

August 19, 2011

Clerk
Otsego County Circuit Court
Suite 204
225 W. Main Street
Gaylord, Michigan 49735

Re: **Michigan Department of Environmental Quality, et al. v
Golden Lotus, et al.
Case No. 09-12933-CE**

Dear Clerk:

Enclosed for filing are an original and Judge's copy of Intervening Plaintiffs' Response to Defendant's Motion for Relief From Order Under MRC 2.612(C)(1)(c) and Affidavit of W. Joseph Jarecki, together with Proof of Service.

Thank you for your assistance in this matter.

Yours very truly,


Peter L. Gustafson

vb

Enclosures

c: Pamela J. Stevenson (w/enc)
William M. Schlecte (w/enc)
Harry Ingleson II (w/enc)
(via electronic & regular mail)
Kay Pagel, Secretary to Judge Murphy (via facsimile w/encs)

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**STATE OF MICHIGAN
IN THE 46TH JUDICIAL CIRCUIT
COUNTY OF OTSEGO**

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, et al.

Plaintiffs,

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,

Case No.: 09-12933-CE

Hon. Dennis F. Murphy

**INTERVENING PLAINTIFFS' RESPONSE
TO DEFENDANT'S MOTION FOR RELIEF
FROM ORDER UNDER MCR 2.612(C)(1)(c)**

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INTRODUCTION

Defendant Golden Lotus, Inc. (“Golden Lotus”) has filed two motions requesting reconsideration of this Court’s July 22 Opinion and Order, one raising a number of new issues under MCR 2.1119(F) and the other a “misrepresentation” claim under MCR 2.612(C)(1)(c).

MCR 2.119(F)(2) specifies that “[n]o response to the motion may be filed, and there is no oral argument, unless the Court otherwise directs.” In compliance with this rule, Intervening Plaintiffs’ response is limited to Defendant’s narrower motion for relief under MCR 2.612(C)(1)(c), in which Defendant makes the false accusation that Intervening Plaintiffs misrepresented to the Court their understanding of the Interim Order.¹ Golden Lotus carelessly makes allegations of misrepresentation based on two writings prepared by W. Joseph Jarecki, a member of the Pigeon River County Association. One was a report on a meeting where Golden Lotus initially presented a proposal for impoundment drawdown and various options for dam removal. The second was a personal sketch Mr. Jarecki offered at a confidential settlement meeting after Intervening Plaintiffs had served their Motion to Clarify and Enforce Interim Order. Neither of those documents expresses any opinion or statement regarding the Association’s understanding of the legal requirements of the Interim Order, and neither contradicts the position that was clearly and properly set out in Intervening Plaintiffs’ Motion.

DISCUSSION

I. A Claim Of Fraud Or Misrepresentation Requires Proof By Clear And Convincing Evidence.

Golden Lotus asserts in its motion that Intervening Plaintiffs have committed a fraud on the court by misrepresenting their understanding of the requirements of the Interim Order.

¹ Intervening Plaintiffs believe that the second motion is a mere pretext to obtain another opportunity for oral argument since none is permitted under 2.119 (where Defendant has grouped most of its arguments), thus precluding a response by Intervening Plaintiffs.

Under Michigan Law, a claim of fraud or misrepresentation must be supported by proof that is “clear, satisfactory and convincing.” *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330; 247 NW2d 813 (1976). *Johnson v Wassau Ins Co*, 283 Mich App 636, 769; NW2d 755 (2009) (fraud will not be presumed, it must be proven by clear, satisfactory, and convincing evidence.)² A claim of misrepresentation presented under MCR 2.612 must be proven with the same “clear and convincing evidence.” As Justice Griffin noted in his dissent (on other grounds) in *Triplett v St Amour*, 444 Mich 170, 209; 507 NW2d 194, 211 (1993):

. . . [In] suing for fraud, the requisite proofs in achieving that end are no less formidable than those facing a party who pursues relief under MCR 2.612. Just as a party seeking equitable relief from a judgment based on fraud “must offer clear and convincing proof to establish that the evidence underlying the judgment was indeed fabricated or concealed,” Restatement Judgments, 2d § 70, comment d, p 183, a party suing in an action at law for fraud in the execution of a settlement agreement similarly bears the heavy burden of proving the elements of the alleged fraud. . . .

Golden Lotus’ allegations wholly fail to meet the standard of proof required by Michigan Law.

