

STATE OF MICHIGAN

COURT OF APPEALS

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,
Appellees/Cross-Appellants,

COA Docket N^o: 254202

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation,
Appellant/Cross-Appellee,

Mecosta County Circuit Court
Case N^o: 01-14563-CE
Hon. Lawrence C. Root, Circuit Judge

and DONALD PATRICK BOLLMAN AND NANCY
GALE BOLLMAN, husband and wife, a/k/a Pat
Bollman Enterprises,
Defendants-Appellees.

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,
Appellees,

COA Docket N^o: 256153

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation,
Appellant,

Mecosta County Circuit Court
Case N^o: 01-14563-CE
Hon. Lawrence C. Root, Circuit Judge

and DONALD PATRICK BOLLMAN AND NANCY
GALE BOLLMAN, husband and wife, a/k/a Pat
Bollman Enterprises,
Defendants-Appellees.

**PLAINTIFFS-APPELLEES' MOTION FOR MODIFICATION OF STAY
TO TERMINATE OR REDUCE PUMPING**

July 29, 2005

Plaintiffs-Appellees Michigan Citizens for Water Conservation, by and through its undersigned attorneys of record, move this Court to enter an order terminating or modifying the Stay Order of this Court, dated December 16, 2003, on the following grounds:

1. Plaintiffs-Appellees request this Court pursuant to MCR 7.209(D) and MCR 7.216(A)(7) to terminate or modify the stay issued by the Court of Appeals on December 16, 2003, in COA Docket No. 252717 (**Ex 1**). For the reasons described below, the basis or justification for Nestlé's stay no longer exist. If the stay is not terminated or pumping reduced, significant and irreparable alteration and harm to private riparian rights and the stream/lake/wetlands complex will continue to occur.

2. The Trial Court issued a detailed Opinion and Judgment/Order ("Opinion"), November 25, 2003, finding unlawful diminishment of the flow and level of the stream and related natural resources in violation of the Plaintiffs' common law water rights, and finding unlawful impairment contrary to the Michigan Environmental Protection Act (now Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* ("MEPA"). Due to the variability and complexity of the stream/lake/wetlands/spring complex and its vulnerability to continuous high-capacity pumping, the Trial Court ordered Nestlé to stop pumping. Opinion, pp. 49, 50-60, 65.¹

3. Nestlé filed a motion for stay of the Opinion on December 5, 2003. The Trial Court denied the motion. It reasoned that its findings of fact and law were carefully detailed and sound, that Nestlé had assumed the risks of the injunction, and that Nestlé failed to plead or prove at trial that it had no alternative water sources or alternatives to its marketing decision to bottle "spring water". **Ex 2, Bench Opinion Regarding Stay Request, December 12, 2003**, pp. 39-49.

¹ The Opinion and Order/Judgement is part of the record on appeal and has also been made part of the Defendant-Appellant's Appendix, **Ex 25**. Because this Motion seeks only to terminate or modify the Stay Order, Plaintiff-Appellees have not re-argued the issues underlying the above-captioned appeal concerning the detailed findings and conclusions of the Trial Court's Opinion. Both Defendant-Appellant Nestlé and Plaintiffs-Appellees have filed appellate briefs and appendices; the Court heard oral arguments on June 14, 2005.

4. Nestlé filed its Motion for Stay pending appeal on December 15, 2003 in COA Docket No. 252717 (**Ex 3**), along with an emergency application for leave to appeal and motion for immediate consideration. Nestlé sought to overturn the Trial Court's refusal to grant a stay of its order that Nestlé must cease pumping at the Sanctuary Springs well-field.

5. Nestlé's motion for stay was based on assertions that (a) its pumping rates, which were 160-170 gpm at that time, would not cause environmental and/or ecological damage even up to 250 gpm, and (b) Nestlé would have to lay off employees if pumping ceased. **Ex 3**, paragraphs 16-20, pp. 3-5.

6. The Court of Appeals' Panel assigned to consider Nestlé's emergency request for stay had less than 24 hours to consider the extraordinarily voluminous and complex record. The COA's December 16 Stay Order modified the Trial Court's Order by allowing Nestlé to pump at a rate of 250 gallons per minute (gpm) on a monthly average. **Ex1**. The COA Stay Order was issued without explanation. Presumably, it was based on the assertions of temporarily higher flows and levels of water in the stream and lakes/wetlands complex and threatened lay-offs of employees just before the December Holidays. Even if these conditions may have at that time justified the Stay, they no longer exist.

7. The asserted bases for Nestlé's Stay have changed, and the Stay is no longer justified for several reasons. First, the seasonal low flows in the Summer and into the Fall together with increased levels of pumping have increased diminishment of flows and level and accelerated impacts to the stream. **Ex 4, Affidavit of Dr. David Hyndman**, paragraphs 2-3, Table 1. Second, the effects of pumping on the level of the stream appear to be double the effects found unlawful in the Trial Court's Opinion. **Ex 4, Affidavit of Dr. David Hyndman**, paragraphs 3-5. Third, without conceding or waiving claims regarding its lawfulness, Nestlé has other available water sources to continue operating its plant. Fourth, Nestlé constructed and operated the well-field, pipeline, and plant with full knowledge of the business risks posed by this litigation.

