

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO EX REL.
WAYNE T. DONER, ET AL.,

Relators,

v.

SEAN D. LOGAN, DIRECTOR
OHIO DEPARTMENT OF
NATURAL RESOURCES, ET AL.,

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

**RELATORS' MOTION FOR AN ORDER FOR HYDROSPHERE ENGINEERING TO
SHOW CAUSE WHY IT SHOULD NOT BE HELD IN CONTEMPT**

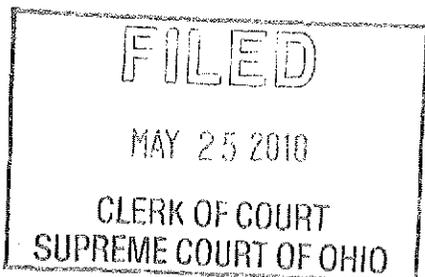
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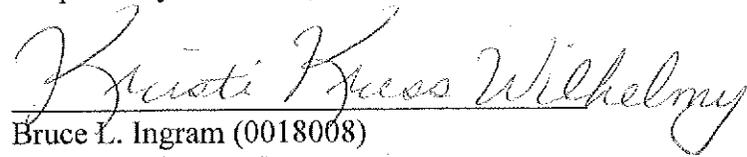
Attorneys for Respondents



Relators, by and through counsel, respectfully move this Court to order Hydrosphere Engineering (“Hydrosphere”), to show cause why it should not be held in contempt for failing to obey this Court’s subpoena, issued pursuant to Rule 45 of the Ohio Rules of Civil Procedure, ordering a corporate representative to attend a deposition and produce documents prior to the deposition. Relators further request that this Court order Hydrosphere to produce documents responsive to the subpoena and listed in the attached privilege log – but wrongfully withheld under the guise of attorney client privilege and work product – at a time and place chosen by Relators, and to reimburse Relators the expenses incurred as a result of Hydrosphere’s failure to comply with this Court’s subpoena. Alternatively, Relators move this Court to order Stantec to produce the responsive documents to this Court for an in camera inspection. Because the June 1, 2010 deadline for the submission of evidence is quickly approaching, Relators also request that should this Court order Hydrosphere to produce certain documents and those documents prove to be relevant to the credibility of Respondents’ expert, that Relators be granted leave to supplement Relators’ Presentation of Evidence.

The grounds for this motion are more particularly set forth in the Memorandum in Support submitted herewith.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Respondents are at it again. They did not want Relators to have the opportunity to submit rebuttal evidence to the flawed reports of Respondents' experts. This Court denied that obfuscation. Respondents did not want Relators to have the opportunity to submit evidence of the flooding of their property in March, 2010 by the actions of Respondents. This Court denied that obfuscation attempt as well. Now in concert with its testifying experts, Respondents are at it again trying to hide what must be information materially damaging to its position in this action. Thus, despite the fast-approaching deadline for the submission of evidence, Relators have no choice but to seek this Court's assistance in obtaining the compliance of Hydrosphere Engineering ("Hydrosphere") with a valid subpoena served upon Hydrosphere by Relators.

Specifically, Hydrosphere and Respondents have failed to produce certain documents and communications responsive to the subpoena, claiming, via Respondents' counsel, the Ohio Attorney General's Office, that the items are protected from disclosure under several theories including the attorney client privilege, work product doctrine, and the consulting expert exception. Hydrosphere and Respondents have wrongfully refused disclosure of such documents because: 1) Rule 26(B)(5) provides for the disclosure of all materials given to and reviewed by a testifying expert, including trial preparation materials, opinion work product, and privileged materials; and 2) Hydrosphere and Respondents have failed to identify a clear line of demarcation between Hydrosphere's purported roles as consulting expert verses testifying expert. Accordingly, this Court should order Hydrosphere to produce documents responsive to the subpoena and listed in the attached privilege log with great haste, and to reimburse Relators the expenses incurred as a result of Hydrosphere's failure to comply with this Court's subpoena.

II. STATEMENT OF FACTS

On March 1, 2010, Respondents produced an Affidavit of Philip De Groot, Ph.D., to which Dr. De Groot attached two reports prepared by his company Hydrosphere.¹ On April 24, 2010, by express mail service, Relators served a subpoena upon Hydrosphere. *See* Notice of Filing Subpoena to Hydrosphere Engineering at 4, attached as Ex. 1. That subpoena commanded Hydrosphere to present a corporate representative for deposition on April 29, 2010, at 12:00 p.m. and produce documents at or before the deposition. *Id.* at Ex. A.

Hydrosphere did not object to the subpoena, and on April 29, 2010, Hydrosphere presented corporate representative Philip De Groot, Ph.D for deposition. During Dr. De Groot's deposition, it quickly became apparent that despite the Relators' clear requests for the production of certain documents set forth in the subpoena, Hydrosphere did not produce several categories of responsive documents. Counsel for Relators reiterated Relators' requests for certain documents during the deposition. Dep. of Philip De Groot at 13:13-6; 15:5-16:23; 19:13-23; 72:5-23; 75:12-76:7; 137:9-19, attached as Ex. 2.

In follow-up, on May 2, 2010, counsel for Relators sent written correspondence to counsel for Respondents again seeking production of the seven categories of documents which Hydrosphere failed to produce in response to the subpoena: 1) Hydrosphere's contract with the Ohio Department of Natural Resources ("ODNR"); 2) Stantec Consulting Corporation's ("Stantec") preliminary report which Dr. De Groot testified that Hydrosphere received; 3) Hydrosphere's emails related to Dr. De Groot's expert testimony and review of Stantec's work; 4) Hydrosphere's invoice; 5) Relators' affidavits/"complaints" which Hydrosphere received either from the ODNR or Stantec; 6) the FEMA.pdf files ODNR provided to Hydrosphere; and

¹ For purposes of this motion, Hydrosphere and Dr. De Groot are one and the same.

7) the Stantec HEC-IIMS & RAS CD Dr. Groot testified Hydrosphere received.

Correspondence dated May 2, 2010, attached as Ex. 3-A to Aff. of Thomas H. Fusonie.²

Counsel for Relators reminded counsel for Respondents that all of these documents were responsive to the subpoena served on Hydrosphere on April 24, 2010, and that Hydrosphere did not object to that subpoena. *Id.* Counsel for Relators' demanded production of these responsive documents by May 7, 2010. *Id.*

On May 7, 2010, counsel for Respondents informed counsel for Relators that Hydrosphere would be unable to comply with the document request by the May 7th deadline, but stated that they were "working" on a response. Correspondence dated May 7, 2010, attached as Ex. 3-B.

A week later, on May 14, 2010, counsel for Respondents sent correspondence informing counsel for Relators that responsive documents would be produced "early" the following week, but asserted that certain documents were protected work product. Correspondence dated May 14, 2010, attached as Ex. 3-C at 5. Counsel claimed that although Hydrosphere (through Dr. De Groot) was a "testifying expert," Hydrosphere would not produce documents upon which Dr. De Groot did not rely and would not produce documents already in Relators' possession. *Id.*

That same day, counsel for Relators responded, reiterating that Relators served Hydrosphere with a valid subpoena for Hydrosphere's files, which included the complaint and Relator affidavits, and that Hydrosphere did not object to the subpoena or the production of such documents. Correspondence dated May 14, 2010, attached as Ex. 3-C at 4-5. Relators also stated they were not aware of any authority which would permit a party to withhold a portion of an expert's files because the other party already has a copy of some of the documents, and that in

² The Affidavit of Thomas H. Fusonie is attached hereto as Ex. 3.

fact, ODNR has taken the exact opposite position in ODNR v. Baucher, Case No. 08-CIV-250, currently pending in the Mercer County Court of Common Pleas. *Id.* Likewise, Relators noted they were not aware of any authority which would permit a party to refuse to turn over portions of an expert's files because the expert did not rely on that portion in preparing his affidavit or report, and that ODNR has taken the opposite approach in ODNR v. Baucher (Mercer County C.C.P Case No. 08-CIV-250), ODNR v. Linn (Mercer County C.C.P Case No. 08-CIV-251), ODNR v. Minch (Mercer County C.C.P Case No. 08-CIV-252), ODNR v. Post (Mercer County C.C.P Case No. 08-CIV-253), and ODNR v. Zumberge (Mercer County C.C.P Case No. 08-CIV-254), all cases pending before the Mercer County Court of Common Pleas. *Id.* Indeed, the absence of reliance on portions of an expert's files is certainly information likely to lead to the discovery of admissible evidence. *Id.* Relators demanded production of the documents by May 18, 2010, or Relators would be forced to seek the assistance of this Court. *Id.*

On May 18, 2010, counsel for Respondents produced a few documents responsive to the subpoena, but withheld numerous emails on the basis of attorney client privilege and/or attorney work product. Correspondence dated May 18, 2010, attached as Ex. 3-C at 2-3. Notably, Hydrosphere's production did not include: 1) Hydrosphere's contract with ODNR; 2) Stantec's preliminary report which Dr. De Groot testified that Hydrosphere received; 3) Hydrosphere's emails related to Dr. De Groot's expert testimony and review of Stantec's work; 4) Hydrosphere's invoice; and 5) the Stantec HEC-HMS & RAS CD Dr. Groot testified Hydrosphere received. *Id.*

That same day, counsel for Relators responded, pointing out Hydrosphere's failure to produce the above-listed five categories of requested documents and again reiterating that Respondents' decision to withhold communications Dr. De Groot had with Respondents on the

basis of attorney work product or attorney client privilege, despite no objection by Hydrosphere to the subpoena, lacked merit. Correspondence dated May 18, 2010, attached as Ex. 3-C at 1-2. In a last-ditch effort to avoid involving the Court, Relators gave Hydrosphere until the end of business on May 19, 2010, to produce the requested communications. *Id.*

On May 19, 2010, counsel for Respondents responded by producing two items which were allegedly inadvertently omitted from production: 1) a redacted copy of Hydrosphere's contract in which Respondents redacted the entire "Scope of Work" section of the contract; and 2) the invoice for Hydrosphere's services. Correspondence dated May 19, 2010, attached as Ex. 3-C at 1; Personal Services Agreement at 1, attached as Ex. 3-D. Respondents also produced a single, short email chain with a heavily redacted attachment, a memorandum from Hydrosphere dated Feb. 23, 2010, regarding comments about the hydrologic model developed for Grand Lake St. Mary's. Correspondence dated May 19, 2010, attached as Ex. 3-C at 1; Hydrosphere Comments, attached as Ex. 3-E. Respondents claimed the redacted portions were protected from discovery as attorney work product. Correspondence dated May 19, 2010, attached as Ex. 3-C at 1. Respondents refused to provide a copy of the Stantec preliminary report and the Stantec HEC-HMS & RAS CD on the basis that Dr. De Groot purportedly did not rely on these documents in forming his opinion, despite the fact that Dr. De Groot testified that he received a copy of both documents. *Id.* Further, Respondents claimed that Hydrosphere was a consulting expert, that as such the communications between Hydrosphere and Respondents were protected by the attorney client privilege and work product doctrines, and thus for this additional reason Hydrosphere would not be producing the responsive documents. *Id.*

True to Respondents' word, Hydrosphere failed to produce the requested documents by the end of business on May 19, 2010. Respondents also never provided Relators with any authority to support the nondisclosure of such documents.

III. LAW AND ARGUMENT

A. **Ohio Civil Rule 45 Requires A Third Party To Comply With A Subpoena In The Absence Of A Proper Objection, Motion To Quash, Or Other Adequate Excuse.**

A party to a civil action may subpoena a third party to "produce documents, electronically stored information, or tangible things at a ... deposition." *See* Ohio Civ. R. 45(A)(1)(b)(ii). The subpoenaed party may object to or move to quash the subpoena pursuant to Ohio Civ. R. 45(C)(2)(b). Otherwise, unless the subpoenaed party has an "adequate excuse," failure to obey the subpoena may be deemed contempt of court. *See* Ohio Civ. R. 45(E). Indeed, the failure to move to quash or modify the subpoena constitutes waiver of any privilege. *Gannett v. Booher* (6th Dist. 1983), 12 Ohio App.3d 49, 55.

