

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, AND THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES, No. 1:20-cv-528
HON. PAUL L. MALONEY

Plaintiffs,

v

LEE MUELLER; BOYCE MICHIGAN, LLC;
EDENVILLE HYDRO PROPERTY, LLC;
BOYCE HYDRO POWER LLC; BOYCE
HYDRO, LLC; WD BOYCE TRUST 2350; WD
BOYCE TRUST 3649; AND WD BOYCE
TRUST 3650,

Defendants.

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**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION UNDER RULE 55(B)(2)
FOR DEFAULT JUDGMENT AGAINST LEE MUELLER AND FINAL
DECLARATORY RELIEF AGAINST THE REMAINING DEFENDANTS**

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CONCISE STATEMENT OF ISSUES PRESENTED

1. The Court defaulted Lee Mueller as a sanction and declined to set that default aside. Evidence already in the record shows that Mr. Mueller is responsible for at least \$119,825,000 in civil fines and damages. Should the court enter default judgment in that amount?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: *Pope v. United States*, 323 U.S. 1, 12 (1944).

INTRODUCTION

The motion seeks a default judgment in the amount of \$119,825,000 against Lee Mueller. That is the amount that can be shown simply with the evidence that is already in the record. To be sure, Mr. Mueller caused more damage than that. If Plaintiffs were to present proofs in an evidentiary hearing, they could show that Mr. Mueller is responsible for even higher civil fines and even more natural resource damage, not to mention emergency response costs and enforcement expenses. But Plaintiffs recognize that investing more of their time, or the Court's time, into further increasing that figure will likely not result in any greater return to the people of the State of Michigan. It is well-established that the Court can issue the default judgment against Mr. Mueller based on record evidence without conducting an evidentiary hearing to gather additional evidence. That is the appropriate thing to do in this circumstance. The Court should also issue final declaratory relief against the other defendants in this case.

STATEMENT OF FACTS

The Edenville Dam was technically owned by Lee Mueller's family trust and operated by the Boyce Hydro entities. But Mr. Mueller "exercised unilateral control over those entities." (ECF No. 58, PageID.2523, ¶ 17.) It was Mr. Mueller who "made the decision not to perform repairs and maintenance and otherwise failed to ensure the safety of the dam." (*Id.* at ¶ 18.) It is because of Mr. Mueller's decisions

that Plaintiffs and the public experienced massive property and natural resources damages when the Edenville Dam failed on May 19, 2020. (*Id.*)

Following the dam's failure and Plaintiffs' filing of this enforcement suit against Mr. Mueller, the Court deemed it established fact in this case that Mr. Mueller helped prepare "statements that were not true" regarding his management of the dam as "part of a coordinated effort to deflect blame away from the Muellers and their family business, and onto the State of Michigan." (ECF No. 156, PageID.4743, referring to established fact #3.)

Later, after Mr. Mueller disregarded at least "six" of this Court's directives and engaged in conduct that rose "to the level of willfulness," the Court defaulted Mr. Mueller as a sanction of "last resort." (ECF No. 225, PageID.6024–6025.) The default also applied to Edenville Hydro Property, LLC. The answer of both Mr. Mueller and Edenville Hydro Property, LLC was stricken and Plaintiffs' allegations against them are deemed admitted.¹ (ECF No. 225, PageID.6030.)

After this lawsuit was filed, Mr. Mueller lost control of his family trust and the Boyce Entities when two of the entities filed for bankruptcy protection, and all the entities passed to a liquidating trustee. The default, therefore, did not extend to the remaining entity defendants in this case. Plaintiffs filed a motion for summary

¹ Defendant Edenville Hydro Property, LLC's attorney withdrew following the default. But the LLC's registered agent is the liquidating trustee who runs the other Entity Defendants, Scott Wolfson, who is the same person who has already appeared in this case. Thus, even though Mr. Wolfson decided not to speak for Edenville Hydro Property, LLC, as the registered agent of the LLC, he will still receive the notice of this motion required by Rule 55(b)(2) through the ECF filing system.