II. **Golden Lotus “Evidence” Does Not Support The Allegation That Intervening Plaintiffs Misrepresented Their Legal Position To The Court.**

In support of its “fraud on the Court” argument, Defendant offers a handwritten note (GL Ex 101) prepared by Mr. Jarecki and presented at a settlement meeting held on March 17, 2011, *after Intervening Plaintiffs had served their Motion for Clarification and Enforcement of Interim Order dated February 11, 2011*. The motion clearly sets forth the understanding and belief of Intervening Plaintiffs, including the Pigeon River Country Association, as to the requirements of the Order. The March 17 meeting was a “meet and confer” session regarding

² See also *Youngs v Tuttle Hill Corp* 373 Mich 145; 128 NW2d 472 (1964) (“clear and satisfactory”); *Welch v Citizens Mut Auto Ins Co*, 285 Mich 82; 280 NW 118 (1938) (“clear and positive”).

the motion. At the express written insistence of counsel for Golden Lotus, the meeting was *not* to discuss the parties' disputed positions regarding the dam removal requirements of the Interim Order. Golden Lotus had already received Intervening Plaintiffs' motion. As Golden Lotus' counsel put it – “We understand your position and you understand ours.” (See Attachment 2 to Jarecki Affidavit.) Furthermore, Golden Lotus insisted, and Intervening Plaintiffs agreed, that “the discussion must be off the record and may not be used by either party in any forum . . . TU and PRCA must acknowledge that the willingness of Golden Lotus to meet is entirely voluntary and unrelated to the litigation.” (See Attachment 2 to Jarecki Affidavit.)³

So, in the spirit of settlement protected by the confidentiality rule, Mr. Jarecki attended the meeting and offered an idea set forth in his notes and sketch (GL Ex 101) as to how the spillway ramp at the base of the dam could be cut off and other concrete at the bottom of the dam excavated, possibly to provide fish passage and improve river flow. Michigan Trout Unlimited's representative at the meeting expressed serious reservations about this idea because it would still leave some concrete in place at the bottom of the dam. (See Jarecki Affidavit.) Mr. Jarecki also offered a second idea about supporting the existing bridge with auger cast pilings after removal of all dam structures.⁴ These ideas were provided at a settlement meeting as constructive suggestions where the ground rules of the meeting specified that there was to be no rehash of the parties' legal positions (which were already known) and where, as Golden Lotus insisted, discussions were to be protected by the settlement confidentiality rule. Yet now Golden Lotus contends that Mr. Jarecki's personal idea evidences a misrepresentation to the Court by the Pigeon River Country Association about its interpretation of the requirements of the Interim

³ Intervening Plaintiffs respect the rule pertaining to the confidentiality of settlement discussions. This response references the pertinent meeting only after Golden Lotus has breached its promise of confidentiality and only to meet Defendant's serious but groundless claim that Intervening Plaintiffs made a misrepresentation to the Court.

⁴ Mr. Jarecki's ideas were for naught; Golden Lotus rejected further consideration of the suggestions made at the March 17 meeting, and Intervening Plaintiffs then filed their motion.

Order. It does nothing of the sort. Mr. Jarecki's sketch and notes make no mention of any interpretation of the Interim Order, nor any requirement of the Interim Order. Moreover, the events surrounding the March 17, meeting, including Mr. Jarecki's sketch, were well known by Golden Lotus long before briefing and hearing on Intervening Plaintiffs' motion, but were not previously raised. Grasping at straws, Golden Lotus now seeks to inject this ill-founded argument in an untimely manner into proceedings on a motion already fully considered by the Court. An order should not be set aside if the "new" arguments could have been presented as the motion was heard. A motion for rehearing or reconsideration is not a second chance to present material or arguments that could have been presented in the original motion. *See Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333, 338 (2000) (second affidavit from expert witness); *Charbeneau v Wayne County General Hosp*, 158 Mich App 730, 733; 405 NW2d 151, 153 (1987) (new legal theory). *See also, Smith v Pontiac Citizens Loan & Ins Co*, 294 Mich 312; 293 NW2d 661 (1940) (refusing relief from adjournment where attorney could have but failed to raise the objections at trial).

Similarly, Golden Lotus falsely contends that a status report prepared by Mr. Jarecki to the Pigeon River Country Association even earlier, following an October 22, 2010, pre-application meeting between the parties, shows that Intervening Plaintiffs misrepresented their understanding of the Interim Order to the Court. It does not. As Mr. Jarecki states in his Affidavit, his report was based on a presentation made by Golden Lotus and its engineers at the October 22 meeting, following receipt from Golden Lotus shortly before an "Interim Evaluation of Drawdown and Dam Removal Options." (Exhibit D to Memorandum in Support of Intervening Plaintiffs' Motion to Clarify; GL Ex 5.) There was no discussion in his report about the requirements of the Interim Order other than by reference to the words used in the Order.

There was no discussion at the meeting or in his report about the spillway structures at the base of the dam, and Intervening Plaintiffs did not understand that Golden Lotus' proposal would leave those structures in place. (Jarecki Affidavit; See also, April 6, 2011, Burroughs Affidavit.) Going into the meeting, the State and Intervening Plaintiffs understood that the goal for the dam removal included restoration of passage for aquatic organisms and returning the Pigeon River to free-flowing condition. (Jarecki Affidavit; See Attachment 2 to April 6, 2011 Burroughs Affidavit; Exhibit A to April 30, 2011, Burroughs Affidavit.) Mr. Jarecki's report merely described Golden Lotus' upbeat presentation; the Golden Lotus "Interim Evaluation" was just that – it was interim and incomplete. The October 22 meeting concluded with the agreement that Golden Lotus would provide additional information about its proposed plan, and further meetings would be held to understand, evaluate, and discuss the proposal, as Mr. Jarecki stated in his report.