Hydrosphere has refused to comply with Relators' subpoena, yet has not objected to or moved to quash the subpoena. Nor has Hydrosphere's counsel or counsel for Respondents provided any authority to support Hydrosphere's failure to produce the requested documents. Because Hydrosphere has failed to object to or otherwise move to quash the subpoena, and such failure constitutes waiver of any privilege, Hydrosphere should be ordered to immediately produce the documents identified in the subpoena.

B. All Materials Reviewed By Hydrosphere, Including Hydrosphere's Agreement With Respondents And All Communications With Respondents Are Discoverable.

Hydrosphere cannot withhold from discovery its agreement with Respondents or the communications it had with Respondents on the basis of attorney work product, attorney client privilege, or dual status as a "consulting" expert.

1. Anything received, reviewed, read, or authored by Hydrosphere, before or in connection with the forming of its opinion, must be disclosed.

Ohio Rule of Civil Procedure 26(B)(5) provides for the disclosure, if requested by the opposing party, of all materials given to and reviewed by a testifying expert, including trial preparation materials, opinion work product, and privileged materials. Ohio Rule of Civil Procedure 26(B)(5)(b) provides in pertinent part:

[A] party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given to the other party or those to be given on direct examination at trial.

Ohio R. Civ. P. 26(B)(5)(b) (emphasis added). While the Ohio Rules of Civil Procedure also provide protection from discovery for work product materials, *see* Ohio R. Civ. P. 26(B)(3), the rule explicitly states that this protection is "[s]ubject to the provisions of subdivision (B)(5)" Though Ohio case law interpreting the relationship between these two provisions has yet to be developed, case law interpreting analogous rules from other states as well as case law interpreting the Federal Rules of Civil Procedure require the conclusion that because the rules permit a party to discover from the expert "facts known or opinions held" by the expert,

including the “grounds therefor”, a party is entitled to the discovery of all documents the expert reviewed in forming its opinions.

In this regard, the manner in which Missouri courts have interpreted their Rules of Civil Procedure, which are similar to the Ohio Rules of Civil Procedure, is particularly instructive. Like the Ohio Rules, while opinion work product is protected from discovery, it is subject to the provisions regarding expert discovery. Compare Ohio R. Civ. P. 26(B)(3) and Ohio R. Civ. P. 26(B)(5) with Mo. R. Civ. P. 56.01(b)(3) and Mo. R. Civ. P. 56.01(b)(4). Like Ohio Rule 26(b)(5), Missouri Rule 56.01(b)(4) provides for discovery of “facts known and opinion held” by experts retained for litigation once they have been designated as trial witnesses. *Edwards v. Mo. State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 27 (Mo. Ct. App. 2002) (citing *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 834 (Mo. banc 2000)). Missouri courts have interpreted these rules to “require an expert to produce at deposition the materials that the expert has reviewed in order that the opposing attorney be able to intelligently cross-examine the expert concerning what facts he used to formulate his opinion.” *Id.* (citing *Tracy*, 30 S.W.3d at 835) (quotation omitted). In other words, “Rule 56.01(b)(4) provides a ‘bright line’ rule that all material given to and reviewed by a testifying expert must, if requested, be disclosed[.]” including “both trial preparation materials and opinion work product.” *Id.*

Likewise, the analogous Federal Rules have been interpreted as providing a similar bright line rule: a party is required to disclose “all data and information considered by testifying experts, including that otherwise privileged.” *Euclid Chem. Co. v. Vector Corrosion Tech., Inc.*, No. 1:05 CV 80, 2007 WL 1560277, at *3 (N.D. Ohio May 29, 2007) (citing *Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 715-16 (6th Cir. 2006)). Indeed, the overwhelming majority of courts follow this approach and mandate disclosure of all documents, including attorney work

product, given to testifying experts. *Reg'l Airport Auth.*, 460 F.3d at 717 (noting that “the ‘overwhelming majority’ of courts . . . mandate[e] disclosure of all documents, including attorney opinion work product, given to testifying experts”).

This duty to disclose “prevails with equal force over claims of attorney-client, work product, and common interest privilege.” *Id.* (citing *Bitler Inv. Venture II, LLC v. Marathon Ashland Petroleum LLC*, No. 1:04-CV-477, 2007 WL 465444, at *3 (N.D. Ind. Feb. 7, 2007)). Thus, “whether any privilege otherwise attaches to the documents at issue makes no difference” because the rule is clear: “[i]f a testifying expert ‘considered’ a document in forming his opinion, then it must be produced.” *Id.* “Considered” is broadly defined to include “anything received, reviewed, read, or authored by the expert, before or in connection with the forming of his opinion, if the subject matter relates to the facts or opinions expressed.” *Id.* at *4 (footnotes omitted). “All ambiguities must be resolved in favor of discovery.” *Id.*

For testifying experts, “[e]verything the expert so receives is discoverable, regardless of privilege and regardless of whether the expert found the data or information helpful in forming the opinion.” *Id.* (citation omitted). *See also In re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 248 F.R.D. 532, 537 (N.D. Ohio 2008) (“Materials reviewed or generated by an expert must be disclosed, regardless of whether the expert actually relies on the material as a basis for his or her opinions.”) (quotation omitted). “If the expert maintains a file relating to his engagement, everything in that file is discoverable.” *Id.* “‘Marching orders’ from counsel are discoverable” as well as are “[d]ata or information received from a non-testifying expert . . .” *Id.* (footnotes omitted).

The reasoning behind this approach is simple. “Once an expert sees information . . . that information becomes part of the expert’s mental database, and the opposing party is entitled to

test how, if at all, knowing that information may have influenced the expert's opinion." *MVB Mortg. Corp. v. Fed. Deposit Ins. Corp.*, No. 2:08-cv-771, 2010 WL 582641, at *4 (S.D. Ohio Feb. 11, 2010).

Under this bright line rule, Hydrosphere cannot withhold an unredacted copy of the agreement between Hydrosphere and Respondents. On May 19, 2010, nearly three weeks after Hydrosphere's deposition, Respondents, in concert with Hydrosphere, finally produced a copy of its agreement with Respondents but redacted the entire scope of work section of the agreement. Correspondence dated May 19, 2010, attached as Ex. 3-C at 1 & Personal Services Agreement at 1, attached as Ex. 3-D. According to the forgoing authorities, and contrary to Respondents' position, the agreement, including the scope of work section, is not protected work product. Moreover, counsel for Relators specifically asked Hydrosphere's representative, Dr. De Groot, during the deposition about the scope of Hydrosphere's work in this case. De Groot Dep. at 82:5-18. Respondents did not object to this line of questioning. *Id.* Dr. De Groot then described the scope of Hydrosphere's work as "the review of the work by Pressley Campbell" and working with Stantec on Stantec's data and modeling. *Id.* Based on Dr. De Groot's testimony, Respondents and Hydrosphere have no basis to withhold the portion of the Personal Services Agreement that describes the scope of Hydrosphere's work.

Likewise, as the foregoing authorities hold, communications between Hydrosphere and Respondents are not protected by any privilege. Whether Hydrosphere relied on the documents and emails is irrelevant; once Hydrosphere saw the materials and information, it became part of the expert's mental database. Under the bright line rule of Rule 26, these communications and materials must be disclosed.

2. Hydrosphere's role as a consulting expert does not save from discovery Hydrosphere's agreement with Respondents or its communications with Respondents.

Similarly, Hydrosphere's agreement with Respondents and Hydrosphere's communications with Respondents are not protected from discovery by Hydrosphere's purported role as a "consulting" expert. When an expert serves as both a litigation consultant and a testifying witness, in many cases, "the party relinquishes the privilege that would otherwise attach to the litigation consultant's work." *In re Commercial Money Ctr., Inc.*, 248 F.R.D. at 537. In such circumstances, "an expert's proponent still may assert a privilege over such materials, but only over those materials generated or considered uniquely in the expert's role as consultant." *Id.*

Relators do not bear the burden of establishing that the requested communications and documents are related to the subject matter of Hydrosphere's report and not to Hydrosphere's role as a consultant. Rather, it is well-settled that the party asserting a privilege bears the burden of establishing it. *Id.* at 539 (citing *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002)). Moreover, in light of the purpose behind Rule 26's "disclosure requirement—to allow parties to reveal weaknesses in expert testimony offered by an adversary, the scope of the privilege must be narrowly construed against the expert's proponent." *Id.* at 538 (quotation omitted).

While here Respondents argue that disclosure of documents reviewed by a consulting expert is protected, the Ohio Attorney General took the opposite position in *Wilson v. Wilkinson*, No. 2:04-cv-00918 (S.D. Ohio May 19, 2006), attached hereto as Ex. 4. In *Wilson*, the Attorney General sought an order compelling the disclosure of certain documents by and compelling the testimony on certain issues of plaintiff's expert. *Id.* at 1. Plaintiff claimed that plaintiff's expert

served a dual role: a consulting expert and testifying expert. *Id.* at 2. Plaintiff argued that the expert's communications with counsel prior to June 2005 (i.e., the point at which plaintiff's expert was retained as a testifying expert) constituted protected attorney work product, and that, before conducting the requested discovery, the Attorney General must establish exceptional circumstances requiring the discovery of such information. *Id.* Plaintiff also argued that in any event, its litigation strategy or/and mental impressions were protected work product and not discoverable. *Id.* at 2-3.

The Court rejected the plaintiff's arguments and concluded that neither the "exceptional circumstances" of Federal Rule of Civil Procedure 26(b)(4), nor the work product doctrine of Federal Rule of Civil Procedure 26(b)(3) apply to a consulting expert who has been designated as an expert witness, particularly where . . . his role as a consultant is closely intertwined with his role and opinions as a testifying expert." *Id.* at 9. The Court noted that "[t]hough it is theoretically possible to distinguish between an expert testifying and consulting, in practice, "the delineation between those roles . . . become[s] blurred" when an expert "review[s] documents in his role as an expert that he previously had reviewed in his role as consultant [.]" *Id.* (citing *Schwab v. Philip Morris USA, Inc.*, No. No. 04-CV-1945 (JBW), 2006 WL 721368, at *3 (E.D.N.Y. March 20, 2006); *B.C.F. Oil Ref., Inc. v. Consol. Edison Co.*, 171 F.R.D. 57, 61 (S.D.N.Y. 1997)). Additionally, "any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery." *Id.* (quoting *B.C.F. Oil Ref.*, 171 F.R.D. at 62). The Court reasoned that it was "impossible to clearly delineate [the expert's] service as a consultant from his service as a [testifying] expert witness" and indeed "appear[ed] to have consulted with plaintiff's counsel on the very same issues for which he has now been retained." *Id.* at 5.

Additionally, and consistent with the authorities discussed in § III.B.1, the Court refused to limit the discovery to exclude counsel’s mental impressions and trial strategy. *Id.* at 6. The Court adopted the position that “any material generated by the testifying expert in connection with the subject litigation” and “all communications by the expert to the attorneys was discoverable.” *Id.* at 6 (quotation omitted). *See also id.* at 7 (“Rule 26 . . . require[es] disclosure of material ‘considered,’” and thus “allows discovery of all communications between counsel and a retained testifying expert, even if those communications contain the attorneys’ mental impressions or trial strategy or is otherwise protected by the work product privilege.”)

Here, in light of the privilege log produced by Respondents, it is impossible to clearly delineate Hydrosphere’s service as a consultant from Hydrosphere’s service as a testifying expert witness. Respondents simply described the purportedly protected documents as “emails” and did not bother to identify which emails were exchanged with Hydrosphere personnel in its role as a consultant. *See generally* Respondents’ Privilege Log, attached as Ex. 3-F. **And interestingly, the majority of these emails were exchanged near the time Dr. De Groot executed his affidavit and near the time Dr. De Groot was deposed.** *Id.* Moreover, Respondents redacted the entire scope of work section of the agreement between Hydrosphere and Respondents; Respondents did not even attempt to delineate Hydrosphere’s work as a consultant verses its work as a testifying expert. Personal Services Agreement at 1, attached as Ex. 3-D. Likewise, Hydrosphere’s invoice makes no effort to distinguish between work done on a consulting basis verses work done as a testifying witness. Hydrosphere Invoice, attached as Ex. 3-G. Indeed, the subject of the entire invoice is “Invoice for consulting engineering services”, but the individual time sheets reveal the work was directed at the preparation of an expert report and Dr. De Groot’s affidavit. *Id.* All the facts indicate that Hydrosphere’s role as a consultant is closely

intertwined with its role and opinions as a testifying expert. As such, Respondents have relinquished the privilege that would otherwise attach to the litigation consultant's work, and thus, these communications must be produced.

