

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

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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.<sup>1</sup> Golden Lotus carelessly makes allegations of misrepresentation based on two writings prepared by Joseph Jarecki, a member of the Pigeon River County Association. One was a report on a meeting in which Mr. Jarecki recounted what Golden Lotus had presented as its proposal for impoundment drawdown and options for dam removal. The second was a personal sketch Mr. Jarecki presented at a confidential settlement meeting after Intervening Plaintiffs had served their Motion for Clarification. 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.

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<sup>1</sup> 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.

## 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. 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.)<sup>2</sup> A claim of misrepresentation presented under MCR 2.612 must be proven with the same “clear and convincing evidence.” *Triplett v St Amour*, 444 Mich 170, 209; 507 NW2d 194, 211 (1993). (“[A] party seeking equitable relief from a judgment [under 2.612] based on fraud must offer clear and convincing proof. . . .”)

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 Joseph 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 12, 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

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<sup>2</sup> 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”).

confer” session regarding 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.)<sup>3</sup>

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 pilings after removal of all dam structures.<sup>4</sup> 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

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<sup>3</sup> 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.

<sup>4</sup> Mr. Jarecki’s ideas were for naught; Golden Lotus rejected further consideration of the suggestions made at the March 17 meeting, and Intervening Plaintiffs filed their Motion.

Country Association about its interpretation of the requirements of the Interim 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 at all relevant times to Golden Lotus during proceedings 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. *Smith v Pontiac Citizens Loan & Ins Co*, 294 Mich 312; 293 NW2d 661 (1940) (refusing relief where attorney could have but failed to raise the objections at trial). 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); *Brown v Libbey-Owens-Ford Co*, 166 Mich App 213, 217; 420 NW2d 106, 108 (1987) (reconsideration denied even though defendants' new position was correct); *Charbeneau v Wayne County General Hosp*, 158 Mich App 730, 733; 405 NW2d 151, 153 (1987) (new legal theory).

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 a few days earlier of an "Interim Evaluation of Drawdown and Dam Removal Options." (Exhibit D to Memorandum in Support of Intervening Plaintiffs')

initial motion; 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 were not then aware that Golden Lotus' plan would leave those structures in place. 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. (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, and 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 evaluate 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. 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. (See Exhibits D and E to Intervening Plaintiffs' Motion to Clarify.) 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. 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 12, 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.<sup>5</sup>

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 properly 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, he did have his own subjective understanding of the Interim Order 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 never expressed any different interpretation and his innocuous report about what Golden Lotus presented at an early-

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<sup>5</sup> 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 away. The purpose of the emergency spillway is to carry away water in the event of a flood if the dam were blocked so the water would not overtop the road.

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.

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