In the ensuing weeks, substantive questions were raised about the "Interim Evaluation," and Golden Lotus was asked to include an additional option involving removal of the dam and bridge and use of the existing downstream bridge. Golden Lotus engineers prepared two additional reports in response to these inquiries. (Exhibits D and E to Intervening Plaintiffs' Motion to Clarify.) The Technical Team expressed concern that Option 1 of Golden Lotus' various dam removal alternatives would create high water velocities and block passage of fish, waders, and watercraft. (Jarecki Affidavit; April 6, 2011, Burroughs Affidavit; Exhibit E to Plaintiff's Motion to Clarify, p. 10.) As the discussions about the Golden Lotus options proceeded, it became apparent that the plan Golden Lotus was advocating would not, in fact, constitute dam removal, but would leave the spillway structures in place. (Jarecki Affidavit; April 6, 2011, Burroughs Affidavit.) At a further meeting in Lansing on December 15, 2010,

attended by Mr. Jarecki, Intervening Plaintiffs objected to the incomplete nature of the plan, and did so again in follow-up written comments. (See Exhibit G to Intervening Plaintiffs' Motion to Clarify.) When this problem was not cured in Golden Lotus' permit application submitted in early February 2011, Intervening Plaintiffs prepared and served their Motion to Clarify dated February 11, 2011. In no manner does Mr. Jarecki's newsletter report on Golden Lotus' initial presentation of its "Interim Evaluation" of dam removal options contradict the position properly, repeatedly and openly taken by Intervening Plaintiffs that the Interim Order requires Golden Lotus to remove its dam, including the spillway structures, so as to restore the free flow of the Pigeon River.⁵

And what alleged misrepresentation (and by whom) exactly is Golden Lotus' motion based upon? Golden Lotus implies that Mr. Jarecki believed the Interim Order had different requirements than those set out in motion papers filed by Intervening Plaintiffs, as non-profit organizations governed by boards and represented by counsel. In fact, Mr. Jarecki had no such "other" interpretation, and his newsletter report and settlement idea in no way expressed an interpretation of the Interim Order different from that held by Intervening Plaintiffs. But even if, contrary to the evidence, Mr. Jarecki had expressed his own subjective understanding of the Interim Order, this would be irrelevant to a proper interpretation of the written requirements of the Order, as the Court correctly ruled in its Opinion on the Motion. The Interim Order is not ambiguous, and it broaches no need for consideration of the subjective beliefs or opinions of members of the party organizations as to its meaning. Most importantly, however, Mr. Jarecki

⁵ For clarification, and as noted by Mr. Jarecki in his Affidavit, the reference to the "emergency spillway" in Mr. Jarecki's report on the October 22 meeting does not relate to the spillway structures at the base of the dam. The "emergency spillway" is separate and distinct from the dam structures at issue and consists of culverts running under an approach road some distance away. The purpose of the emergency spillway is to carry away water in the event of a flood.

never expressed any different interpretation and his innocuous report about what Golden Lotus presented at an early-stage meeting regarding its dam removal proposal, and his good faith attempt to participate in a settlement discussion, are hardly badges of fraud.

III. Golden Lotus' Motion under MCR 2.612(C)(1)(c) Is Improper, Because the Court's Order is Not a Final Judgment, Order, or Proceeding.

Golden Lotus' motion for relief from Order cites as authority MCR 2.612(C)(1)(c), but that subrule, under Section (C)(1), states:

“On motion and on just terms, the court may relieve a party. . .from a *final* judgment, order or proceeding on the following grounds: . . .(c) fraud (intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party.” . . . (emphasis supplied).

Here, Golden Lotus is not seeking relief from a final order, and the order cannot be made such. It is an interlocutory ruling on a motion to clarify an Interim Order. The Court has clarified the meaning of the Interim Order and directed Golden Lotus to revise its Conceptual Plan accordingly. Under MCR 2.702(6)(a)(i), a final order is “the first judgment or order that disposes of all claims and adjudicates the rights and liabilities of all parties. . . .” The Court's interlocutory ruling on Intervening Plaintiffs' motion plainly does not meet this test. Nor can this problem with Golden Lotus' motion be overcome by a request that the Court “certify” the question as final. The Supreme Court amended MCR 2.604 in 1995, deleting the provision that authorized the circuit court to certify that an interlocutory order was a final order, with one exception: interlocutory orders in receivership and similar actions may be entered as final and immediately appealed. MCR 2.604(B); 7.202(6)(a)(ii).

CONCLUSION

Golden Lotus' motion for relief from this Court's order is ill-conceived, without evidentiary support (let alone clear and convincing proof), untimely, and improperly grounded because it does not seek relief from a final order. The Court's Opinion and Order are correctly decided and should stand.

Dated: August 19, 2011

WARNER NORCROSS & JUDD LLP

By: _____

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**STATE OF MICHIGAN
IN THE 46TH JUDICIAL CIRCUIT
COUNTY OF OTSEGO**

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, et al.

Case No.: 09-12933-CE

Plaintiffs,

Hon. Dennis F. Murphy

And

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

**AFFIDAVIT OF
W. JOSEPH JARECKI**

Intervening Plaintiffs

vs.

