quality, Steven E. Chester, Michigan Department of Natural Resources and Rebecca Humphries, against Defendant Golden Lotus, Incorporated (“Original Complaint”). MCTU and PRCA also assert against Defendant related claims, involving common questions of law and fact, pursuant to the Michigan Environmental Protection Act (MCL 324.1701 et seq.) and public nuisance.

### **INCORPORATION BY REFERENCE OF ORIGINAL COMPLAINT**

2. MCTU and PRCA adopt, restate and incorporate by reference each allegation and claim in the Original Complaint, as if fully set forth in this pleading.

### **INTERVENING PARTIES**

3. MCTU, a Michigan non-profit corporation, is an affiliate of Trout Unlimited devoted to the conservation, protection and restoration of Michigan’s coldwater fish and their watersheds, including the Pigeon River, a designated Natural River in Northern Lower Michigan. MCTU coordinates and represents 23 local chapters of Trout Unlimited, including the Headwaters Chapter located in Vanderbilt Michigan, near the Pigeon River.

4. MCTU has standing in this action under Michigan law to bring suit in the interest of its members, because members of MCTU, including members of the Headwaters Chapter, would have standing as individual plaintiffs (“MCTU Members”).

5. MCTU Members, including but not limited to John Walters, President of the Headwaters Chapter, at all times pertinent to this case have personally and frequently accessed, used, physically participated in and enjoyed recreational and aesthetic interests in the Pigeon River in the immediate vicinity of the Song of the Morning Ranch dam and downstream therefrom. Accordingly, they have a substantial interest in this area of the Pigeon River, detrimentally affected by Defendant’s conduct, that is distinct from the interest of the general public.

6. Because of Defendant’s gross mismanagement of the Song of the Morning Ranch dam resulting in a massive and uncontrolled discharge of sediment-laden water and drastic flow fluctuations in the Pigeon River, MCTU Members have directly suffered an injury in fact to their recreational and aesthetic interests, causally connected to Defendant’s conduct, that can be redressed by a favorable decision.

7. MCTU also has standing in this action because it was a plaintiff in the 1984 action in this Court known as *Frank J. Kelly, et al v Golden Lotus Inc.* (Case No. 84-2871-CE) (“1984 Action”), brought against Defendant for a prior discharge of sediments from the Song of the Morning Ranch dam into the Pigeon River, which resulted in the Consent Judgment attached as an Addendum to the Original Complaint.

8. PRCA is a Michigan non-profit corporation dedicated to protecting the unique wilderness characteristics of the Pigeon River Country, known as the “Big Wild,” and insuring that this area retains its aesthetic, wildlife, recreational and educational values for present and future generations.

9. The Pigeon River, in the area directly affected by the Song of the Morning Ranch dam, is within the Pigeon River Country State Forest designated as a special management unit by the DNR under a Concept of Management initially adopted in 1973, and updated by DNR Director Humphries in 2007. It is the policy of the Concept of Management, *inter alia*, “to manage the Pigeon River Country to protect and maintain the natural beauty of its forests and waters, and to sustain a healthy elk herd, fish, and wildlife populations.” The Concept mandates that the DNR shall, *inter alia*, “[p]rotect water quality, stream habitat and manage the streams for a naturalized trout fishery. . .”

10. PRCA has standing in this action under Michigan law to bring suit in the interest of its members, because members of PRCA would have standing as individual plaintiffs (“PRCA Members”).

11. PRCA Members, including but not limited to board members Greg Keith and Lance Weyeneth, at all times pertinent to this case have personally and frequently accessed, used, physically participated in and enjoyed recreational and aesthetic interests in the Pigeon River in the immediate vicinity of the Song of the Morning Ranch dam and downstream therefrom. Accordingly, they have a substantial interest in this area of the Pigeon River, detrimentally affected by Defendant’s conduct, that is distinct from the interest of the general public.

12. Because of Defendant’s gross mismanagement of the Song of the Morning Ranch dam resulting in a massive and uncontrolled discharge of sediment-laden water and drastic flow fluctuations in the Pigeon River, PRCA Members have directly suffered an injury in fact to their recreational and aesthetic interests, causally connected to Defendant’s conduct, that can be redressed by a favorable decision.

### COUNT III

13. MCTU and PRCA restate and incorporate by reference paragraphs 1 through 12 above, as if fully set forth herein.

14. The Michigan Environmental Protection Act (MCL 691, 1201 et seq) (“MEPA”) was enacted in 1970 for the protection, *inter alia*, of the water and other natural resources of the state and the public trust in those resources.