Further, it is obvious that Hydrosphere and Respondents are desperate to hide information materially damaging to Respondents' position in this action. Nothing illustrates Respondents' desperation more than Respondents' redaction of the entire scope of services in the Personal Services Agreement – **even though the scope clearly covers Hydrosphere's services as a testifying expert.** Personal Services Agreement at 1, attached as Ex. 3-D.

C. Hydrosphere Should Be Held In Contempt And Ordered To Pay Relators Attorneys' Fees Incurred As A Result Of Its Failure To Comply With The Subpoena.

Ohio Rule of Civil Procedure 45(E) provides that "failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court." Ohio Civ. R. 45(E). Moreover, a "subpoenaed person or that person's attorney who frivolously resists discovery under this rule may be required by the court to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking the discovery." *Id.* Hydrosphere has repeatedly disregarded the subpoena issued under the authority of this Court and adopted positions contrary to the law (and contrary to the position adopted by Respondents in related litigation). Its actions constitute willful impediment to Relators' efforts to obtain full and complete expert discovery. As a result, Relators have incurred otherwise unnecessary attorneys' fees to obtain the subpoenaed documents.

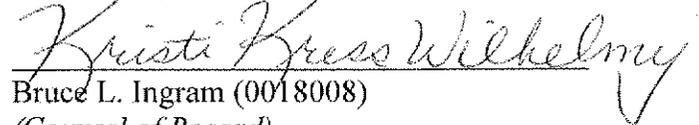
Therefore, Relators moves this Court for an Order requiring Hydrosphere to answer and show cause why it should not be held in contempt of this Court and, upon a failure to show cause, to adjudge it in contempt of this Court for having disregarded the subpoena. Relators

further move this Court to order that Hydrosphere relieve itself of contempt by paying Relators' reasonable attorneys' fees incurred as a result of its failure to comply with the subpoena.

IV. CONCLUSION

For the reasons set forth above, Relators respectfully request that this Court order Hydrosphere to show cause why it should not be held in contempt for failing to obey this Court's subpoena. Relators further move this Court to order Hydrosphere to produce the requested documents at a time and place specified by Relators, and to pay Relators' attorneys' fees incurred as a result of its failure to comply with the subpoena. Alternatively, Relators move this Court to order Hydrosphere to produce the responsive documents to this Court for an in camera inspection. Last, because the June 1, 2010 deadline for the submission of evidence is quickly approaching, Relators also request that should this Court order Hydrosphere to produce certain documents and those documents prove to be relevant to the credibility of Respondents' expert, that Relators be granted leave to supplement Relators' Presentation of Evidence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via U.S. Mail postage prepaid, this 25th day of May, 2010:

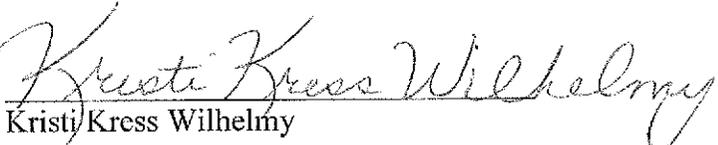
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The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via overnight express delivery postage prepaid, this 25th day of May, 2010:

Hydrosphere Engineering
c/o Phillip H. De Groot
8843 Fair Road
Strongsville, Ohio 44149


Kristi Kress Wilhelmy

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
WAYNE T. DONER, ET AL.,

Relators,

v.

SEAN D. LOGAN, DIRECTOR
OHIO DEPARTMENT OF
NATURAL RESOURCES, ET AL.,

Respondents.

Case No.: 2009-1292

Master Commissioner Campbell

**NOTICE OF FILING OF SUBPOENA
TO HYDROSPHERE ENGINEERING**

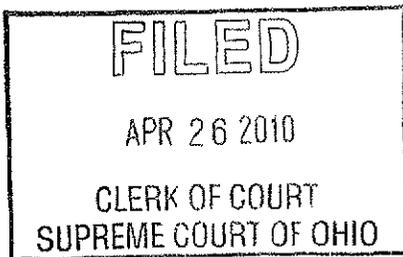
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Attorneys for Respondents



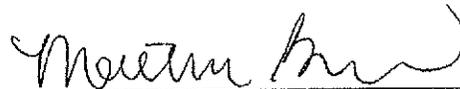
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via electronic mail and U.S. Mail postage prepaid, this 26th day of April, 2010:

William J. Cole
Mindy Worly
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Dale T. Vitale
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2045 Morse Road # D-2
Columbus, Ohio 43229

Attorneys for Respondents



Martha C. Brewer

IN THE SUPREME COURT OF OHIO, 65. S. FRONT STREET, COLUMBUS, OHIO 43215

[[[[[CIVIL CASE SUBPOENA]]]]]

STATE OF OHIO EX REL. WAYNE T. DONER, ET AL.,

Case No. 2009-1292

Relators,

FOR CLERK USE ONLY:

-vs-

Receipt # _____ (cost) (deposit)

SEAN D. LOGAN, DIRECTOR OHIO DEPARTMENT OF NATURAL RESOURCES, ET AL.,

Respondents.

CLERK \$ _____ \$ _____
FR. CO. SHERIFF \$ _____ \$ _____
FOREIGN SHERIFF \$ _____

TO: Hydrosphere Engineering
c/o Philip H. De Groot
8843 Fair Road
Strongsville, Ohio 44149

YOU ARE HEREBY COMMANDED TO:

X ATTEND AND GIVE TESTIMONY AT A (TRIAL) (HEARING) (DEPOSITION) ON THE DATE, TIME AND AT THE PLACE SPECIFIED BELOW.

X ATTEND AND PRODUCE (DOCUMENTS) (TANGIBLE THINGS) AT A (TRIAL) (HEARING) (DEPOSITION) ON THE DATE, TIME AND AT THE PLACE SPECIFIED BELOW.

____ PRODUCE, AND PERMIT INSPECTION AND COPYING, ON THE DATE AND AT THE TIME AND PLACE SPECIFIED BELOW, OF ANY DESIGNATED DOCUMENTS THAT ARE IN YOUR POSSESSION, CUSTODY OR CONTROL.

____ PRODUCE AND PERMIT INSPECTION AND COPYING, TESTING OR SAMPLING, ON THE DATE AND AT THE TIME AND PLACE SPECIFIED BELOW, OF ANY TANGIBLE THINGS THAT ARE IN YOUR POSSESSION, CUSTODY OR CONTROL.

____ PERMIT ENTRY UPON THE FOLLOWING DESCRIBED LAND OR OTHER PROPERTY, FOR THE PURPOSES DESCRIBED IN CIV. R. 34(A)(3), ON THE DATE AND AT THE TIME SPECIFIED BELOW.
DESCRIPTION OF LAND OR OTHER PREMISES : _____

Day Thursday DATE April 29, 2010 TIME 10:00 a.m.

PLACE Vorys Sater Seymour and Pease LLP, 52 E. Gay Street, Columbus, Ohio 43215

DESCRIPTION OF ITEMS TO BE PRODUCED: See Exhibit A attached.

THE STATE OF OHIO

Franklin County, ss:

To the Sheriff of N/A

County, Ohio Greetings :

YOU ARE HEREBY COMMANDED TO SUBPOENA THE ABOVE NAMED PERSON.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 30th DAY OF DECEMBER, 2009.

KRISTINA D. FROST, CLERK OF THE SUPREME COURT OF OHIO

BY: [Signature]
SIGNATURE OF ATTORNEY FOR RELATORS

REQUESTING PARTY INFORMATION

NAME: Martha C. Brewer

Attorney for Relators

ATTORNEY CODE 0083788

TELEPHONE NUMBER: (614) 464-5626

Civil rule 45(c) protection of persons subject to subpoenas

- (1) A PARTY OR AN ATTORNEY RESPONSIBLE FOR THE ISSUANCE AND SERVICE OF A SUBPOENA SHALL TAKE REASONABLE STEPS TO AVOID IMPOSING UNDUE BURDEN OR EXPENSE ON A PERSON SUBJECT TO THAT SUBPOENA.
- (2) (a) A PERSON COMMANDED TO PRODUCE AND PERMIT INSPECTION AND COPYING OR DESIGNATED BOOKS, PAPERS, DOCUMENTS, OR TANGIBLE THINGS, OR INSPECTION OF PREMISES, NEED NOT APPEAR IN PERSON AT THE PLACE OF PRODUCTION OR INSPECTION UNLESS COMMANDED TO APPEAR FOR DEPOSITION, HEARING, OR TRIAL.
- (b) SUBJECT TO DIVISION (D)(2) OF THIS RULE, A PERSON COMMANDED TO PRODUCE AND PERMIT INSPECTION AND COPYING MAY, WITHIN FOURTEEN DAYS AFTER SERVICE OF THE SUBPOENA OR BEFORE THE TIME SPECIFIED FOR COMPLIANCE IF SUCH TIME IS LESS THAN FOURTEEN DAYS AFTER SERVICE, SERVE UPON THE PARTY OR ATTORNEY DESIGNATED IN THE SUBPOENA WRITTEN OBJECTIONS TO INSPECTION AND COPYING OR ANY OR ALL OF THE DESIGNATED MATERIALS OR OF THE PREMISES. IF OBJECTION IS MADE, THE PARTY SERVING THE SUBPOENA SHALL NOT BE ENTITLED TO INSPECT AND COPY THE MATERIALS OR INSPECT THE PREMISES EXCEPT PURSUANT TO AN ORDER OF THE COURT BY WHICH THE SUBPOENA WAS ISSUED. IF OBJECTION HAS BEEN MADE, THE PARTY SERVING THE SUBPOENA, UPON NOTICE TO THE PERSON COMMANDED TO PRODUCE, MAY MOVE AT ANYTIME FOR AN ORDER TO COMPEL THE PRODUCTION. AN ORDER TO COMPEL PRODUCTION SHALL PROTECT ANY PERSON WHOSE IS NOT A PARTY OR AN OFFICER OF A PARTY FROM SIGNIFICANT EXPENSE RESULTING FROM THE INSPECTION AND COPYING COMMANDED.
- (3) ON TIMELY MOTION, THE COURT FROM WHICH THE SUBPOENA WAS ISSUED SHALL QUASH OR MODIFY THE SUBPOENA, OR ORDER APPEARANCE OR PRODUCTION ONLY UNDER SPECIFIED CONDITIONS, IF THE SUBPOENA DOES ANY OF THE FOLLOWING:
 - (a) FAILS TO ALLOW REASONABLE TIME TO COMPLY;
 - (b) REQUIRES DISCLOSURE OF PRIVILEGED OR OTHERWISE PROTECTED MATTER AND NO EXCEPTION OR WAIVER APPLIES;
 - (c) REQUIRES DISCLOSURE OF AN UNRETAINED EXPERT'S OPINION OR INFORMATION NOT DESCRIBING SPECIFIC EVENTS OR OCCURRENCES IN DISPUTE AND RESULTING FROM THE EXPERT'S DUTY MADE NOT AT THE REQUEST OF ANY PARTY;
 - (d) SUBJECTS A PERSON TO UNDUE BURDEN.
- (4) BEFORE FILING A MOTION PURSUANT TO DIVISION (C)(3)(d) OF THIS RULE, A PERSON RESISTING DISCOVERY UNDER THIS RULE SHALL ATTEMPT TO RESOLVE ANY CLAIM OF UNDUE BURDEN THROUGH DISCUSSIONS WITH THE ISSUING ATTORNEY. A MOTION FILED PURSUANT TO DIVISION (C)(3)(d) OF THIS RULE SHALL BE SUPPORTED BY AN AFFIDAVIT OR THE SUBPOENAED PERSON OR A CERTIFICATE OF THAT PERSON'S ATTORNEY OF THE EFFORTS MADE TO RESOLVE ANY CLAIM OF UNDUE BURDEN.
- (5) IN CASES UNDER DIVISION (C)(3)(c) OR (C)(3)(d) OF THIS RULE, THE COURT SHALL QUASH OR MODIFY THE SUBPOENA UNLESS THE PARTY IN WHOSE BEHALF THE SUBPOENA IS ISSUED SHOWS A SUBSTANTIAL NEED FOR THE TESTIMONY OR MATERIAL THAT CANNOT BE OTHERWISE MET WITHOUT UNDUE HARDSHIP AND ASSURES THAT THE PERSON TO WHOM THE SUBPOENA IS ADDRESSED WILL BE REASONABLY COMPENSATED.

