

STATE OF MICHIGAN  
MECOSTA COUNTY CIRCUIT COURT

MICHIGAN CITIZENS FOR WATER  
CONSERVATION, a Michigan nonprofit  
corporation; R.J. DOYLE AND BARBARA  
DOYLE, husband and wife; and JEFFREY R.  
SAPP AND SHELLY M. SAPP, husband and  
wife,

Plaintiffs,

Case N<sup>o</sup>: 01-14563-CE

v

NESTLÉ WATERS NORTH AMERICA INC., a  
Delaware corporation; and DONALD PATRICK  
BOLLMAN AND NANCY GALE BOLLMAN,  
husband and wife, a/k/a Pat Bollman  
Enterprises,

Defendants.

Hon. Susan Hennigan Grant  
By Assignment

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**PLAINTIFFS' MOTION AND BRIEF TO STRIKE  
EXPERT WITNESS DR. ROBERT A. MUSSETTER**

May 1, 2009

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Plaintiffs, through their counsel, request that this Court strike Defendant's expert witness Dr. Robert A. Mussetter as set out in the following motion and brief in support:

### MOTION

1. In this Court's Scheduling Conference Order, the parties were to exchange expert reports on January 15, 2009. **Ex 1** (Order, 10-1-08)

2. This Court apparently based the January 15, 2009 deadline on counsels' agreement on that date for mutual exchange of expert reports. **Ex 2** (Status/Scheduling Conference, 9-30-08 transcript, pp 49-51.)

3. On February 18, 2009, this Court modified the Scheduling Order because the parties stipulated that:

2. It became apparent during depositions of Plaintiffs' and Defendants' experts on February 11, 2009 that some expert reports had been or were going to be supplemented, therefore requiring additional time to review and continue the depositions;

3. Each expert witness needs a full and fair opportunity to formulate expert opinions, and needs the opportunity to know and respond to the expert opinions of his/her opposition experts. **Ex 3** (Fourth Stipulated Order, 2-18-09).

4. The above contemplated that the experts that had already completed their initial reports were to be the same experts that would supplement their reports (para 2) and would respond to the opposition experts (para 3).

5. The Order reflected that the experts would exchange supplementary reports on March 1, 2009 and rebuttal reports on March 27, 2009. **Ex 3** (Fourth Stipulated Order).

6. The parties then stipulated to the Fifth Stipulated Order to modify the expert rebuttal report deadline to April 10, 2009. **Ex 4** (Fifth Stipulated Order, 3-27-09).

7. The parties then stipulated to the Sixth Stipulated Order to modify the expert rebuttal report deadline to April 20, 2009. **Ex 5** (Sixth Stipulated Order, 4-09-09).

8. On April 20, 2009, at 9:56 P.M., Defendant's counsel emailed the expert report of Dr. Robert A. Mussetter to Plaintiffs' counsel. **Ex 6** (Email, DeVries to Olson, 4-20-09 9:56 p.m.).

9. At no time prior to April 20, 2009 did Defendant's counsel disclose to Plaintiffs' counsel that Defendant would attempt to present Dr. Robert A. Mussetter as an expert witness.

10. On January 22, 2009, Plaintiffs asked the following interrogatory:

**Discovery Request 7. - Interrogatory**

Please identify the following:

a. The name, address and qualifications of each expert whom you expect to or may call as an expert witness at the hearing schedule for March 2009 of this case;

b. The subject matter on which the expert is expected to testify;

c. In particular, the substance of the facts and opinions to which the expert is expected to testify; and

d. A summary of the grounds for each opinion.

11. Defendant's response did not name Dr. Robert A. Mussetter. **Ex 7** (Nestlé Response, 2-19-09, pp 14-16).

12. Defendant never supplemented its response as required by the Michigan Court Rules.

13. Dr. Robert A. Mussetter's report is not rebuttal testimony, but is direct testimony.

14. Dr. Robert A. Mussetter's report offers direct opinion on: a) stage discharge of Dead Stream, and b) the reason that the mud flats in front of the Doyle's property have been more exposed since Defendant began pumping.