judgment against the remaining Boyce Hydro entities. The Boyce Hydro entities did not respond with any evidence to counter the evidence presented by Plaintiffs. The Court granted Plaintiffs' motion on October 6, 2023. (ECF No. 263, PageID.7140.) The Court held that "Plaintiffs brought sufficient evidence to show that Defendants knew of its dam's vulnerability and that Defendants did not make EGLE aware of that vulnerability. Defendants do not dispute either assertion." (ECF No. 263, PageID.7145.) The Court noted that as far back as November 29, 2011, the Defendants even "designed a sheet pile cutoff wall to address the problem and reinforce the dam." (*Id.*) And that cutoff wall "more likely than not" would "have prevented the failure" of the Edenville Dam. (ECF No. 263, PageID.7143.) But the Defendants never "implemented" it. (ECF No. 263, PageID.7145.) As Mr. Mueller acknowledged under oath, Boyce Hydro "absolutely" could have installed the cutoff wall. (ECF No. 248-1, PageID.6538–6539.)

ARGUMENT

I. The Court should enter a default judgment against Lee Mueller and Edenville Hydro Property, LLC.

Even as far back as 1944, it was already "a familiar practice and an exercise of judicial power for a court upon default . . . by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly." *Pope v. United States*, 323 U.S. 1, 12 (1944). The court rules have not disturbed that familiar practice. They continue to give courts the discretion to decide whether they need additional evidence before issuing a default

judgment. Fed. R. Civ. P. 55(b)(2). And a court's decision to issue a default judgment without first holding an evidentiary hearing is reviewed only for abuse of discretion. *Vesligaj v. Peterson*, 331 F. App'x 351, 355 (6th Cir. 2009).

In this case, there are sufficient "facts of record" for the Court to perform the necessary "computation" without a hearing "to fix the amount which [Plaintiffs are] lawfully entitled to recover and to give judgment accordingly." *Pope v. United States*, 323 U.S. at 12. Because Lee Mueller has been defaulted, Plaintiffs' allegations against him are admitted and he is liable for Plaintiffs' claims. *Nat'l Satellite Sports, Inc. v. Mosley Ent. Inc.*, No. 01-cv-74510-DT, 2002 WL 1303039, at *3 (E.D. Mich. May 21, 2002), citing *Dundee Cement Co. v. Howard Pipe & Concrete Prod., Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983).

A. Part 31

Plaintiffs alleged claims under Part 31 of the Michigan Natural Resources and Environmental Protection Act against both Mr. Mueller and Edenville Hydro Property, LLC. (ECF No. 58, Page ID.2546, ¶¶ 101–104.)² Under that part, a person cannot "fill or grade or permit the filling or grading [of] . . . a floodplain, stream bed, or channel of a stream" without a permit. Mich. Comp. Laws § 324.3108(1). The record contains sworn statements from Bethany Matousek and Joy Brooks who both visited the area of the dam failure on various dates to observe

² Plaintiffs' complaint seeks civil fines and damages against Mr. Mueller, but not Edenville Hydro Property, LLC, because Plaintiffs at the time understood the confirmed bankruptcy plan to forbid seeking monetary relief against Edenville Hydro Property, LLC.

the impacts of dam failure, visiting as late as June 30, 2020. (ECF No. 248-12, PageID.6687; ECF No. 248-13, PageID.6698.) They observed massive amounts of devastation because of the garbage and sediment that filled floodplains and stream beds after the May 19, 2020 dam failure.

Part 31 authorizes a fine up to \$25,000 per day of violation. Mich. Comp. Laws § 324.3115(1)(a). If offering proofs at trial, Plaintiffs could show should that Defendants violated Part 31 for months, if not years. But for the purposes of this motion and relying only on the evidence already in the record, the evidence shows that Defendants violated Part 31 at least from May 19, 2020, the day of the dam failure, to June 30, 2020, the final day Ms. Matousek documented observing Part 31 violations. That is 43 days. At \$25,000 per day, that is \$1,075,000 in civil fines for Part 31 violations.