Civ. R. 45(D) Duties in responding to subpoena

- (1) A PERSON RESPONDING TO A SUBPOENA TO PRODUCE DOCUMENTS SHALL PRODUCE THEM AS THEY ARE KEPT IN THE USUAL COURSE OF BUSINESS OR SHALL ORGANIZE AND LABEL THEM TO CORRESPOND WITH THE CATEGORIES IN THE DEMAND. A PERSON PRODUCING DOCUMENT PURSUANT TO A SUBPOENA FOR THEM SHALL PERMIT THEIR INSPECTION AND COPYING BY ALL PARTIES PRESENT AT THE TIME AND PLACE SET IN THE SUBPOENA FOR INSPECTION AND COPYING.
- (2) WHEN INFORMATION SUBJECT TO A SUBPOENA IS WITHHELD ON A CLAIM THAT IT IS PRIVILEGED OR SUBJECT TO PROTECTION AS TRIAL PREPARATION MATERIALS, THE CLAIM SHALL BE MADE EXPRESSLY AND SHALL BE SUPPORTED BY A DESCRIPTION OF THE NATURE OF THE DOCUMENTS, COMMUNICATIONS, OR THINGS NOT PRODUCED THAT IS SUFFICIENT TO ENABLE THE DEMANDING PARTY TO CONSENT THE CLAIM.

Civ. R. 45(E) Sanctions

FAILURE BY ANY PERSON WITHOUT ADEQUATE EXCUSE TO OBEY A SUBPOENA SERVED UPON THAT PERSON MAY BE DEEMED A CONTEMPT OF THE COURT FROM WHICH THE SUBPOENA ISSUE. A SUBPOENAED PERSON OR THAT PERSON'S ATTORNEY FRIVOLOUSLY RESISTING DISCOVERY UNDER THIS RULE MAY BE REQUIRED BY THE COURT TO PAY REASONABLE EXPENSES, INCLUDING REASONABLE ATTORNEY'S FEES, OF THE PARTY SEEKING THE DISCOVERY. THE COURT FROM WHICH A SUBPOENA WAS ISSUED MAY IMPOSE UPON A PARTY OR ATTORNEY IN BREACH OF DUTY IMPOSED BY DIVISION (C)(1) OF THIS RULE AN APPROPRIATE SANCTION, WHICH MAY INCLUDE, BUT IS NOT LIMITED TO, LOST EARNINGS AND REASONABLE ATTORNEY'S FEES.

**** RETURN OF SERVICE ****

I RECEIVED THIS SUBPOENA ON April 23, 2010 AND SERVED THE PARTY NAMED ON THE REVERSE HEREOF
BY express mail ON April 24, 2010

I WAS UNABLE TO COMPLETE SERVICE FOR THE FOLLOWING REASON: _____

Sheriff's Fees _____ Malcolm M...
(Signature of Serving Party)

Service _____
Mileage _____
Copy _____
Total _____

Circle One: Deputy Sheriff Attorney
Process Server Deputy Clerk
Other _____

EXHIBIT A

DOCUMENTS TO BE PRODUCED AND TESTIMONY TO BE GIVEN

Relators Wayne T. Doner, *et al.* ("Relators") hereby requests that a corporate representative of Hydrosphere Engineering ("Hydrosphere"), chosen by Hydrosphere to testify as to matters known or available to Hydrosphere. In addition, Hydrosphere shall produce the following documents to counsel for Relators at or before Hydrosphere's deposition on April 29, at 10:00 a.m. and offer testimony on the following areas during that deposition.

Definitions

1. "Documents" means all writings and things of any nature whatsoever, including originals and all non-identical copies and drafts thereof, in your possession, custody or control, regardless of where located, and includes, but is not limited to, contracts, agreements, memoranda, notes, correspondence, letters, electronic mail, telegrams, teletypes, telecopies, transmissions, messages (including, but not limited to, records, reports or memoranda of telephone calls and conversations), reports, studies, summaries, analyses, minutes, diaries, calendars, manuals, brochures, statements, books of account, ledgers, statistical, accounting and financial statements, forecasts, work papers, notebooks, data sheets, computer-stored information which can be retrieved or placed into reasonably usable form, written communications and written evidence of oral communications, and any other "document" from which information can be obtained or translated, if necessary, by you through detection devices into reasonably usable form. In all cases where originals and/or non-identical copies are not available, "documents" also means identical copies of original documents and copies of non-identical copies.

2. A document "relating to", "related to", or that "relates to" a given subject matter means a document or communication that constitutes, embodies, comprises, reflects, identifies, states, refers to, deals with, comments on, responds to, describes, analyzes, contains information concerning, or is in any way pertinent to that subject matter.

3. The term "you" or "your" means Hydrosphere Engineering, and any other companies or entities with which you are associated and/or affiliated, and any employees, agents, representatives, attorneys, accountants, and any other persons or entities representing you and/or directly or indirectly employed by or connected with you.

4. "Respondent" means and refers to the Respondent in this action, the Ohio Department of Natural Resources, and includes any employee, agent, contractor, subcontractor, representative, surveyor, or attorney or other person acting on behalf of the Ohio Department of Natural Resources in this action.

5. "Lawsuit" means the case entitled State of Ohio Ex Rel. Wayne T. Doner, et al. v. Sean D. Logan, Director Ohio Department of Natural Resources, et al., Case No. 2009-1292, currently pending in the Supreme Court of Ohio, and any of the claims, factual allegations, or legal conclusions asserted therein.

6. "Stantec" means Stantec Consulting Corporation and any of its employees, including, but not limited to, Tadd Henson.

7. "Person" or "persons" includes natural persons, departments or agencies, corporations, companies, firms, partnerships, associations, joint ventures, or any other type or form of legal or governmental entity, whether formal or informal.

Instructions

1. If you contend that the contents of a writing herein requested to be produced for inspection and copying are protected from disclosure by virtue of a privilege, it is requested that you nevertheless provide the following with respect to each such writing:

- a. A description of the type of each such writing (e.g. letter, memoranda, etc.);
- b. The date of each such writing;
- c. The author of each such writing;
- d. The person to whom such writing was directed;
- e. The person who received a copy of each such writing; and
- f. The general subject matter of each such writing.

2. With respect to each writing which you claim is protected from disclosure by virtue of a privilege, as provided for in the foregoing instruction, it is requested that you provide as part of such description thereof:

- a. Each privilege whereby you contend the contents of such writing are protected from disclosure; and
- b. Each and every fact upon which you rely to support such claim of privilege.

Documents Requested

1. All documents that reflect, refer, or relate in any way to the Lawsuit.
2. All documents that reflect, refer, or relate in any way to hydrology or hydraulics review and analysis you have performed or rendered to Respondent from January 1, 2005 to the present.
3. In addition to those documents responsive to the foregoing requests, all reports, draft reports, draft documents of any kind, files or notes of any kind, and/or review documents of any kind that in any way reflect, refer, or relate to the Lawsuit or any hydrology or hydraulics review and analysis you have performed or rendered to Respondent from January 1, 2005 to the present.

4. In addition to those documents responsive to the foregoing requests, all notes, correspondence, email, or other documents that reflect, refer, or relate in any way to communications between you and Respondent (including, but not limited to, counsel for Respondent) related to the Lawsuit or any hydrology or hydraulics review and analysis you have performed or rendered to Respondent from January 1, 2005 to the present.

5. In addition to those documents responsive to the foregoing requests, all documents given to Respondent (including, but not limited to, counsel for Respondent) by you or received by you from Respondent (including, but not limited to, counsel for Respondent) that reflect, refer, or relate in any way to communications between you and Respondent (including, but not limited to, counsel for Respondent) related to the Lawsuit or any hydrology or hydraulics review and analysis you have performed or rendered to Respondent from January 1, 2005 to the present.

6. All documents that reflect, refer, or relate in any way to any contracts or agreements between you and Respondent related in any way to the Lawsuit or any hydrology or hydraulics review and analysis you have performed or rendered to Respondent from January 1, 2005 to the present.

7. All documents that reflect your curriculum vitae, resume, professional or educational experience, credentials, qualifications, and/or identify or describe any and all instances and matters in which you have previously served or currently serve as an expert witness, including any and all instances and matters in which you have served or currently serve as an expert witness for Respondent.

Areas of Testimony for Deposition

1. Testimony regarding the search for and the content of the documents produced in response to Documents Requested Nos. 1 through 7.
2. The affidavit of Philip DeGroot dated March 1, 2010.
3. The report by Stantec entitled, "Grand Lake Saint Marys and Beaver Creek Hydrologic and Hydraulic Analysis," dated March 1, 2010.
4. The report by Stantec entitled, "Grand Lake Saint Marys and Beaver Creek Hydrologic and Hydraulic Analysis – Discussion of Results and other Analysis," dated March 1, 2010.
5. Communications between Hydrosphere and ODNR and/or the Ohio Attorney General's Office.
6. Communications between Hydrosphere and Stantec.

1 A. These are a series of figures that I
2 would anticipate that you will be asking me
3 questions about during the deposition.
4 Q. Okay.
5 A. And these will facilitate my answering
6 by referring to these figures.
7 Q. And are these documents that you
8 prepared after you signed your affidavit in this
9 case?
10 A. Yes. I did not prepare all of them.
11 Some of them are reference documents, which have
12 been prepared by FEMA.
13 Q. Are these documents that you have copied
14 since you prepared your affidavit in this case?
15 A. Made a better copy, yes.
16 Q. So --
17 A. These were prepared -- what I'm
18 referring to are the schematic diagram that I
19 prepared, yes. I prepared this yesterday
20 (indicating) --
21 Q. Okay.
22 A. -- in anticipation of some questions.
23 Q. So some of the documents in this packet
24 are dated April 28th, 2010, and they were

1 A. Yes.
2 Q. And is that the same as to the six-page
3 report?
4 A. Yes.
5 Q. Okay. And then moving on to the next
6 paperclipped document, what is this, dated at
7 the top 4-29, 2010?
8 A. These are simply a pile of scratch paper
9 that if I have to take notes during our
10 deposition.
11 Q. Okay. And then you have brought a
12 manila folder with documents within the manila
13 folder. Can you identify those documents for
14 me.
15 A. These would have been -- well, the date
16 on the top sheet is April 27th, 2010. And I
17 prepared just dates of contact so I might have
18 those all in front of me when you -- if you were
19 to question me about how I became affiliated
20 with the Ohio Department of Natural Resources.
21 Q. Okay. And that's a document you
22 prepared two days ago?
23 A. Yes.
24 Q. Okay. And that's Page 1? Page 1 of

1 prepared by you on that date?
2 A. Yes.
3 Q. Okay. After you prepared your affidavit
4 in this case?
5 A. Yes.
6 Q. Moving on to the next paperclipped
7 document, is this your report dated February
8 25th, 2010, to William Cole, Senior Assistant
9 Attorney General?
10 A. Yes.
11 Q. And that's a six-page report?
12 A. Yes.
13 Q. And then the next paperclipped document
14 is a report that is dated February 25th, 2010,
15 that you prepared; is that correct?
16 A. Yes.
17 Q. And it's a nine-page document?
18 A. Yes.
19 Q. Okay.
20 A. When you say "prepared," I did some
21 supervision, also.
22 Q. Okay. We'll get into that.
23 So it's a document prepared by
24 Hydrosphere Engineering?