GOLDEN LOTUS, Incorporated,

Defendant,

STATE OF MICHIGAN)
 : SS.
COUNTY OF OTSEGO)

W. Joseph Jarecki, being duly sworn, deposes and says:

1. I am Treasurer of the Pigeon River Country Association, and reside at 8485 Old Vanderbilt Road in Vanderbilt, Michigan. I was employed by the Michigan Department of Natural Resources, Forest, Mineral and Fire Management Division, and served as Unit Manager of the Pigeon River Country State Forest from 1990 until my retirement in 2007.

2. Although I did not participate in the preparation of the Interim Order for dam removal entered by the Court on April 5, 2010, or the mediation and settlement negotiations leading up to it, I attended meetings between the parties regarding the dam removal process as a

member of the Board of Directors of the Pigeon River Country Association, including a Lansing meeting held on October 22, 2010, and a subsequent meeting also held in Lansing on December 15, 2010.

3. I also attended a settlement meeting between representatives of Intervening Plaintiffs and Defendant Golden Lotus at the offices of Golden Lotus' counsel in Ann Arbor on March 17, 2011. (The ideas I presented at the meeting were mine alone, and had not been approved by the PRCA Board of Directors.)

4. I have read Defendant's Motion for Relief from the Court's Opinion and Order of July 22, 2011, which falsely accuses Intervening Plaintiffs of misrepresenting to the Court their interpretation and understanding of the Interim Order. As the author of the exhibits attached to Golden Lotus' motion, I am responding to these unwarranted allegations.

5. As has been presented to the Court in affidavits, exhibits, and briefs previously filed in this case, on October 20, 2010, Golden Lotus submitted to the parties an Interim Evaluation of Drawdown and Dam Removal Options (Exhibit C to Intervening Plaintiffs' Motion to Clarify; GL Ex 5.) Two days later, on October 22, 2010, a meeting was held in Lansing to discuss the Interim Evaluation which described the drawdown process Golden Lotus was proposing, and then presented three options for dam removal ranging from removal of dam structures to complete demolition of the bridge and dam and construction of a new bridge. (Id.)

6. The dam removal goals of the State and Intervening Plaintiffs going into the meeting were referenced in a memorandum from Jessica Mistak of MDNR, leader of the State's Technical Review Team. Those goals included restoration of passage for aquatic organisms by removing the dam structures blocking the river so as to restore the free and unimpeded flow of

the river. (Attachment 2 to April 6, 2011, Burroughs Affidavit; Exhibit A to April 30, 2011, Burroughs Affidavit.)

7. Since the Golden Lotus Interim Evaluation document was received on short notice prior to the October 22 meeting, without opportunity for extensive review in advance, most of the meeting consisted of a presentation by Golden Lotus' counsel and engineers regarding their proposal. At the conclusion of the meeting, a number of questions were posed to Golden Lotus about the proposal details and intent, which were incomplete. Golden Lotus agreed to submit additional information, and further meetings were scheduled.

8. Following the October 22 meeting, I prepared a report about the meeting, dated October 27, 2010, to the members of the Pigeon River Country Association. Attachment 1 is a copy of the report in the format I submitted. (See GL Ex 100). My report reviewed what Golden Lotus had presented at the meeting, particularly how they proposed to accomplish drawdown of the impoundment, as described in their Interim Evaluation document. I noted in my report that the information presented was not yet complete, stating that Golden Lotus engineers "will gather the needed information and submit it by November 15th so that we can evaluate the information in preparation for the next scheduled meeting on November 22nd." I discussed the proposal as presented by Golden Lotus, and noted that the goal was to "convert from an impoundment to a healthy free flowing river" and that I believed the process was on track "for the pond to be drawn down, the dam structure to be removed, re-vegetation of the exposed pond bottom to be well underway, and the Pigeon River to be free flowing for the first time in over a century by the fall of 2011."

9. My report on the meeting was just that – a summary of what Golden Lotus had presented at the meeting and the anticipation of further information submissions, meetings, and

discussions to follow. It was not a statement of acceptance or approval of the Golden Lotus proposal. There was no mention in my report of the spillway and turbine pit floor structures at the base of the dam, because this did not come up at the October 22 meeting, and Intervening Plaintiffs did not then understand that the Golden Lotus dam removal proposal was to leave the spillway and turbine pit floor structures in place.

10. I note that Golden Lotus' motion excerpts a portion of my report referencing the "emergency spillway," which could be misunderstood to pertain to the bottom of the dam. It does not. The emergency spillway consists of facilities about one hundred and fifty feet from the dam that are culverts under the roadway leading to the bridge. The emergency spillway has nothing to do with the base of the dam. The purpose of the emergency spillway is to let water flow out of the pond at some distance from the dam, so flood water does not overtop the dam or the roadway during a major (100 year) storm event.