15. In addition, Judge Root ruled on stage discharge analysis and the Court of Appeals affirmed his findings so the stage discharge relationship cannot be retried at this hearing.

16. Defendant's inclusion of Dr. Robert A. Mussetter's opinion on the mud flats came about because Defendant's plan to have Dr. William Taylor testify on the mudflat creation was foiled when Dr. Taylor admitted he was not qualified to testify to its creation.

**Request for Relief**

Plaintiffs request that this Court strike Dr. Robert A. Mussetter's report, exclude him from testifying in any manner, and exclude all other of Defendant's expert witnesses from testifying to, referring to, or relying upon Dr. Robert A. Mussetter's report.

## **BRIEF IN SUPPORT**

Defendant never disclosed the existence of its proposed expert, Dr. Robert A. Mussetter although all of the scheduling orders indicated that expert witness reports would be exchanged on a date certain, and those expert witnesses would have the opportunity to offer rebuttal to their opposing counterparts. Defendant also failed to supplement its response to Plaintiffs' request to disclose all expert witnesses in violation of the Michigan Court Rules. Finally, Defendant's inclusion of Dr. Robert A. Mussetter is nothing more than a surprise expert witness who Defendants hope will be allowed to provide direct testimony to issues already ruled upon by this Court. Plaintiffs request that this Court strike Dr. Robert A. Mussetter's report, exclude him from testifying in any manner, and exclude all other of Defendant's expert witnesses from testifying to, referring to, or relying upon Dr. Robert A. Mussetter's report.

### **1. Defendant Failed to Follow the Scheduling Order**

As set out in Plaintiffs' Motion, the parties agreed to exchange expert witness reports on a date certain. They then allowed supplementation of those reports and an opportunity for each expert to rebut his or her opposing expert. This was a stipulated order and signed by this Court. There was no stipulation concerning additional experts. All expert reports were to be disclosed in the initial mutual exchange of reports. **Exs 8 & 9** (Second and Third Stipulated Orders).

On April 20, 2009, Defendant delivered Dr. Robert A. Mussetter's "rebuttal" report to Plaintiffs' counsel. Defendant did not exchange his report during the initial mutual exchange of expert reports as required by the stipulated orders. The parties' stipulations limited the expert witnesses to those included in the initial mutual exchange of expert reports. Defendant has attempted to offer Dr. Robert A. Mussetter as an expert witness under the guise of rebuttal, but his opinions could and should have been exchanged in an initial expert report. Plaintiffs experts are left without the "full and fair opportunity to formulate expert opinions, and [] the opportunity to know and respond to the expert opinions of his/her opposition experts." **Ex 3** (Fourth Stipulated Order).

## 2. Defendant Failed to Follow the Michigan Court Rules

On January 22, 2009, Plaintiffs sought discovery of Defendant's expert witnesses through a request for interrogatories. On February 19, 2009, Defendant responded with its list of expert witnesses. Ex 7 (Nestlé Response). Defendant's listed certain experts and upon mutual exchange of expert reports did exchange reports from those experts. Defendants never disclosed Dr. Robert A. Mussetter as an expert.

The Michigan Court Rules require that a party supplement its discovery response with regard to expert witnesses. MCR 2.302(E)(1)(a)(ii).

(a) A party is under a duty seasonably to supplement the response with respect to a question directly addressed to

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(ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony. MCR 2.302(E)(1)(a)(ii).

When a party fails to properly supplement, a "court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, *in particular*, MCR 2.313(B)(2)(b)." MCR 2.302(E)(2) (emphasis added). MCR 2.313(B)(2)(b) provides for "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence..." This Court should exclude Dr. Robert A. Mussetter's expert report, his testimony, any reference to his report, and any other expert from testifying to the issues included in his report.