1 what you have there?
2 A. Yes.
3 Q. Okay.
4 A. And the remainder of the pages are notes
5 that were made during the review of the
6 documents by Pressley Campbell and the Corps of
7 Engineers.
8 Q. Okay. And were all of those documents
9 prepared prior to you signing your affidavit in
10 this case?
11 A. All of them, with the exception of the
12 directions on how to get here.
13 Q. Is what you have provided to us today
14 and what we've just talked about your entire
15 file regarding your work for the Attorney
16 General's office in this action?
17 A. No.
18 Q. You have other documents?
19 A. I have a document which was a client --
20 attorney-client confidential.
21 Q. Okay. Does the Attorney General's
22 office represent you, Dr. De Groot?
23 MR. COLE: It's a work product document.
24 Q. What's the general nature of the

1 document?
2 **A. It was a two-page memorandum, which I**
3 **prepared and provided to the Ohio Department of**
4 **Natural Resources, if they wished to provide it**
5 **to Stantec. It was some comments about the**
6 **hydrologic model that they prepared.**
7 Q. So I understand correctly, you have also
8 reviewed Stantec's hydrological modeling in this
9 action?
10 **A. I can't use the word review, because it**
11 **was only at the latter part of February, just**
12 **briefly.**
13 Q. Okay.
14 **A. So a consequence of the meeting. So**
15 **there is no quality control or assurances that I**
16 **did that. It was just an overview of the**
17 **approach that they were taking.**
18 Q. Okay. Where is the -- what document did
19 you review of Stantec?
20 **A. That, I can't remember precisely,**
21 **because there's been so much e-mail exchanged.**
22 **It would have been whatever report that they had**
23 **started to put together at the end of February.**
24 Q. Okay. Have you -- and were you provided

1 a copy of a Stantec document?
2 **A. Yes.**
3 Q. And is that document in your files?
4 **A. It would be sitting on my computer.**
5 Q. Okay. And you have not provided today
6 that document?
7 **A. I have not.**
8 Q. And there were e-mails that you
9 exchanged with representatives of Stantec?
10 **A. Not directly. I was only on the CC**
11 **list, if you will.**
12 Q. And you haven't provided any of those
13 e-mails here today?
14 **A. No, I did not.**
15 Q. And have you had communications directly
16 with the Attorney General's office by e-mail?
17 **A. Yes.**
18 Q. And you haven't provided those here
19 today?
20 **A. No.**
21 Q. Do you have a written contract for this
22 work with the Attorney General's office?
23 **A. Yes.**
24 Q. Is that here today? Have you provided

1 that today?
2 **A. No, I did not.**
3 Q. Okay. I'd ask for a copy of that
4 document. I'd ask for a copy of the Stantec
5 document. I'd ask for a copy of all e-mails
6 exchanged.
7 Yes, sir?
8 **A. Copy of contract, copy of Stantec**
9 **report, copy of e-mails exchanged.**
10 Q. Correct.
11 **A. Did I list it correctly?**
12 Q. Those are the three so far, yes, sir.
13 Have you received any payment from the
14 Attorney General's office yet?
15 **A. Unfortunately, not yet.**
16 Q. Have you submitted any invoices to the
17 Attorney General's office?
18 **A. Yes.**
19 Q. And you haven't provided those invoices
20 here today?
21 **A. No.**
22 Q. Okay. I'd ask for a copy of those
23 invoices.
24 **A. So far, it's only been invoice, but**

1 **there should be one more.**
2 Q. Okay. Without getting into the specific
3 detail of your -- did you -- as I understand it,
4 did you generate a -- you generated a document
5 and provided some comments about Stantec's
6 hydraulic modeling; is that correct?
7 **A. Yes.**
8 Q. Without getting into the details of what
9 you wrote in that document, did you make any
10 suggestions on improving what they had done?
11 **A. Yes.**
12 Q. Did you also do any review of any of
13 their hydrology modeling?
14 **A. The two are interconnected, so yes.**
15 Q. Okay.
16 **A. Technically, I did not review their**
17 **hydraulic model. Technically, I reviewed their**
18 **hydrology model.**
19 Q. Okay. And that was HEC-HMS?
20 **A. Yes.**
21 Q. Okay.
22 **A. Let me rephrase that.**
23 Q. Sure.
24 **A. I did not actually look at the HEC-HMS**

1 information. I read the summary -- what was in
2 the report and made a comment about what I would
3 do slightly differently if I used HEC-HMS.

4 Q. Okay. So you had suggestions as to what
5 they should do differently?

6 A. Yes.

7 Q. And do you remember when you provided
8 that document to the Attorney General's office?

9 A. I would think it would be the latter
10 part of February.

11 Q. Okay. Was that document, to your
12 knowledge, also provided to anyone at Stantec?

13 A. I do not know if it went beyond the
14 Attorney General's office.

15 Q. You e-mailed your document to the
16 Attorney General's office, or was it mailed, or
17 faxed? How was it delivered?

18 A. I e-mailed it, I believe, to the Ohio
19 Department of Natural Resources.

20 Q. Okay. Do you know who at -- and I'll
21 refer to it as ODNR. Is that okay?

22 A. Yes.

23 Q. Do you know who you e-mailed it to at
24 ODNR?

1 additional copies of the Army Corps report? He
2 didn't rely on them. Or do you want to wait?

3 MR. FUSONIE: I'm going to wait on that.
4 But I want to know what's in his file.

5 Q. Outside of what exhibit -- well, hold
6 on.

7 I'm going to mark what you have provided
8 to us today as Exhibit B, which I am putting on
9 the first page of the Case Leasing report.

10 --0--

11 (Relators' Exhibit B marked.)

12 --0--

13 BY MR. FUSONIE:

14 Q. Do you agree with that?

15 A. Yes.

16 MR. COLE: That's for all of this, right
17 (indicating)?

18 MR. FUSONIE: That's for all of the
19 documents he's come here with today.

20 Q. And I'm also going to want a copy of
21 your notes at the end of the day here, as well,
22 so that I have a full, complete record.

23 Outside of Exhibit B, are there any
24 other documents that you relied upon in

1 A. Yes.

2 Q. And who was that?

3 A. Jay Dorsey.

4 Q. Anyone else that you e-mailed that
5 document to?

6 A. I don't think so.

7 Q. Okay. And do you have a business e-mail
8 address?

9 A. Yes.

10 Q. Is that what you e-mailed the document
11 from?

12 A. Yes.

13 Q. Are there any other documents in your
14 files that you have not come here with today?

15 A. No. I think you pretty well covered
16 them.

17 Q. So there's a contract, copy of the
18 Stantec report, copy of e-mails that you have
19 exchanged in this matter, a copy of the invoice,
20 and there's also additional volumes of the Army
21 Corps of Engineers survey report?

22 A. Yes.

23 Q. Correct?

24 MR. COLE: Counsel, do you want the

1 preparation of your affidavit in this case?

2 A. I did examine the floodplain maps, but I
3 believe I have a printed copy of those in here.

4 Q. The FEMA floodplain maps?

5 A. Yes.

6 Q. Outside of the FEMA floodplain maps,
7 which is already part of Exhibit B, are there
8 any other documents that you relied upon in
9 preparation of your affidavit in this case?

10 A. Not that I can think of.

11 --0--

12 (Relators' Exhibit C marked.)

13 --0--

14 BY MR. FUSONIE:

15 Q. Dr. De Groot, I'm going to show you what
16 I've marked as Exhibit C. If you could -- do
17 you recognize Exhibit C as your affidavit that
18 you prepared in this lawsuit?

19 A. I recognize my signature.

20 Q. Did you draft this affidavit?

21 A. I provided the information for the
22 affidavit, but I did not draft it.

23 Q. Do you know who -- to your knowledge, do
24 you know who drafted it?

1 **A. No, not before the phone call.**
2 Q. Okay. Were you provided any materials
3 before that phone call from ODNR?
4 **A. No.**
5 Q. And then your next contact was February
6 10, 2010, with Jay Dorsey by telephone?
7 **A. Yes.**
8 Q. And what was the nature of that
9 conversation?
10 **A. To set up a meeting the following day**
11 **between Bill Cole, Jay Dorsey, and myself.**
12 Q. Okay. Between your first contact on
13 February 9 and your contact with Jay Dorsey on
14 February 10, did ODNR or the Ohio Attorney
15 General's office provide you with any materials?
16 **A. No.**
17 Q. Okay.
18 **A. On the first telephone contact, I**
19 **believe that they decided after I got off the**
20 **phone that they were going to retain me, and**
21 **then they notified Jay Dorsey to contact me.**
22 Q. Okay.
23 **A. I don't know what went on internally,**
24 **but that's what I suspect.**

1 Q. And your next contact was a meeting with
2 Jay Dorsey and Bill Cole on February 11, 2010?
3 **A. Yes.**
4 Q. Was that -- where did you meet them?
5 **A. At the Ashland County Soil & Water**
6 **District office.**
7 Q. Okay. And during that meeting, they
8 provided you with certain documents?
9 **A. Yes. Received from them the Corps of**
10 **Engineers study, the Campbell report, and there**
11 **was another engineering report that they gave me**
12 **that I can't remember right now. And then also,**
13 **the 2 inches of landowner complaints.**
14 Q. Okay. So let's step back. Does your
15 file include a copy of the complaint that was
16 filed by the landowners in this lawsuit?
17 **A. Some of them, I believe.**
18 Q. Okay.
19 **A. I did not rely on them, though.**
20 Q. Okay. But that's in your file?
21 **A. It's sitting on my table, if you want to**
22 **call it a file.**
23 Q. Did you make any notes on that document?
24 **A. No.**

1 Q. Did you mark it up in any manner?
2 **A. No. There's numerous of them. There's**
3 **probably 15 of them. I didn't rely on them at**
4 **all.**
5 Q. Are these complaints, or affidavits?
6 **A. I don't know the correct legal term.**
7 **What would you file on behalf of a relator?**
8 **Something like that.**
9 Q. Were they documents similar to your
10 affidavit marked today as Exhibit C?
11 **A. Yes.**
12 Q. Did they have aerial maps attached to
13 them?
14 **A. I believe some of them did.**
15 Q. Okay. I'd like a copy of those.
16 MR. COLE: Counsel, you want --
17 MR. FUSONIE: From his file.
18 MR. COLE: You want a copy of the
19 complaint and all affidavits, even if they're
20 not marked up?
21 MR. FUSONIE: I want a copy of the
22 affidavits that you provided him on February 11,
23 2010.
24 THE WITNESS: Can I just return them?

1 MR. COLE: I will say this, Counsel. I
2 believe -- well, I don't -- I'll -- all right.
3 You can make the request. I don't know if those
4 were just the ones attached to the complaint or
5 not.
6 MR. FUSONIE: Well, he's saying he
7 believes there were aerials attached, and there
8 were no aerials attached to the ones to the
9 complaint.
10 MR. COLE: Right. So maybe it was the
11 follow-up ones.
12 BY MR. FUSONIE:
13 Q. So there were affidavits of landowners
14 that you were provided on February 11, 2010?
15 **A. Yes.**
16 Q. And your recollection is that they may
17 have contained aerials attached to them?
18 **A. What I did was I thumbed through them,**
19 **and they did not seem to be strictly text.**
20 Q. Okay.
21 **A. There might have been some figures. I**
22 **can't remember if there were aerials.**
23 Q. Okay.
24 THE WITNESS: What do you call those?

1 MR. COLE: Just move on.
2 THE WITNESS: Complaints?
3 Q. They're complaints -- they're
4 affidavits, I believe, is what you're talking
5 about.
6 MR. COLE: They would have been signed
7 and notarized.
8 Q. And it's your testimony here today that
9 you did not rely upon those affidavits in
10 preparation of your report or affidavit in this
11 case?
12 **A. That is correct.**
13 Q. Did you review them in detail?
14 **A. No.**
15 Q. So you have no knowledge as to whether
16 one of those affidavits is from a farmer who has
17 lived on the Beaver Creek for 50 years?
18 **A. I have no knowledge of that.**
19 Q. No knowledge that that farmer may have
20 testified that he has had increased flooding
21 since 1997?
22 **A. I have no knowledge of that, that's**
23 **correct.**
24 Q. Okay.