11. In November and December 2010, further communications occurred to clarify the proposal submitted by Golden Lotus at the October 22, 2010, meeting. At the request of the State and Interveners, Golden Lotus modified its proposal to include an additional option, involving removal of the dam, earthen embankment and bridge, and use of an existing bridge immediately downstream of the dam. The updated options thus ranged from removal of the existing bridge and dam structures and modifying another immediately downstream bridge; to removal of the existing bridge and dam structures and construction of a new bridge; to removal of the dam structures, leaving the existing bridge in place. Also provided, as requested, was additional information about sediment core data, sediment volumes, sediment movement/transport, a structural analysis of the bridge, detailed cost estimates for the options, anticipated water velocities passing under the bridge, and fish swim speed data. The November

and December reports from Golden Lotus responding to questions raised and discussions that occurred were submitted as Exhibits D and E to Intervening Plaintiffs' Motion to Clarify and Enforce Interim Order.

12. As these communications unfolded in November and December (after my report on the October 22 meeting was published), Golden Lotus asserted that it was required under the Interim Order to only accomplish what it had described as Option 1 in its proposal.

13. Both the State and Interveners asked for clarification and additional information about what Option 1 specifically contemplated. Concerns were raised about potential impoundment of water under high flow conditions from the narrow opening under the existing bridge, and anticipated high water velocities passing under the bridge. Also, more detailed information was requested about the physical layout of the dam structures and how they were to be removed. The December 3, 2010, report from Golden Lotus, for example, attempted to respond to written concerns from the Technical Review Team that "the Technical Team was surprised that the water velocities were so high through the structure . . . The water velocities provided are a barrier for fish passage and potentially a safety concern for wading anglers or paddlers." (Exhibit E to Intervening Plaintiffs' Motion to Clarify; GL Ex 6.)

14. As of the December 15, 2010, meeting which I attended, it became clear that Option 1 as set out in Golden Lotus' proposed Interim Evaluation would not, in fact, accomplish dam removal, but would leave the spillway floor and the turbine pit floor structures at the base of the dam in place as described in Intervening Plaintiffs' motion.

15. On our behalf, counsel for Intervening Plaintiffs objected to the Option 1 proposal at the December 15, 2010, meeting, and reiterated that objection in a written communication to the parties on December 17, 2010. (Exhibit G to Intervening Plaintiffs' Motion to Clarify.)

16. It is unfounded for Golden Lotus to suggest that I, the Pigeon River Country Association or Intervening Plaintiffs, misrepresented to the Court an understanding about the meaning and requirements of the Interim Order, when in fact our counsel, with my concurrence, objected to the Golden Lotus dam removal proposal at the December 15, 2010, meeting that I attended when it became clear what was being proposed and then followed that up with a written objection to Golden Lotus on our behalf. In no way was my report to PRCA members about the October 22 meeting expressing an understanding, intent or agreement regarding the requirements of the Interim Order other than as stated in the Order.

17. When Interveners' objections to the incomplete Golden Lotus dam removal proposal were disregarded, our counsel prepared and served on opposing counsel the Motion to Clarify and Enforce Interim Order, dated February 11, 2011, again clearly setting forth the understanding and belief of Intervening Plaintiffs that the Interim Order required removal of structures at the base of the dam. At the suggestion of our counsel, Intervening Plaintiffs agreed to meet and confer with Golden Lotus and their counsel before filing the motion with the Court. Two meetings were then held. Both took place in Ann Arbor, Michigan, at the offices of Golden Lotus' attorney. At the first meeting on February 24, 2011, the parties debated their positions on the motion and nothing was resolved. I participated by telephone. A second meeting was held on March 17, 2011, which I attended. At the request of counsel for Golden Lotus, written ground rules for the meeting were established (See Attachment 2). These included:

- The meeting would be a settlement discussion about a possible "Phase II" approach to dam removal, not to discuss the parties' understanding of the meaning and intent of the Interim Order, which had been clearly set out in Interveners' motion previously served and debated at the earlier meeting. As

counsel for Golden Lotus stated in an email on March 3, 2011: “We do not want to get into a debate on whether Phase II is or is not required by the Interim Order. We understand your position and you understand ours.” (Attachment 2.)

- The meeting was to involve settlement negotiations protected by confidentiality provisions. As Golden Lotus’ attorney stated: “The discussion must be off the record and may not be used by either party in any forum in the event that TU and PRCA move forward with objections to our Application. . . . TU and PRCA must acknowledge that the willingness of Golden Lotus to meet is entirely voluntarily and unrelated to the litigation.” (Attachment 2.) Our attorney responded: “We agree that the meeting is covered by the offer in compromise rule, involves protected settlement discussions, and thus not usable in any other forum as provided in the rule.” (Attachment 2.)

18. At the March 17 meeting, and in the spirit of constructive settlement dialogue that our counsel suggested for the meeting, I presented two possible ideas – which were mine alone – for dealing with the dam removal dispute. One, described in my handwritten notes submitted by Golden Lotus with its motion (GL Ex. 101), put forward an idea I had regarding removing the spillway ramp from the base of the dam and excavating pockets from the concrete at the bottom of the remaining spillway and turbine pit floor, to see if this could provide for aquatic organism passage and enhance river flow. Another idea I presented was to support the existing bridge abutments with auger cast pilings, to remove the bottom of the spillway and turbine pit, and to protect the base of the abutments from scouring with rock once the river establishes its new bed, with some thoughts on how this could be done at moderate cost. It was agreed that these ideas were to be reviewed by Golden Lotus engineers to see if there was a basis for possible further

discussion. (I should note that TU's representative at the meeting expressed serious reservations regarding the feasibility and acceptability of the sketch I prepared about removing the ramp and excavating concrete, because this would still leave a portion of the concrete slab at the bottom of the dam in place).