15. Section 1701(1) of MEPA (MCL 324.1701(1)) provides that:

“. . .[A]ny person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment or destruction.”

Section 1704(1) of MEPA (MCL 324.1704(1)) provides that:

“The court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment or destruction.”

16. Defendant’s gross mismanagement of the Song of the Morning Ranch dam resulted in a massive and uncontrolled discharge of sediment-laden water and drastic flow fluctuations in the Pigeon River, a designated Natural River, which polluted, impaired or destroyed the river, its water quality, fish, plants, aquatic life and the public trust therein, in violation of MEPA.

17. The continued presence of the Song of the Morning Ranch dam and the impoundment unnaturally: (a) increases the water temperature of the Pigeon River; (b) reduces oxygen capacity and the total habitable area of the river for trout; (c) alters the natural flow of the river; (d) acts as a barrier to upstream fish migration; (e) produces extreme variability in flow discharge; (f) increases turbidity of the water; (g) disrupts navigation; and (h) causes further accumulation of silt and organic matter behind the dam creating a continuous threat of

catastrophic discharge. Accordingly, the continued presence of the dam and the impoundment pollutes, impairs or destroys the river, its water quality, fish, plants, aquatic life and the public trust therein, in violation of MEPA.

18. This claim in Count III is brought pursuant to Sections 1701 and 1704 of MEPA (MCL 324.1701 and 324.1704).

#### **COUNT IV**

19. MCTU and PRCA restate and incorporate by reference Paragraphs 1 through 18 above, as if fully set forth herein.

20. Defendant's gross mismanagement of the Song of the Morning Ranch dam resulted in a massive and uncontrolled discharge of sediment-laden water and drastic flow fluctuations in the Pigeon River that are injurious to the river, its water quality, fish, plants, aquatic life, aesthetic and recreational uses and the public trust therein. Defendant's mismanagement and continued use and operation of the dam therefore violate the Michigan statutes referenced in the Original Complaint and constitute a public nuisance.

21. The continued presence of the dam and the impoundment unnaturally: (a) increases the water temperature of the Pigeon River; (b) reduces oxygen capacity and the total habitable area of the river for trout; (c) alters the natural flow of the river; (d) acts as a barrier to upstream fish migration; (e) produces extreme variability in flow discharge; (f) increases turbidity of the water; (g) disrupts navigation; and (h) causes further accumulation of silt and organic matter behind the dam creating a continuous threat of catastrophic discharge and pollution, impairment or destruction of the river, its water quality, fish, plants, aquatic life, and the public trust therein. Accordingly the continued presence of the dam and the impoundment constitutes a public nuisance.

22. Defendant's gross mismanagement of the Song of the Morning Ranch dam, resulting in a massive and uncontrolled discharge of sediment laden water and drastic flow fluctuations in the Pigeon River, constitutes an unwarranted, unreasonable and unlawful use by Defendant of its property and establishes that the dam poses an unreasonable risk of sediment discharge and environmental damage to the river, its water quality, fish, plants, aquatic life, and aesthetic and recreational uses. The continued presence of the dam and the impoundment therefore constitutes a nuisance requiring removal of the dam for abatement.

23. In its Opinion in the 1984 Action, this Court found that the release of sediments from the Song of the Morning Ranch dam constituted an intentional nuisance, and ruled that "should the dam become a nuisance [again] because of Defendant's or its successors or assigns noncompliance with this Court's Order, the Court will require removal of the dam." June 8, 1987 Bifurcated Trial Opinion, p. 46.

24. MCTU and PRCA make this claim in Count IV pursuant to the common law and MCR 3.601 to remedy and abate a public nuisance.

### **RELIEF REQUESTED**

WHEREFORE, MCTU and PRCA request that this Honorable Court:

- A. Grant the relief requested in the Original Complaint for the reasons stated therein and in this Complaint of Intervenors;
- B. Require removal by Defendant of the Song of the Morning Ranch dam;
- C. Require Defendant to mitigate and restore the value of lost recreational, aesthetic and natural resources resulting from the mismanagement of the Song of the Morning Ranch dam, including damages to the water quality, fish, plants and aquatic life of the Pigeon River;
- D. Require Defendant to pay the costs associated with rehabilitating and restoring the Pigeon River to its natural condition, including removal of the Song of the Morning Ranch dam;

E. Require Defendant to pay the attorney fees and costs incurred by MCTU and PRCA in this action; and

F. Award MCTU and PRCA such other relief as may be deemed just and proper.

Respectfully submitted,

WARNER, NORCROSS & JUDD LLP

Dated: \_\_\_\_\_, 2009

By: \_\_\_\_\_

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