1 **A. Not specifically in reading. Just**
2 **secondhand in the description of the lawsuit**
3 **that said that the landowners have**
4 **experienced -- and reading from Campbell's**
5 **report.**
6 Q. Okay. Were you -- did you sign a
7 contract on February 11, 2010?
8 **A. Very close to that date, yes. I can't**
9 **remember if it was the 10th or the 11th.**
10 Q. Okay.
11 **A. They got it to me fairly quickly.**
12 Q. Between the 11th and your next contact,
13 which you've identified as February 22nd, 2010,
14 were you provided any other materials by ODNR or
15 the Ohio Attorney General's office?
16 **A. Some of the copies of the FEMA**
17 **floodplain maps.**
18 Q. Okay. Those were provided to you by
19 ODNR?
20 **A. Yes. They saved us the time of having**
21 **to go to the FEMA site because they already had**
22 **them in-house.**
23 Q. Which ones did they provide you?
24 **A. I don't know the numbers. There's about**

1 **a 15-digit code number and then it is a PDF**
2 **file.**
3 Q. Okay.
4 **A. I believe there were eight of them.**
5 Q. Okay. They provided --
6 MR. FUSONIE: I want a copy of all of
7 those.
8 Q. Do you know who provided you those?
9 **A. Yes.**
10 Q. Who did?
11 **A. Jay Dorsey.**
12 Q. Any other documents you were provided
13 between your third contact with ODNR and your
14 fourth contact, as identified on your
15 handwritten notes dated April 27, 2010?
16 **A. No, I don't think so.**
17 Q. Then your next -- the next contact
18 you've identified was February 22nd, 2010. And
19 that was at Stantec's office in Columbus?
20 **A. Correct.**
21 Q. Were you provided a copy of any report
22 from Stantec prior to that meeting?
23 **A. No.**
24 Q. Were you provided a copy at that

1 meeting?
2 **A. Not a paper copy. We were looking at**
3 **computer slides.**
4 Q. So you reviewed, on Stantec's computer,
5 a working report?
6 **A. I would not use the word reviewed.**
7 Q. You read it?
8 **A. No. We were looking at various output**
9 **from the computer model. We were not reading**
10 **reports.**
11 Q. So you were looking at some of the data
12 of the Stantec report?
13 **A. Some of the maps.**
14 Q. Some of the maps, okay.
15 Do you remember which maps you were
16 looking at?
17 **A. It was generally floodplain maps of**
18 **Beaver Creek and the Wabash River.**
19 Q. Okay. Who was there with you?
20 **A. There were about 10 people there. I**
21 **never received a sign-up list. But the ones**
22 **that I can remember were Bill Cole, Jay Dorsey,**
23 **Charles Rowan, Ted Henson, Ted Henson's**
24 **supervisor, Michael Menoes, and there were some**

1 MR. COLE: Objection. How can he know?
2 MR. FUSONIE: I'm asking.
3 Q. You don't know one way or another?
4 **A. Correct.**
5 Q. Your work for this case, what is the
6 scope of your work, as you understand it?
7 **A. On February 22nd, we realized with the**
8 **late date that I was involved, and my scope,**
9 **Hydrosphere Engineering's scope, had to be**
10 **limited to the review of the work by Pressley**
11 **Campbell; that there was insufficient time to**
12 **prepare a hydrologic model.**
13 Q. But you did also meet with Stantec
14 representatives and ask Stantec representatives
15 questions about some of their data or modeling;
16 is that fair to say?
17 **A. I made some observations and had some**
18 **questions, yes.**
19 Q. Okay. I want to go back to Exhibit C,
20 if you could turn to Exhibit C. That's going to
21 be your affidavit and report. It's right here,
22 Doctor (indicating).
23 **A. I'm just trying to reorganize the pile.**
24 Q. If you could turn to your first report,

1 May, 2006 report, and criticizes Dr. Campbell
2 because, according to you, he used the same
3 water surface elevation for determining
4 discharge from both the old and the new
5 spillway.
6 **A. Yes.**
7 Q. Is that an accurate summary of your
8 criticism?
9 **A. That is correct.**
10 Q. Okay. And is one of the bases for that
11 your general view that a smaller spillway will
12 cause the water surface elevation of a lake to
13 rise to a greater elevation than would a wider
14 spillway?
15 **A. Yes.**
16 Q. So that's a general principle, correct?
17 **A. Yes.**
18 Q. Now, here, are you aware that the normal
19 pool elevation of the Grand Lake St. Mary's from
20 1914 until 1988 was 820 -- 870.27?
21 **A. Yes.**
22 Q. Okay. And then in order to increase the
23 lake normal pool elevation, in approximately
24 1988, ODNR added stoplogs to the weir?

1 the nine-page report. Page 2 of 9. Now that
2 you're there, would you agree with me that your
3 first criticism of Dr. Campbell's May, 2006
4 report is Page 5 of Dr. Campbell's report?
5 **A. Yes.**
6 Q. So no criticism of Page 1, Page 2, Page
7 3, Page 4?
8 **A. I made this so we could try to find it**
9 **easily.**
10 Q. So my question, there was no criticism
11 of the first four pages of his report?
12 **A. None that were worth recording.**
13 Q. So in your report, there are no
14 criticisms of Dr. Campbell's report, the first
15 four pages of it?
16 **A. I'll use my words again. None that were**
17 **worth recording.**
18 Q. Okay.
19 **A. They could have been minor, that I was**
20 **not going to take the time to elaborate on here.**
21 Q. In your report?
22 **A. Yes.**
23 Q. Okay. Now, Page 5 of -- well, Page 2 of
24 your report talks about Page 5 of Dr. Campbell's

1 **A. Yes.**
2 Q. And that raised the normal pool
3 elevation to 870.6?
4 **A. Yes.**
5 Q. Which is the same normal pool elevation
6 as with the 500-foot spillway currently,
7 correct?
8 **A. That is correct.**
9 Q. So would you agree with me, then, that
10 the normal pool elevation of the Grand Lake
11 before 1988 was lower than the normal pool
12 elevation for the Grand Lake post 1997?
13 **A. Yes.**
14 Q. Okay. Is it fair to say you've done no
15 studies yourself to determine the difference in
16 lake levels at Grand Lake St. Mary's?
17 **A. Correct.**
18 Q. Have you looked at any lake level
19 elevation data for any period for the Grand
20 Lake?
21 **A. Not in detail.**
22 Q. Are you aware that Dr. Campbell did for
23 the period of 1927 to 2006?
24 **A. Yes. In his affidavit, he described**

1 Q. Are you aware of flooding along the
2 Beaver Creek in March of 2010?
3 **A. Yes, but not in detail.**
4 Q. Would you agree that both January and
5 March fall within your definition of when ODNR
6 was doing its drawdowns?
7 **A. March would, but January -- excuse me,
8 March would not, but January would.**
9 Q. I thought you testified earlier that
10 November through March is when they conducted
11 the drawdowns.
12 **A. Through the beginning of March, I think,
13 is when they try to get back to the normal pool
14 level.**
15 Q. Okay. Have you ever been provided any
16 court decisions in the Case Leasing case?
17 **A. No.**
18 Q. Have you ever been provided any court
19 decisions in the Post v Speck case?
20 **A. These would be written decisions?**
21 Q. Yes.
22 **A. No.**
23 Q. Were you provided a copy of a report by
24 a Doyle Hartman in the Case Leasing case?

1 Page 2 is some handwritten notes titled Grand
2 Lake of St. Mary's.
3 **A. Yes.**
4 Q. Were you -- so were you asked by ODNR to
5 evaluate the technical content of the Warns
6 report?
7 **A. I was -- this was a list of items that I
8 was told I was being given on that day. There
9 was notes that were taken during the meeting
10 between myself, Jay Dorsey, and Bill Cole.**
11 Q. Okay.
12 **A. So I was not asked to formally evaluate
13 that.**
14 Q. So you did not evaluate the Warns
15 report?
16 **A. Unfortunately, joining this February 11,
17 I had to choose what I could accomplish by the
18 cutoff date. So I didn't get a chance to
19 evaluate everything.**
20 Q. Okay. So you have no opinion --
21 obviously you have no professional opinions of
22 the Warns report.
23 **A. No.**
24 Q. What is this reference to the HEC-RAS

1 **A. Yes.**
2 Q. Were you provided a copy of Doyle
3 Hartman's report in the Post versus Speck case?
4 **A. One of those questions is -- the
5 answer's -- one is yes and one is no. I can't
6 remember which case it was. I didn't rely on
7 it.**
8 Q. Okay. Is it in your file?
9 **A. Yes.**
10 Q. Did you review it?
11 **A. Just paged through it briefly to see if
12 it was comparable to what Stantec is doing.**
13 Q. Okay. And is it comparable to what
14 Stantec is doing?
15 **A. In terms of hydrologic modeling, all I
16 could just say is they're both doing a
17 hydrologic model.**
18 Q. Were you provided any copy of a report
19 by a -- I forget his last name, but -- Warns,
20 W-a-r-n-s?
21 **A. I think I was, but I'm not certain.**
22 Q. Okay. Were you asked to evaluate that?
23 If I can -- I'll strike that question and I'll
24 ask you about your -- in your manila folder,

1 HEC-HMS models on CD?
2 **A. That would have been the -- telling me
3 that they provided the preliminary versions of
4 the Stantec report.**
5 Q. To who?
6 **A. To me. It should have been on the CD,
7 but I didn't -- did I get a CD that day? I
8 can't remember if I got the CD that day or not.**
9 Q. Okay. So you have a copy of the
10 preliminary version?
11 **A. Yes.**
12 Q. Okay.
13 **A. But it was not referred to other than at
14 the office. I didn't have time to go through a
15 detailed review of it.**
16 Q. But in your files is that CD?
17 **A. I might have that CD.**
18 Q. Okay. I'd ask for the CD.
19 **A. Okay.**
20 MR. COLE: Counsel, you've made a number
21 of requests. Would you be willing to put
22 several items in an e-mail so we can look at
23 that?
24 MR. FUSONIE: Sure. I would say I

1 --O--
2 Thereupon, the testimony of April 29,
3 2010, was concluded at 1:24 p.m.
4 --O--

1 CERTIFICATE
2 STATE OF OHIO :
3 SS:
4 COUNTY OF FRANKLIN :
5 I, Sara S. Clark, RPR/CRR/CCP/CBC, a
6 Notary Public in and for the State of Ohio, duly
7 commissioned and qualified, do hereby certify
8 that the within-named PHILIP DE GROOT, PH.D. was
9 first duly sworn to testify to the truth, the
10 whole truth, and nothing but the truth in the
11 cause aforesaid; that the testimony then given
12 was reduced to stenotypy in the presence of said
13 witness, afterwards transcribed; that the
14 foregoing is a true and correct transcript of
15 the testimony; that this deposition was taken at
16 the time and place in the foregoing caption
17 specified.

18 I do further certify that I am not a
19 relative, employee or attorney of any of the
20 parties hereto; that I am not a relative or
21 employee of any attorney or counsel employed by
22 the parties hereto; that I am not financially
23 interested in the action; and further, I am not,
24 nor is the court reporting firm with which I am
affiliated, under contract as defined in Civil
Rule 28(D).

In witness whereof, I have hereunto
set my hand and affixed my seal of office at
Columbus, Ohio, on this day
of , 2010.

Sara S. Clark, RPR/CRR/CCP/CBC
Notary Public, State of Ohio.
My commission expires: March 10, 2013

1 *Attach to the deposition of PHILIP DE GROOT,
2 PH.D.
3 DONER, ET AL. V. ODNR, ET AL.
4 Case No. 2009-1292

5 STATE OF OHIO :
6 SS:
7 COUNTY OF :
8

9 I, PHILIP DE GROOT, PH.D., do hereby
10 certify that I have read the foregoing
11 transcript of my deposition given on April 29,
12 2010; that together with the correction page
13 attached hereto noting changes in form or
14 substance, if any, it is true and correct.

15 I do hereby certify that the foregoing
16 transcript of PHILIP DE GROOT, PH.D. was
17 submitted for reading and signing; that after it
18 was stated to the undersigned notary public that
19 the deponent read and examined the deposition,
20 the deponent signed the same in my presence on
21 this day of , 2010.

22 NOTARY PUBLIC
23 My commission expires:
24



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 Columbus, OH 43215-5542
 800.229.0675 • 614.460.5000
 fax • 614.460.5566
 pri@prioio.com • www.prioio.com

WITNESS ERRATA SHEET

Case Caption: State of Ohio Ex Rel. Wayne T. Doner v Sean D. Logan, Dir ODNR
 Deposition of: Philip De Groot
 Date Taken: 4/29/2010
 File Number: 1981

INSTRUCTIONS

If there are any corrections, indicate them on this form giving the change, page number, line number and reason for the change. Please either use a blank piece of paper if you need more room, or call us for additional sheets.