B. Part 301

Plaintiffs alleged claims under Part 301 of the Michigan Natural Resources and Environmental Protection Act against both Mr. Mueller and Edenville Hydro Property, LLC. (ECF No. 58, Page ID.2546, ¶¶ 105–110.) Under Part 301, a person without a permit cannot “create, enlarge, or diminish an inland lake or stream.” Mich. Comp. Laws § 324.30102(1)(d). Nor can a person, without a permit, deposit material on bottomlands. Mich. Comp. Laws § 324.30102(a). Mr. Mueller is responsible for both in two different lakes. (ECF No. 58, PageID.2546, ¶¶ 105–108.) This constitutes at least four violations of Part 301: the diminishment of Wixom

Lake and the fill of Wixom Lake bottomlands; and the diminishment of Sanford Lake and the fill of Sanford Lake bottomlands.

Part 301 authorizes a fine up to \$5,000 per day, per violation. Mich. Comp. Laws § 324.30112(2). If offering proofs at trial, Plaintiffs could show that Defendants violated Part 301 for months, if not years. But for the purposes of this motion and relying only on the evidence already in the record, the evidence shows that Defendants violated Part 301 at least from May 19, 2020, the day of the dam failure, to June 30, 2020, the final day Ms. Matousek documented observing the Part 301 violations. (ECF No. 248-12, PageID.6687; ECF No. 248-13, PageID.6698.) That is 43 days. At \$5,000 per day per violation, that is \$20,000 per day, or \$860,000 in civil fines for Part 301 violations.

C. Part 303

Plaintiffs alleged claims under Part 303 of the Michigan Natural Resources and Environmental Protection Act against both Mr. Mueller and Edenville Hydro Property, LLC. (ECF No. 58, Page ID.2547, ¶¶ 111–115.) Part 303 prohibits, without a permit, either draining a wetland or depositing fill in a wetland. Mich. Comp. Laws §§ 324.30304(a) & (d). Mr. Mueller is responsible for both. (ECF No. 58, PageID.2530, ¶ 42.) That is at least two violations of Part 303.

Part 303 authorizes a fine up to \$10,000 per day, per violation. Mich. Comp. Laws § 324.30316(1). If offering proofs at trial, Plaintiffs could likely show that Defendants violated Part 303 for months, if not years, and in more than two ways. But for the purposes of this motion and relying only on the evidence already in the

record, the evidence shows that Defendants violated Part 303 at least from May 19, 2020, the day of the dam failure, to June 30, 2020, the final day Ms. Matousek documented observing the Part 303 violations. (ECF No. 248-12, PageID.6687; ECF No. 248-13, PageID.6698.) That is 43 days. At \$10,000 per day per violation, that is \$20,000 per day, or \$860,000 in civil fines for Part 303 violations.

D. Part 315

Plaintiffs alleged claims under Part 315 of the Michigan Natural Resources and Environmental Protection Act against both Mr. Mueller and Edenville Hydro Property, LLC. (ECF No. 58, Page ID.2548, ¶¶ 116–119.) Under Part 315, Mr. Mueller was required to “advise [EGLE] and the affected offsite public authorities and safety agencies of any . . . unusual or alarming circumstances or occurrence existing or anticipated that may affect the safety of the” Edenville Dam. Mich. Comp. Laws § 234.31520(1). As the Court already concluded, Mr. Mueller believed as early as 2010 that the part of the dam that eventually failed was too narrow and could fail, and he worked to develop a plan by 2011 to build a cutoff wall to address the problem—he just never implemented the plan. (ECF No. 263, PageID.7145.) Nor did he notify EGLE of the alarming circumstance. (*Id.*)

Part 315 authorizes a fine up to \$10,000 per day, per violation. Mich. Comp. Laws § 324.31525(3). Even though Mr. Mueller knew about the problem and kept it from regulatory agencies for many years, the Edenville Dam did not fall under EGLE’s jurisdiction until September 25, 2018. (ECF No. 58, PageID.2530, ¶ 42.) From that date until May 19, 2020, the day of the dam failure, is 603 days that Mr.