Defendant had a duty to supplement Plaintiffs' discovery request, but failed to do so. Plaintiffs do not know how long Defendant has had Dr. Robert A. Mussetter on retainer, but the report indicates that he visited the site on March 25, 2009. That date occurred over a month after Defendant's disclosure of its experts in its response to Plaintiffs' discovery request. It also occurred nearly a month prior to Defendant's disclosure of Dr. Robert A. Mussetter through its April 20, 2009 delivery of his report.

MCR 2.302(E)(1)(a)(ii) requires that a party "seasonably" supplement its discovery response. The Court Rules do not define "seasonably," but the *Mich Court Rules Practice* indicates that the

term generally means “timely under all the facts and circumstances.” Longhoffer, *Mich Court Rules Practice*, § 2302.24, pp 223. Defendant obviously knew that it had hired a new expert no later than March 25, 2009, and likely sometime prior to that. It did not disclose the existence of this expert, the subject matter of his testimony, or the substance of his testimony until April 20, 2009. Under the facts and circumstances of this case, Defendant should have disclosed the existence of Dr. Robert A. Mussetter well before April 20. Over the past months, the parties’ experts have developed their opinions, reviewed their opposing counterparts’ opinions, and offered rebuttal to those opinions. Plaintiffs have faithfully followed the scheduling orders and the court rules in doing so all the while with the understanding that the parties’ experts were developing their opinions for testimony at the hearing. At no time did Plaintiffs have any indication that Defendant would offer a new expert under the guise of rebuttal.

The *Mich Court Rules Practice* discusses the proper sanction for violation which includes barring the use of expert evidence. Longhoffer, *Mich Court Rules Practice*, § 2302.25, pp 224-225. In fact, the Court of Appeals has reversed, for abuse of discretion, a trial court’s allowance of expert evidence or testimony when a party violates the supplementation rule. In *Morinelli v Provident Life & Accident Ins Co*, the Court of Appeals reversed the trial court’s decision to allow testimony from an expert when the party had not supplemented its discovery response. 242 Mich App 255, 264-66; 617 NW2d 777 (2000).

It is within the trial court’s discretion to sanction a party for violating discovery rules. Likewise, a trial court’s decision to admit evidence is reviewed for an abuse of discretion. We find that the trial court abused its discretion in allowing Dr. LaFleur to testify.... *Id.* at 265-66.

In addition to Defendant’s plain violation of the Court Rules and the scheduling orders, Plaintiffs have been prejudiced by Defendant’s failure to properly disclose the existence of Dr. Robert A. Mussetter. First, Plaintiffs’ experts have worked diligently in formulating their opinions and responding to Defendant’s other experts over the last months with the understanding that these would be the experts and opinions for the hearing. Defendant has now injected a new expert into the mix with complete surprise to Plaintiffs. Second, the parties agreed to a certain order of expert

report exchange and then both agreed to prevent any further expert work. In order to address Dr. Robert A. Mussetter's expert report, Plaintiffs experts would be forced to review his report and attachments, and then formulate opinions. This would undoubtedly trigger another round of multiple depositions.<sup>1</sup> In addition, it is not clear that the scheduling order would even allow Plaintiffs' experts to respond.

### **3. Dr. Robert A. Mussetter's Report is Not Rebuttal**

Dr. Robert A. Mussetter's Report addresses the stage-discharge relationship of the Deadstream and the mud flats at the Doyle's property. Neither of these issues are rebuttal.