REASONS FOR CHANGES

- 1) To clarify the record.
- 2) To conform to the facts.
- 3) To correct transcription errors.

Page #	Line #	Change	Reason #
		See Below	

I, Philip De Groot, have read the foregoing transcript of my deposition given on 4/29/2010; together with the corrections on this page noting changes in form or substance, if any, it is true and correct.

Date: _____ Signature: _____

Professional Reporters, Inc. does hereby certify that: Philip De Groot did not read or sign his/her deposition taken 4/29/2010; that the deponent was notified by letter and informed of the Rule 30, providing the number of days within which to read and sign the deposition. The witness has not notified our office of the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason; and the deposition may then be used as fully as though signed.

Date: 05/24/2010

Signature:

Christy M. Heaney

AFFIDAVIT OF THOMAS H. FUSONIE

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

My name is Thomas H. Fusonie, I am over the age of 21, and I am competent to make this affidavit. The facts stated herein are within my personal knowledge and are true and correct.

I state as follows:

1. I am an associate attorney with the law firm of Vorys, Sater, Seymour and Pease LLP, counsel for the Relators in this action.
2. Attached as Exhibit 3-A is a true and accurate copy of correspondence dated May 2, 2010, from Thomas H. Fusonie, counsel for Relators, to William J. Cole and Mindy Worly, counsel for Respondents.
3. Attached as Exhibit 3-B is a true and accurate copy of correspondence dated May 7, 2010, from Jennifer Croskey, counsel for Respondents, to Thomas H. Fusonie, counsel for Relators.
4. Attached as Exhibit 3-C is a true and accurate copy of an email chain exchanged between counsel for Respondents and counsel for Relators. Page 5 of Exhibit 3-C is a true and accurate copy of correspondence dated May 14, 2010, from William J. Cole, counsel for Respondents, to Thomas H. Fusonie, Bruce L. Ingram, Joseph R. Miller, Kristi K. Wilhelmy, and Martha C. Brewer, counsel for Relators.
5. Page 4-5 of Exhibit 3-C is a true and accurate copy of correspondence dated May 14, 2010, from Thomas H. Fusonie, counsel for Relators, to William J. Cole, Dale T. Vitale, Mindy Worly, Jennifer Croskey, Rachel H. Stelzer, and Daniel J. Martin, counsel for Respondents.



6. Page 2-3 of Exhibit 3-C is a true and accurate copy of correspondence dated May 18, 2010, from William J. Cole, counsel for Respondents, to Thomas H. Fusonie, Bruce L. Ingram, Joseph R. Miller, Kristi K. Wilhelmy, and Martha C. Brewer, counsel for Relators.

7. Page 1-2 of Exhibit 3-C is a true and accurate copy of correspondence dated May 18, 2010, from Thomas H. Fusonie, counsel for Relators, to William J. Cole, counsel for Respondents.

8. Page 1 of Exhibit 3-C is a true and accurate copy of correspondence dated May 19, 2010, from William J. Cole, counsel for Respondents, to Thomas H. Fusonie, Bruce L. Ingram, Joseph R. Miller, Kristi K. Wilhelmy, and Martha C. Brewer, counsel for Relators.

9. Attached as Exhibit 3-D is a true and accurate copy of a document titled Personal Services Agreement which was provided to me on May 19, 2010, by Respondents purportedly on the behalf of Hydrosphere Engineering.

10. Attached as Exhibit 3-E is a true and accurate copy of an email chain exchanged between Jay Dorsey, counsel for Respondents, Hydrosphere Engineering, and Stantec Consulting Corporation, and includes an attached memorandum from Philip De Groot and Mike Menoes to Jay Dorsey regarding "Comments about the hydrologic model developed for GLSM." This email chain and attached memorandum were provided to me on May 19, 2010, by Respondents, purportedly on the behalf of Hydrosphere Engineering.

11. Attached as Exhibit 3-F is a true and accurate copy of Respondents' Supplemental Privilege Log, dated April 27, 2010, produced by Respondents to Relators in this action on May 18, 2010.

12. Attached as Exhibit 3-G is a true and accurate copy of an Invoice from Hydrosphere Engineering which was provided to me on May 19, 2010, by Respondents purportedly on the behalf of Hydrosphere Engineering.

FURTHER AFFIANT SAYETH NAUGHT.



Thomas H. Fusonie

Sworn to before me and subscribed in my presence this 25th day of May, 2010.

KRISTI KRESS WILHELMY
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 O.R.C.



Notary Public

Wilhelmy, Kristi K.

From: Fusonie, Thomas H.
Sent: Sunday, May 02, 2010 3:34 PM
To: Mindy Worly; William J. Cole
Cc: Wilhelmy, Kristi K.; Brewer, Martha C.; Miller, Joseph R.; Ingram, Bruce L.
Subject: Doner, et al v. Logan, et al.

Bill and Mindy,

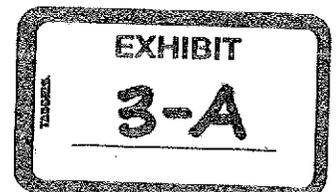
To confirm my requests for documents from Dr. De Groot during his deposition, he needs to produce the following:

- 1) copy of his contract;
- 2) copy of the Stantec preliminary report as he testified that he received;
- 3) his emails exchanged related to his expert testimony and review of Stantec work;
- 4) copy of his invoice;
- 5) copy of the affidavits/"complaints" of relators he received either from ODNR or Stantec;
- 6) the FEMA.pdf files the State provided him;
- 7) the Stantec HEC-HMS & RAS CD he testified receiving

All of these documents were responsive to the subpoena served on Dr. De Groot on April 24, 2010 to which he did not object. Therefore, we demand production of the above documents by May 7, 2010.

Thank you.

Tom Fusonie



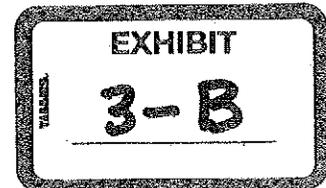
Fusonie, Thomas H.

From: Jennifer Croskey [Jennifer.Croskey@ohioattorneygeneral.gov]
Sent: Friday, May 07, 2010 4:19 PM
To: Fusonie, Thomas H.
Cc: William J. Cole; Mindy Worly; Dale T. Vitale; Daniel J. Martin; Rachel H. Stelzer
Subject: FW: Doner, et al v. Logan, et al.

Tom,

In response to your correspondence below, we are still working on this response.

Jennifer S. M. Croskey
Assistant Attorney General, Executive Agencies
Ohio Attorney General Richard Cordray
Phone 614.466.2980
Fax 866.803.9971
Email Jennifer.Croskey@OhioAttorneyGeneral.gov
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
OhioAttorneyGeneral.gov
SpeakOutOhio.gov



From: William J. Cole
Sent: Friday, May 07, 2010 12:18 PM
To: Jennifer Croskey
Subject: FW: Doner, et al v. Logan, et al.

From: Fusonie, Thomas H. [thfusonie@vorys.com]
Sent: Sunday, May 02, 2010 3:33 PM
To: Mindy Worly; William J. Cole
Cc: Wilhelmy, Kristi K.; Brewer, Martha C.; Miller, Joseph R.; Ingram, Bruce L.
Subject: Doner, et al v. Logan, et al.

Bill and Mindy,

To confirm my requests for documents from Dr. De Groot during his deposition, he needs to produce the following:

- 1) copy of his contract;
- 2) copy of the Stantec preliminary report as he testified that he received;
- 3) his emails exchanged related to his expert testimony and review of Stantec work;
- 4) copy of his invoice;
- 5) copy of the affidavits/"complaints" of relators he received either from ODNR or Stantec;
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All of these documents were responsive to the subpoena served on Dr. De Groot on April 24, 2010 to which he did not object. Therefore, we demand production of the above documents by May 7, 2010.

Thank you.

Tom Fusonie

From the law offices of Vorys, Sater, Seymour and Pease LLP.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

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Wilhelmy, Kristi K.

From: William J. Cole [william.cole@ohioattorneygeneral.gov]
Sent: Wednesday, May 19, 2010 4:04 PM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly
Subject: RE: Doner, et al. v. Logan, et al.
Attachments: DeGroot Contract.pdf; DeGroot Invoice.pdf; DeGroot Comments.pdf

Tom:

Items 1 and 4 were inadvertently omitted from yesterday's production. See attached. However, the "scope of work" part of the De Groot contract is partially redacted on the basis of attorney work product. Also attached is item 3, which is also partially redacted on the basis of attorney work product. We do not agree that you are entitled to documents, emails, and other items that Stantec or Dr. De Groot had but did not consider or rely upon in forming their expert opinion. Therefore, we decline to provide you with items 2 and 5, since Dr. De Groot did not rely on either in forming his expert opinion in this case. We also disagree that you are entitled to email that is attorney-client privileged and/or protected attorney work product. The fact that Mr. Henson and Dr. De Groot are not clients of the Attorney General is immaterial, as both are consulting experts for the AG's Office and ODNR. And we do not agree that either Mr. Henson or Dr. De Groot testified to any instructions regarding the work to be performed, beyond their general understanding. Accordingly, we must decline your demand to provide you with every document identified in the privilege log.

William J. Cole
Senior Assistant Attorney General
Ohio Attorney General Richard Cordray's Office
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614.466.2980 (phone), 866.354.4086 (fax)
william.cole@ohioattorneygeneral.gov



From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Tuesday, May 18, 2010 5:25 PM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

I received the Stantec and Dr. De Groot files. I've yet to have a chance to review the Stantec documents. As for Dr. De Groot, I did not see the following requested documents:

- 1) copy of his contract;
- 2) copy of the Stantec preliminary report as he testified that he received;
- 3) his emails exchanged related to his expert testimony and review of Stantec work;
- 4) copy of his invoice;
- 5) the Stantec HEC-HMS & RAS CD he testified receiving

As such, Dr. De Groot has failed to comply with the subpoena. In a last effort to avoid involving the Court, we will give Stantec one more day, until the end of business tomorrow to produce the unredacted Supplemental Agreement.

ODNR/Stantec's decision to withhold an unredacted version of the Stantec Supplemental Agreement despite no objection by Stantec to the subpoena lacks merit. Ms. Worly did not object to the question about the scope of the project that led to Mr. Henson's affidavit. ODNR misreads Mr. Henson's deposition. Mr. Henson was asked not only about his understanding of the scope of the potential project, but "ultimately, what was the scope of the project" that led to his affidavit. ODNR did not object to that line of questioning. Mr. Henson then answered that the scope of the project was described in his report. If the scope of the project is all within his report as Mr. Henson testified, ODNR and Stantec have no basis to withhold the portion of the Supplemental Agreement that describes the scope of the work. As such, Stantec has not complied with the subpoena.

In a last effort to avoid involving the Court, we will give Stantec one more day, until the end of business tomorrow to produce the unredacted Supplemental Agreement.

Finally, Stantec and De Groot cannot withhold communications they had with ODNR on the basis of attorney work product or attorney/client. First, Stantec and Dr. De Groot are not clients of the Ohio Attorney General. Second, Relators are entitled to discovery of all documents that Stantec and Dr. De Groot considered in forming their opinions. We'll give Stantec and Dr. De Groot until the end of business tomorrow to produce every document identified in the privilege log provided to us today.

Tom Fusonie

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]

Sent: Tuesday, May 18, 2010 3:44 PM

To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.

Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly

Subject: RE: Doner, et al. v. Logan, et al.

Tom:

Our joint-submission coordinator will be Beth Eckersley, a paralegal in our Office. Ms. Weiss may contact her at 614-728-0467, or by email at beth.eckersley@ohioattorneygeneral.gov. In addition to the Relator depositions, are you agreeable to a joint submission of the supplemental affidavits of Relators who were not deposed? If so, these would also be conditioned upon Respondents' right to object to any of them in whole or in part. Considering the volume of jointly submitted material (affidavits, depositions, and exhibits), I still believe a joint request to reduce the number of copies of joint submissions (perhaps to 5) to the court is appropriate. If you agree, we should file such a request soon.