Mueller knew of an alarming circumstance that could affect the safety of the Edenville Dam and did not notify EGLE. At \$10,000 per day, that is a civil fine of \$6,030,000.

E. Natural Resource Damages—Conversion

Plaintiffs allege a conversion claim against Mr. Mueller. (ECF No. 58, Page ID.2548, ¶¶ 120–127.) Under Michigan law, the State of Michigan owns the aquatic life killed by the failure of the Edenville Dam. Mich. Comp. Laws §§ 324.48702(1), 324.40105. The deaths “were caused by Mr. Mueller’s malfeasance.” (ECF No. 58, PageID.2548, ¶¶ 120–127.) Mr. Mueller is liable for converting the State’s property. (*Id.*) The record evidence shows that Mr. Mueller caused at least \$21,000,000 in damage to the State’s fisheries (ECF No. 248-9, PageID.6635), and at least \$90,000,000 in damages to the freshwater mussel ecosystem (ECF No. 248-9, PageID.6667). Combined, that is at least \$111,000,000 in natural resource damages for Plaintiffs’ conversion claims.

II. The Court can now enter final judgment against all Defendants.

The Court noted that it needed to wait to determine if summary judgment would be granted against the other Defendants in this case before issuing a default judgment against Mr. Mueller. (ECF No. 225, PageID.6029.) Now that the Court has concluded that Plaintiffs are entitled to judgment against the other Defendants (ECF No. 263, PageID.7140), it can both issue a default judgment against Mr.

Mueller and Edenville Hydro Property, LLC, and issue final declaratory relief against the remaining Defendants in this case.

CONCLUSION AND RELIEF REQUESTED

There are three groups of Defendants in this case: the entity defendants against whom the Court granted summary judgment; Edenville Hydro Property, LLC; and Lee Mueller. Plaintiffs respectfully request that the Court enter a final judgment against each of those defendants as follows:

1. The entity defendants against whom the Court granted summary judgment are Boyce Michigan, LLC, Boyce Hydro Power, LLC, Boyce Hydro, LLC, WD Boyce Trust 2350, WD Boyce Trust 3649, and WD Boyce Trust 3650. Plaintiffs request that the Court issue a final judgment against those defendants declaring that their decisions led to the failure of the Edenville Dam and the violation of Parts 17, 31, 301, and 315 of Michigan's Natural Resources and Environmental Protection Act.

2. The liquidating trustee is the registered agent for Edenville Hydro Property, LLC but did not speak for it in this case. The Court defaulted Edenville Hydro Property LLC, which means it is liable for Plaintiffs' claims against it. Plaintiffs sought relief against that LLC that is consistent with the relief it sought against the other entity defendants because they believed that is what the confirmed bankruptcy plan required: declaratory relief, and not monetary relief. Accordingly, Plaintiffs request that the Court enter a default judgment against Edenville Hydro Property, LLC declaring that it violated Parts 17, 31, 301, 303, and

315 of Michigan’s Natural Resources and Environmental Protection Act, which are the claims Plaintiffs alleged in their complaint.

3. The Court has defaulted Lee Mueller. As explained above, Plaintiffs respectfully request that it now issue a default judgment against Lee Mueller as follows:

Part 31 Civil Fines	\$ 1,075,000
Part 301 Civil Fines	\$ 860,000
Part 303 Civil Fines	\$ 860,000
Part 315 Civil Fines	\$ 6,030,000
Natural Resource Damages—Conversion	\$111,000,000
Total	\$119,825,000

Plaintiffs also request any other relief the Court considers appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by LCivR 7.2(b)(ii), the number of words in this brief as defined by LCivR 7.2(b)(i) is 2,436. The brief was prepared using Microsoft Word for Office 365.

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