8. Over the last three months, pumping at varying rates under the current stay (monthly average of 250 gpm) has resulted in, and will continue to result in, major, if not devastating, irreparable effects and impacts to the Dead Stream and related water resources of the State, which form the very subject matter of this appeal. **Ex 4**, Paragraphs 3-5, Fig. 1 and Table 2.

9. After a hearing on June 19, 2001, the Trial Court denied a request for preliminary injunction against the construction of the plant because the plant was separate from the well field and water rights issues. However, the Trial Court expressly cautioned Nestlé that it proceeded with construction of the plant at its own risk, and that Plaintiffs would not be deprived of their claims regarding the water rights and environmental impairment in connection with the high-capacity wells, pumping, and diversion from the Sanctuary Springs. **Ex 5, Hearing Transcript, Plaintiffs' Motion for Order to Show Cause Why a Preliminary Injunction Should Not Issue, June 19, 2001**, pp. 9-11.² Defendant Nestlé constructed and operated the Sanctuary well-field, 11-mile pipeline, and packaging or bottling plant, and began marketing "spring water" with full knowledge that it proceeded at its own risk.

10. The combined effects of Nestlé's continued pumping under the Stay, including pumping rates of over 300 gpm for long periods of time, seasonal low flows and levels, and the intricate direct hydraulic relationship between the spring aquifer, stream, and wetlands has seriously reduced the flows and levels of the stream and related water bodies. The stream has been and will be irreparably altered by even greater impacts than were sufficient grounds for the Trial Court to require an immediate halt to pumping. **Ex 4, Affidavit of Dr. Hyndman**, paragraphs 6-9.

11. Pumping under the Stay Order has seriously altered levels and resulted in significant areas of exposed bottom lands or narrowing of the stream width. **Ex 6, Affidavit of Shelly Sapp**.

² After that hearing the trial court continued to warn Nestlé that it proceeded at its own risk because at the end of the day, the trial court might decide that Nestlé does not have the lawful right to pump water from the springs and shut the operation down. Opinion, Nov. 25, 2003, pp. 4, 49-50.

12. Accordingly, immediate termination or modification of this Court's Stay is required (Plaintiffs-Appellees have filed a Motion for Immediate Consideration) to preserve the status quo and minimize or prevent further serious and irreparable impacts pending the completion of this appeal. **Ex 4**, paragraphs 6-9.

13. Specifically, pumping should be either stopped or significantly reduced from the currently allowed 250 gpm when either the measured flow drops below 1250 or 1300 gpm or the measured level at the SG-Doyle staff gauge reaches 960.2 feet. **Ex 4**, Table 1³ and paragraphs 1, 2, 9. This should be based on the measurements at these locations from the previous week. *Id.* The SG-Doyle Staff Gauge and M-20 Bridge locations can be found on the locator map. See **Defendant Nestlé's Trial Ex Aa** (item 16), attached to this Motion as **Ex 7**.

14. Without conceding or admitting its lawfulness or validity, as noted at the outset, Nestlé has other alternatives or access to other water sources, including a well or wells at the site of the Stanwood Plant, from which it can pump or transport water to the Stanwood plant.

15. Nestlé's chief manager responsible for Michigan operations testified at trial that Nestlé would not pump if significant adverse impacts resulted, even if it meant curtailing production or cutting jobs. **Ex 8, Trial Transcript**, Vol. XIV, Part 1, pp. 124-128, 130-132, 134-139, 143, 144, 147.

16. No one, including Nestlé, should in fact, law, equity, or good conscience, continue pumping and diverting water out of the watershed for purposes of private sale, given the clear adverse impacts and condition of the stream, lakes, and related water resources.

³ Table 1 demonstrates the relationship between base flows, pumping rates, and the percentage reduction or diminishment of flow as the direct result of pumping. **Ex 4**, paragraphs 1 and 2. As can be seen, as the base flow approaches 1250, pumping drives the flow and level much lower. Low flows, typical for Summer and early Fall, coupled with pumping, removes as much 17 to 32 percent of the flow of the stream, at a time when it needs it the most. **Ex 4, Table 1**.

WHEREFORE, Plaintiffs-Appellees request this Court pursuant to MCR to issue an order that requires Defendant-Appellant Nestlé to cease or reduce pumping, pending completion of this appeal, as follows:

a. When stream flows drop to 1300 gpm, pumping should be reduced to 100 gpm, if that does not alleviate the impacts during the next week or the stream flow at M-20 Bridge crossing just above Doyles drops below 1200 gpm, then pumping should stop;

b. When stream level at SG-Doyle drops to 960.2, pumping should be reduced to 100 gpm; if that does not alleviate the impacts during the next week or the water level in the stream at that point drops to 960.1, then pumping should stop.

c. Plaintiffs-Appellees request that this Court grant such further relief as is just and necessary pursuant to MCR 7.216(A)(7) to prevent or minimize further diminishment or impairment of the Dead Stream, wetlands, and lakes or related water and natural resources in violation of private riparian property interests and the paramount interest of the public in the water and natural resources. Mich Const. 1963, Art. 4, Sec. 52.; Michigan Environmental Protection Act (now Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* (“MEPA”).

d. Plaintiffs-Appellees further request costs and fees as authorized by law.

Respectfully submitted,

OLSON, BZDOK & HOWARD, P.C.
Attorneys for Plaintiffs-Appellees

Date: July 29, 2005

By: _____
James M. Olson (P18485)
Scott W. Howard (P52028)