19. After the March 17 meeting, however, Golden Lotus rejected the ideas that had been discussed and declined to evaluate them further. Intervening Plaintiffs then filed their motion with the Court.

20. Again, it is unfounded for Golden Lotus to suggest that ideas I personally offered at a confidential settlement meeting shows that the Association made a misrepresentation to the Court about its understanding of the meaning and intent of the Interim Order. As noted earlier in this Affidavit, our belief and my belief that the Order required removal of the dam, including the spillway and turbine pit floor structures, was stated at meetings, confirmed in written communications from our counsel to Golden Lotus, and then described in the motion filed by Intervening Plaintiffs before the "meet and confer" session took place. This position never varied, and I did not express a contrary understanding either in my October 27, 2010, meeting report or in the sketch and notes I prepared for the March 17, 2011 meeting. In fact, neither of those documents contained any opinion on the meaning of the terms in the Interim Order at all. I am very disappointed that the integrity of my organization has been attacked based on a good faith effort on my part to offer constructive ideas at a settlement conference, when I understood that the intent of the protected settlement process was that thoughts could be shared without the threat that something discussed could be taken out of context and later used in Court proceedings to falsely impugn the integrity of the non-profit organization I belong to.

Further affiant sayeth not.

W. Joseph Jarecki
W. Joseph Jarecki

Subscribed and sworn to before me on Aug 18, 2011.

Loretta A Cwalinski

Notary Public, Otsego County, Michigan

My Commission Expires:

LORETTA A. C WALINSKI
NOTARY PUBLIC, STATE OF MI
COUNTY OF OTSEGO
MY COMMISSION EXPIRES JUL 2, 2015
ACTING IN COUNTY OF Otsego

5687217-2



10/27/2010

Golden Lotus/Song of the Morning Dam Removal Update

The Pigeon River Country Association joined the Michigan Council of Trout Unlimited and the Michigan DNRE in a lawsuit against Golden Lotus resulting from the June 22, 2008, sediment release from the Song of the Morning dam that caused a major fish kill. The Association and Trout Unlimited are both represented on a pro bono basis by Peter Gustafson and share in reimbursing Mr. Gustafson's costs associated with the case (printing and mailing court documents, lodging and meals, etc.). On April 5, 2010, Otsego County 46th Circuit Court Judge Dennis F. Murphy issued an Interim Order which provides in part that:

Golden Lotus shall remove the private dam it owns and maintains on its property creating the impoundment on the Pigeon River known as Lansing Club Pond, Corwith Township, Otsego County. The dam removal project will require DNRE permits pursuant to Parts 301, 303, 315, the floodplain portion of Part 31, and Part 305, of the Natural Resources and Environmental Protection Act ("NREPA") and the rules and regulations promulgated under the NREPA.

The DNRE agrees that upon removal of the dam structure, Golden Lotus will be allowed the continued use of the existing bridge or, if in the opinion of a Golden Lotus engineer, due to structural concerns with the existing bridge structure, a replacement bridge crossing.

The Interim Order also provides that, once Golden Lotus develops a conceptual plan for dam removal, sediment testing and management, and restoration of the formerly impounded area to a stable stream channel that is approved by the DNRE Review Team and the Executive Director of Trout Unlimited, a Pre-Application Meeting "to discuss the information necessary to submit a complete permit application for dam removal and any other issues relevant to the dam removal project contemplated by this Interim Order" will be held. On October 22, 2010, I represented the Pigeon River Country Association at the Pre-Application Meeting that was held in Constitution Hall in Lansing. In addition to me, the 17 attendees included: the three lawyers involved in the case; three DNRE Fisheries Division staff; five DNRE Water Resources Division staff; the Executive Director of Trout Unlimited; two people from Golden Lotus and two people from Golder Associates, the engineering company that Golden Lotus hired. All three lawyers agreed that information discussed at the meeting is not privileged and may be shared with the Association membership.

The meeting ran from 10 am until 2:30 pm. A wide range of issues were covered and additional information that is needed to submit complete permit applications was identified. Golder Associates will gather the needed information and submit it by November 15th so that we can evaluate the information in preparation for the next scheduled meeting on November 22nd. If it is needed, a third meeting has been

10/27/2010

scheduled for December 15th. The goal is to submit complete permit applications in January, 2011, so that permits can be issued and preparations made to begin the drawdown process after spring breakup, probably in May or June of 2011. A target date for completing the drawdown process has not yet been identified. Based on the discussions at the meeting, I expect drawdown will be completed during the summer or early fall of 2011.