#### **a. Stage-Discharge Analysis**

The first eleven pages of Dr. Robert A. Mussetter's report deal with the stage-discharge relationship of the Dead Stream and argue that Plaintiffs' expert Dr. Hyndman is incorrect. **Ex 10**, pp 3-14 (Mussetter Report, 4-16-09). The stage-discharge relationship of the Dead Stream is the major hydrologic issue tried before Judge Root and Judge Root found that Plaintiffs' experts were correct in their analysis. **Ex 11**, p 14 (Judge Root Opinion). Judge Root analyzed all of the variables that Dr. Robert A. Mussetter analyzed (beaver dams, Gilbert Creek, Osprey Lake, etc). **Ex 11**, pp 16-22 (Judge Root Opinion). Based on the 19 days of evidence and consideration of all of the variables, he concluded the following:

After listening and seeing all the evidence, I am convinced that Dr. Hyndman's assessment of the hydrological impacts to Dead Stream's stage and flow is correct, or at least is more accurate than Dr. Andrews'. This includes his approach to computer modeling, the utility of the data to date, and his opinions regarding recharge and base flow as just addressed. Other considerations also support the stated conclusion, such as Dr. Hyndman's criticism of Dr. Andrew' use of the "closed-basin model" Andrews created, Dr. Andrews' rigid adherence to his model and discounting of the data that conflicts with it along with other credibility considerations I have already referred to.

The bottom line on this hydrological analysis of Dead Stream is that the Court accepts Dr. Hyndman's calculation that Dead Stream's stage, or surface level, will drop by approximately two inches as the

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<sup>1</sup>Defendant has taken the deposition of each of Plaintiffs' expert witnesses three times.

result of Nestle pumping at 400 gpm above and beyond the effects on Dead Stream Resulting from the may variables noted above. This is substantially greater than Dr. Andrews' calculation that Dead Stream's stage loss at 400 gpm would be around one half of one inch, but I have stated my reasoning for accepting the higher figure.

Also, Dead Stream will lose flow of 345 gpm at a pump rate of 400 gpm, a figure first calculated by Dr. Andrews and then accepted by Dr. Hyndman. The defense made much over the fact that this figure is different from, and greater than, any loss calculated by Dr. Hyndman's models, a point effectively replied to by Dr. Hyndman as he repeated that his models were not designed to balance all elements of this extremely complex ecosystem. His models were designed to analyze components of the system with as few variables as possible, which he satisfactorily explained as the best use of models in situations such as this one, particularly when much data is available. Dr. Hyndman accepted Dr. Andrews' model's calculated loss of 345 gpm as such seemed reasonable, a conclusion I agree with.

As such, Dead stream will lose from its base flow 28.75 percent of that flow to Nestle's 400 gpm pump rate (345 divided by 1200= 28.75).

These hydrologic effects on Dead Stream can be used to estimate effects at different pump rates by simple arithmetic calculations. For example, with the pump rate at the time of trial being at or near 200 gpm, Dead Stream's stage was down by about one inch and its flow loss was near 15 percent. Ex 11, pp 22 (Judge Root Opinion).

The Court of Appeals affirmed Judge Root's findings of fact on the stage-discharge relationship in the Dead Stream. *Mich Citizens for Water Conservation v Nestle Waters North America*, 269 Mich App 25, 45-46; 709 NW2d 174 (2005).

Defendant's use of Dr. Robert A. Mussetter's expert report on the stage-discharge relationship for the Dead Stream is nothing more than an attempt to re-argue and reverse Judge Root's findings of fact and the Court of Appeals' affirmance.<sup>2</sup> In addition, his testimony is barred by collateral estoppel and res judicata. There is no question that Defendant could have hired Dr. Robert A. Mussetter to present this very same argument at trial. It is simply a re-argument of Dr. Andrews' trial opinions.

Furthermore, Dr. Robert A. Mussetter's expert report is actually direct testimony and not rebuttal. He is simply offering his analysis of the stage-discharge relationship of Dead Stream.

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<sup>2</sup>As will become evident through Plaintiffs' other motions and the hearing, Defendants are intent on re-trying this case and reversing all of Judge Root's findings of fact and rulings.

**b. Mudflat Analysis**

Dr. Robert A. Mussetter's report also attempts to address the mud flats in front of Plaintiff Doyles' residence. Ex 10, pp 14. (Mussetter Report). Again, Judge Root ruled on this issue. In addition, Defendant's use of Dr. Robert A. Mussetter as "rebuttal" is actually an attempt to rehabilitate their argument on this issue after Dr. William Taylor admitted he did not have the expertise to testify concerning the mud flats.