The spillway gates; the wall between them; the structures holding the spillway gates; the power house gate; and the power house equipment, including the generator, will be removed soon after drawdown is completed. The inlets of the existing emergency spillway tubes will be lowered to the pipe inlet invert after drawdown is completed. The exposed sediments are expected to re-vegetate quickly from the natural seed bank that is already part of the sediments. A contingency plan will be developed for re-vegetating the newly established river banks if natural re-vegetation is not adequate. The contingency plan will also address sand/sediments that have accumulated and will begin moving through the system from above the impoundment.

If a structural engineer says that the bridge above the dam will be safe with it removed, the 1.5 foot wide wall between the spillway gates and the powerhouse will be removed to provide for additional capacity to pass water in a flood event. Without including the additional 1.5 feet that would be gained by removing the wall and without considering the emergency spillway tubes, calculations show that the structure, with the gates and power house equipment removed, could pass water from a flood event without overtopping the road that is close to three times as big as the 1995 storm event that was described by the National Weather Service as a 100 year storm event. In the 1995 storm, the emergency spillway tubes passed significant amounts of water, and Ford Lake Road where it crosses the Pigeon River in Pigeon River Campground washed out because the three tubes could not pass the water.

It has not yet been finalized, but it seems likely that, after the initial pond level is lowered one or two feet, stop logs will be installed and the remaining drawdown will be accomplished by systematic removal of the uppermost stop log based on predetermined prerequisites. Carol Armour, Golden Lotus Board Chair, requested that DNRE staff be on site as much as possible during the drawdown process and offered lodging in their facility. She said that she has employment experience developing contingency safety plans. She said that a safety plan to address a flood or other emergency would hopefully not be needed, but if it is, it will be critical to have it in place prior to the emergency. She requested that, to deal with an unexpected emergency from now through the final drawdown, the DNRE identify a contact person who has the authority to quickly decide how to proceed and will so instruct Golden Lotus staff.

I believe that Golden Lotus is committed to doing the drawdown as required by the State Technical Review Team which includes DNRE staff and the Executive Director of Trout Unlimited whose Doctorate degree is in dam removal; to dismantling the dam so it

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will not be able to be put back in service without prohibitive expense; to implementing procedures required by the Technical Review Team to ensure that the river is impacted as little as possible during the drawdown and dam removal process and is returned as quickly as possible to a healthy post removal condition; and to implementing required follow up monitoring, bank stabilization, sediment removal, etc. Golder Associates seems to be competent to design the necessary elements of the project. The Technical Review Team has the skills to identify all of the elements needed to successfully convert from an impoundment to a healthy free flowing river. Judge Murphy is closely monitoring progress toward meeting the requirements of the Interim Order. (The parties are scheduled to meet with him on December 8th and he expects them to present evidence of significant progress in getting to the point of submitting complete permit applications.) I am confident that things are on track for the pond to be drawn down, the dam structure to be removed, re-vegetation of the exposed pond bottom to be well underway, and the Pigeon River to be free flowing for the first time in well over a century by the fall of 2011.

Joe Jarecki, Treasurer
Pigeon River Country Association

Gustafson, Peter

To: bill@schlectelaw.com
Cc: Bryan Burroughs; Joe & Judi Jarecki
Subject: RE: Meeting Postponement

Bill, our understanding of the meeting is to continue to meet and confer regarding my clients' motion and discuss whether it can be resolved by agreement. Our focus will be on the attempted resolution, rather than continued argument about the requirements of the Interim Order. One of the reasons I submitted the motion to you was to avoid the necessity of reiterating points that are more clearly set out in writing. Of course, our understanding of that issue will necessarily inform our perspective on any possible solutions. Further to your points:

1. We agree that Tom Stanko's (or other Golder representatives') participation in the meeting and ongoing settlement discussions is voluntary and will not jeopardize his and Golder's capacity to act as your litigation consultant, and we understand that they are and remain your consultants, not consultants of any joint enterprise.
2. We agree that the meeting will be limited to a possible Phase II, as you reference it, and not a discussion about the present permit application.
3. We agree that the meeting is covered by the offer in compromise rule, involves protected settlement discussions, and thus not usable in any other forum as provided in the rule. We further agree that your willingness to meet is voluntary. There is no hidden agenda here—these are settlement talks on both sides, just as other settlement communications Golder was previously involved in.

I prefer not to preview possible negotiations or draw lines in the sand before we talk, but let me offer the following general suggestions (from me not my clients) as to topics that may be appropriate for discussion:

- Possible formulation of an agreement outside of the Consent Judgment to address the spillway removal issues.
- Required data, information and engineering plans that would enable an informed judgment about what can be done and what would be the cost.
- The timetable for any proposed further engineering analysis/assessment.
- The timetable for any proposed project.
- Fund raising plans, objectives, timetable and responsibilities.
- Financial responsibility to implement such further investigation and/or project.

You have said that Golden Lotus will not fund a phase II project, and my clients could as easily say that they will proceed with the motion unless Golden Lotus commits fully to pay for a project no matter the cost. I suggest that we have a discussion, protected by the settlement privilege, to see if there is a win/win solution that may be to the advantage of all concerned, weighing all relevant factors. There may not be such a solution, but I trust that we can we both agree that it is worth exploring. As Gandhi said, "there's truth in every position".

From: William M. Schlecte [mailto:bill@schlectelaw.com]

Sent: Thursday, March 03, 2011 11:43 AM

To: Gustafson, Peter

Cc: 'Carol & Richard Armour'; 'Verbatim Audio Visual HANDYSIDE'; 'Judy Tracey'; 'Linda Gabby'; drgsaks@gmail.com; drew@schlectelaw.com; 'Stanko, Tom'

Subject: RE: Meeting Postponement

Pete:

I was just getting ready to send you an email.

I just got off the phone with Tom. He is going to come to AA to be present rather than participating by phone.

It is more convenient to do it in my AA office (I have a Southfield office in the former American Center at I-696 and Telegraph, but I avoid going there as much as possible). Besides, as you found out last visit, there are at least 6 coffee shops within a 3 block radius.

A couple of comments and conditions regarding the meeting:

1. Tom is contributing his time as a favor to Golden Lotus and me. We should all, including TU and PRCA, be appreciative of his generosity. Since Tom is our consultant in the litigation, it must be clearly understood that his participation in a Phase II discussion does not jeopardize his and Golder's ability to continue in that capacity. He and Golder shall be deemed to participate as our consultants alone and not consultants on behalf of a proposed joint enterprise. Tom's willingness to contribute his and Golder's resources is limited to this one meeting.
2. The discussion must be limited to a possible Phase II – there is to be no discussion regarding the present Application. We do not want to get into a debate on whether Phase II is or is not required by the Interim Order. We understand your position and you understand ours. It is to be a meeting which is strictly "exploratory" with primary emphasis on how development and implementation of a Phase II project can (realistically) be funded. As I have said on numerous occasions, Golden Lotus will not, and cannot, commit to such a project unless it is funded by other sources.
3. The discussion must be off the record and may not be used by either party in any forum in the event that TU and PRCA move forward with objections to our Application or some third party raises objections – whether in court or in the administrative proceedings; and, whether related to the items included in the Application or to expansion of the work contemplated by the Application (e.g., that the Application fails to include a Phase II project). TU and PRCA must acknowledge that the willingness of Golden Lotus to meet is entirely voluntary and unrelated to the litigation.

Please send me an email that you and your clients agree with Items 1-3.

As an attorney representing the best interests of his client, I would ideally like to condition our willingness to explore a Phase II project upon TU's and PRCA's withdrawal of their objections to our Application. However, in order to demonstrate the good faith of my client, I am not. Let's see where this meeting takes us.

I have not yet heard from Don on his availability on March 17, but will let you know as soon as I do.

Bill

* * * This email constitutes a communication in furtherance of settlement negotiations and, as such, shall be inadmissible in subsequent proceedings except in accordance with MRE 408 and FRE 408.

William M. Schlecte
Schlecte Law Firm, PC
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Other Offices: Southfield - Jackson - Tawas City - Petoskey

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From: Gustafson, Peter [mailto:PGustafson@wnj.com]
Sent: Thursday, March 03, 2011 11:17 AM
To: bill@schlectelaw.com
Subject: RE: Meeting Postponement

This will work for us. If it would be helpful to you or Don, we could use a conference room in our Southfield office at the Town Center with phone hookups, etc, or your office is OK as well.

From: William M. Schlecte [mailto:bill@schlectelaw.com]
Sent: Thursday, March 03, 2011 8:26 AM
To: Gustafson, Peter
Cc: 'Carol & Richard Armour'; 'Verbatim Audio Visual HANDYSIDE'; 'Judy Tracey'; 'Linda Gabby'; drgsaks@gmail.com; 'Andrew D. Campbell'; 'Stanko, Tom'
Subject: RE: Meeting Postponement

Pete –

I can do March 17 in the afternoon. I am in Oakland Circuit Court in the morning, but it should not be a problem for me to be back in my office by 1:30.

I have gotten Tom to commit to participating *gratis* to the extent of an initial meeting to discuss a Phase II project. I presume it will be by phone, but I might be able to entice him to come to Ann Arbor.

By copy of this email to Don, I am asking if he is available for a meeting then.

Let me know as soon as possible from your end if this will work. I put it on my book pending confirmation from you, Don, and Tom.

Bill

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**STATE OF MICHIGAN
IN THE 46TH JUDICIAL CIRCUIT
COUNTY OF OTSEGO**

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, et al.

Plaintiffs,

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,

Case No.: 09-12933-CE

Hon. Dennis F. Murphy

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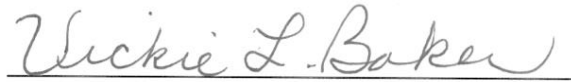
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Vickie L. Baker states that she is an employee of Warner Norcross & Judd LLP, and that on August 19, 2011, she served a copy of Intervening Plaintiffs' Response to Defendant's

Motion for Relief From Order Under MRC 2.612(C)(1)(c) and Affidavit of W. Joseph Jarecki on Pamela J. Stevenson, William M. Schlecte, and Harry Ingleson II by electronic mail and by first-class mail, at their addresses listed above.


Vickie L. Baker

1649042