Judge Root found that the loss of stage (level) in the Dead Stream would have significant impacts to areas including the mud flats:

As for the loss of Dead Stream stage, two inches may not seem like a lot, but remember the nature of the stream. It is already a low-flow stream with many shallows that is subject to many natural variables. Loss of two inches depth beyond the natural forces acting on it is a substantial loss. The mud flats at Doyles' is an isolated, if obvious, example of the effect of even less than a two inch drop in this system. The stream's already limited navigability would be compromised, as would its marginal fishery. Regarding navigability, my own experience in canoeing the entire length of the Dead Stream indicated that there are areas of the stream that are so shallow that very little decrease in water depth would result in even canoes not being able to traverse areas they now and, in the past, could, beaver dams notwithstanding.

There were disputes at the trial regarding whether average flows or low flows are the times at which to assess impacts. I find that it is low flow periods in which most of the harms to the

system will occur. Hydrologists may use other standards, but in assessing impacts in the ecosystem, low flows are the ones that need to be looked at. Whether a change is or is not substantial to a hydrologist does not control whether the impact is or is not substantial in the ecosystem, the sciences being different. At times high flows do become important to the ecosystem, but it must be remembered that the changes here are beyond the natural cycles, except for times when a large precipitation event or the spring melt causes the effects to be overwhelmed temporarily.

Thus, the principal harmful impacts on Dead Stream will be in the effects of reduced flow on stream temperature and nutrients, the narrowing of the physical channel and the physical lowering of the stage of the stream resulting in the exposure of areas that are naturally under water. These all affect the stream's nature as a fishery as well as impair recreational navigation and the aesthetics of the area. Ex 11, pp 32-33 (Judge Root Opinion).

Again, Defendant's use of Dr. Robert A. Mussetter's expert report on the mud flats at Plaintiff Doyles is nothing more than an attempt to re-argue and reverse Judge Root's findings of fact and the Court of Appeals' affirmance. In addition, his testimony is barred by collateral estoppel and res judicata. There is no question that Defendant could have hired Dr. Robert A. Mussetter to present this very same argument at trial. It is simply a re-argument of Defendants' other experts trial opinions.

In addition, Defendant's injection of Dr. Robert A. Mussetter as a "rebuttal" witness is designed to rehabilitate Dr. William Taylor's testimony regarding the mud flats. Dr. Taylor's initial expert report made the very same argument concerning the mud flats. **Ex 12**, p 8 (Taylor Report, 2-02-09). However, during his deposition, Dr. Taylor admitted that he is not an expert in hydrology or hydrogeology.

Q So in your CV you have "Specialization," and it says -- let me correct myself. It says, "Specialization and areas of interest." It says:

"Fisheries ecology, population dynamics, and management. Inter-jurisdictional fishery resource policy and governance from a local to global perspective. Understanding the structure and dynamics of global fishery systems."

So that's what you hold yourself out as an expert in?

A Yes.

Q Anything else?

A No. **Ex 13**, p 11 (Taylor Dep Transcript, 2-18-09).

Later in his deposition, Dr. Taylor admitted that he is not an expert. "I am not an expert on the physical processes other than the very generic, water – faster water hits slower water." **Ex 13**, p 57 (Taylor Dep Transcript).

So, after Dr. Taylor's admission that he is not an expert qualified to testify to the mud flat creation, Defendant found a new expert to testify to the issue. Dr. Robert A. Mussetter's report is not rebuttal, but is rehabilitation.

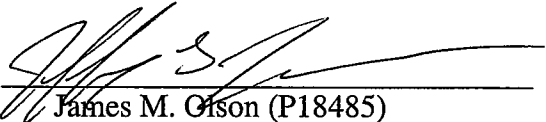
**REQUEST FOR RELIEF**

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