Stantec and Dr. De Groot have supplied us with their files responsive to your subpoenas. Copies will be delivered to your office today. Much of Stantec's production is on two DVDs, most of which should be directly accessible by office computer. However, you will need the appropriate HEC software to open the modeling files contained within the Hartman Reports folder, and you will need GIS software to open some of the files in the OneRain Gage Adjusted Radar folder.

We are withholding some emails that are attorney-client privileged and/or attorney work-product. A privilege/work-product log will be included. The email produced by Dr. De Groot was sent to me, which I then forwarded to Mary Ann Hunter (a legal secretary in our office) to copy. We did not withhold documents, such as a copy of the mandamus complaint and Relator affidavits, that are already in your possession. However, we stand by our redaction of the supplemental agreement that describes the scope of Stantec's work, on the basis of attorney work product. We do not believe Mr. Henson testified to any specifics of the scope of work in his

deposition. In fact, Mr. Henson testified only to his general understanding after attorney Mindy Worly objected on the basis of work product (see page 19 of Henson's deposition).

William J. Cole

Senior Assistant Attorney General
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30 East Broad Street, 26th Floor
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614.466.2980 (phone), 866.354.4086 (fax)
william.cole@ohioattorneygeneral.gov

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Monday, May 17, 2010 7:29 PM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

We agree to submit jointly all depositions taken in this action and their exhibits.

Tom

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Monday, May 17, 2010 7:19 PM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly
Subject: RE: Doner, et al. v. Logan, et al.

Tom:

We will get you a name shortly, probably tomorrow. Are you agreeing to a joint submission of all depositions + exhibits?

Bill

From: Fusonie, Thomas H. [thfusonie@vorys.com]
Sent: Monday, May 17, 2010 6:03 PM
To: William J. Cole; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly
Subject: RE: Doner, et al. v. Logan, et al.

Bill,

Who will be coordinating the preparation of the joint submission from ODNr's end? I'd like to have our paralegal on the case, Courtney Weiss start working out the logistics of gathering and preparing the joint submission.

We do intend to submit additional affidavits. We can't answer when yet, as we're still waiting on Dr. De Groot's compliance with the subpoena served on him.

Tom Fusonie

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]

Sent: Monday, May 17, 2010 11:58 AM

To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.

Cc: Dale T. Vitale; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Mindy Worly

Subject: RE: Doner, et al. v. Logan, et al.

Tom:

We propose jointly submitting all (not just Relator) depositions with exhibits thereto, provided that Respondents (and presumably, Relators) reserve the right to object to any testimony and/or exhibit(s) therein. We also support a joint motion to reduce the number of submissions of any joint material.

Do you intend to submit any more affidavits? If so, when might we expect to receive a copy(s)?

Bill

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]

Sent: Friday, May 14, 2010 3:11 PM

To: William J. Cole; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin

Cc: Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.

Subject: RE: Doner, et al. v. Logan, et al.

Bill,

Thank you for the email. As to the Relator Depositions, it is all or nothing. Either ODNR agrees to submit all of them jointly or none of them. We need to know Monday, May 17, 2010, which depositions the State is interested in submitting jointly. Given the number of depositions that need copying and that the deadline for submitting evidence is the day after Memorial Day, if we don't hear from ODNR by the end of the day Monday, May 17, 2010, we're just going to have to go ahead and copy and submit depositions separately.

We've already planned for having to submit an original and 12 copies so we cannot agree to a joint motion to reduce the number of copies of evidence. We might be able to agree to a joint motion to submit a reduced number of any joint submission of depositions.

On an agreed statement of facts, we'll get back to you.

On the issues related to the experts, how is it that the State of Ohio believes it can withhold copies of documents from Dr. De Groot's files on the basis that we already have copies of the complaint and Relator affidavits. Dr. De Groot was served a valid subpoena for his files, which would include the complaint and Relator affidavits in his files. He did not object to production of those documents. We're not aware of authority that a party can withhold a portion of an expert's files because the other party already has a copy of some of the documents in the file. In fact, ODNR has taken the exact opposite approach in ODNR v. Baucher.

Likewise, Dr. De Groot did not object to producing documents in his file he did not rely on. Again, we're not aware of a party refusing to turn over portions of an expert's files because the expert did not rely on that portion in preparing his affidavit or report. The absence of reliance on portions of an expert's files is certainly information likely to lead to the discovery of admissible evidence. Again, ODNR took the opposite approach in ODNR v. Baucher, ODNR v. Linn, ODNR v. Minch, ODNR v. Post and ODNR v. Zumberge.

Please advise Dr. De Groot that if we do not receive a complete production of the requested documents by the end of the day Tuesday, May 18, 2010, we'll have to seek the Court's assistance.

On Stantec, ODNR takes the position that despite having Stantec prepare a report and affidavit pursuant to the supplemental agreement, it can redact the portion of the supplemental agreement that describes the scope of Stantec's work. If you have authority to support ODNR's position, we'd appreciate it. Again, it is contrary to ODNR's stance in ODNR v. Baucher and in ODNR v. Linn, ODNR v. Minch, ODNR v. Post, and ODNR v. Zumberge. All cases in which ODNR produced its contracts with its expert in unredacted form. Finally, ODNR's position is contrary to its decision to not object when Relators asked Mr. Henson in deposition to describe the scope of Stantec's work for ODNR in this action. Unless we receive authority from ODNR to support its stance by the end of the day on May 18, 2010, we will be forced to seek the Court's assistance. Please advise Stantec accordingly.

Tom

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Friday, May 14, 2010 10:34 AM
To: Fusonie, Thomas H.; Ingram, Bruce L.; Miller, Joseph R.; Wilhelmy, Kristi K.; Brewer, Martha C.
Cc: Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin
Subject: Doner, et al. v. Logan, et al.

Counsel:

Our side is meeting on Monday to discuss which, if any, depositions that we are interested in submitting jointly, and will get back to you. Whatever we decide, what are your thoughts regarding a joint motion to the court to reduce the number of required copies of evidence? The rule is original + 12 copies, and with what both sides have, that will be no small effort or cost. We should also think about an agreed statement of facts. While we obviously disagree significantly on key factual issues, there may be *some* facts we can agree upon which can make things easier on us and the court.

In addition to what Jennifer Croskey provided on Monday, we've received documents/material responsive to your subpoena to Philip De Groot, and will provide to you what is not protected work-product by early next week. While both Dr. De Groot and Mr. Henson are testifying experts, we do not agree that you are entitled to requested documents/material which they testified they did not rely upon in forming their expert opinions and reports. We also object to producing documents/material already in your possession, such as copies of the complaint and Relator affidavits. Finally, we do not agree to your request to remove the redaction from the supplemental agreement with Stantec, because the redacted portion is protected work-product material. Mr. Henson only testified generally about the scope of Stantec's work at GLSM during his deposition.

William J. Cole

Senior Assistant Attorney General
Ohio Attorney General Richard Cordray's Office
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614.466.2980 (phone), 866.354.4086 (fax)
william.cole@ohioattorneygeneral.gov

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Monday, May 10, 2010 4:23 PM
To: Jennifer Croskey; William J. Cole; Mindy Worly; Rachel H. Stelzer; Daniel J. Martin; Dale T. Vitale

Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Subject: RE: Doner, et al. v. Logan, et al.

I was not aware of any prior understanding to submit depositions jointly. I had mentioned previously to Rachel about splitting the cost of submitting the relator depositions, which then led to my below email. We are fine with submitting all depositions jointly. Who should our paralegal contact to coordinate the joint submission.

Tom Fusonie

From: Jennifer Croskey [mailto:Jennifer.Croskey@ohioattorneygeneral.gov]
Sent: Monday, May 10, 2010 7:33 AM
To: Fusonie, Thomas H.; William J. Cole; Mindy Worly; Rachel H. Stelzer; Daniel J. Martin; Dale T. Vitale
Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Subject: RE: Doner, et al. v. Logan, et al.

It was our understanding that all depositions would be submitted jointly. Are you now suggesting that only these depositions be submitted jointly?

Jennifer S. M. Croskey
Assistant Attorney General, Executive Agencies
Ohio Attorney General Richard Cordray
Phone 614.466.2980
Fax 866.803.9971
Email Jennifer.Croskey@OhioAttorneyGeneral.gov
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
OhioAttorneyGeneral.gov
SpeakOutOhio.gov

From: Fusonie, Thomas H. [mailto:thfusonie@vorys.com]
Sent: Monday, May 03, 2010 1:55 PM
To: William J. Cole; Mindy Worly; Rachel H. Stelzer; Jennifer Croskey; Daniel J. Martin; Dale T. Vitale
Cc: Ingram, Bruce L.; Miller, Joseph R.; Brewer, Martha C.; Wilhelmy, Kristi K.
Subject: Doner, et al. v. Logan, et al.

Counsel,

Are you planning on submitting the depositions from Relators, Mike Post and Mike Highley? If so, we think it would make sense as a joint submission. That way each side could split the copying cost and avoid unnecessary duplication. Could you please let me know this week?

Tom Fusonie

From the law offices of Vorys, Sater, Seymour and Pease LLP.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

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From the law offices of Vorys, Sater, Seymour and Pease LLP.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

From the law offices of Vorys, Sater, Seymour and Pease LLP.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

CONFIDENTIALITY NOTICE: This e-mail message is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. If you are the intended recipient but do not wish to receive communications through this medium, please so advise the sender immediately.

PERSONAL SERVICES
AGREEMENT

THIS AGREEMENT is made this 10th day of February 2010, by and between the State of Ohio, Department of Natural Resources, 2045 Morse Road, D-3, Columbus, Ohio 43229-6693, hereinafter referred to as the "State" or "Department", acting through its director, Sean D. Logan, pursuant to section 1501.01 of the Ohio Revised Code and Philip DeGroot, Ph.D., P.E., and Hydrosphere Engineering, P.O. Box. 360530, Cleveland, Ohio 44136, hereinafter referred to as the "Consultant."

WITNESSETH:

WHEREAS, the Department is the Respondent in an Original Action in Mandamus known as *State of Ohio ex rel. Wayne T. Doherty, et al., v. Sean D. Logan, Director, Ohio Department of Natural Resources and Ohio Department of Natural Resources*, Supreme Court of Ohio Case No. 09-1292 (the "Court Case"); and

WHEREAS, the Department wishes to engage the services of the Consultant to provide confidential, expert advice and testimony as appropriate in discovery, pre-hearing, and hearing of matters pertaining to hydrology and hydraulics of the Grand Lake St. Marys, Ohio Watershed insofar as those matters concern the Court Case; and

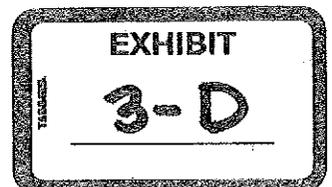
WHEREAS, The consultant is uniquely qualified to provide said advisory services by virtue of extensive experience teaching and consulting in the field of water resources engineering;

NOW THEREFORE, for the purpose of providing said services and in consideration of the compensation to be paid, the parties hereto covenant and agree as follows:

A. The Department retains the Consultant to undertake and perform all work, duties and activities as Expert Consultant to the Department, which shall include confidential, expert consultant services as outlined in the following scope of work.

SCOPE OF WORK

[REDACTED]



The Department reserves the right to modify the range and scope of services provided by the Consultant and associated costs thereto.

B. The Consultant agrees to perform timely any duties within the scope of his expertise and experience as an expert as are deemed necessary by the Department or the Office of the Attorney General. These duties are to be performed in a professional manner in accordance with accepted established practices and procedures. These duties are to be performed exclusively by the Consultant under the supervision of the Department or the Office of the Attorney General.

C. The Consultant agrees that he will not discuss or disclose any information or materials obtained pursuant to Consultant's responsibilities under this Agreement without the consent of the Department and the Office of the Attorney General. The Consultant agrees to be bound by the terms of all protective orders entered by any court in any case that may develop.

D. In the event that this case has not been settled or otherwise dismissed at the time that the Consultant fulfills his duties under this Agreement, the State and the Consultant may extend and modify this Agreement as deemed necessary by the State for the remainder of this case.

E. This document constitutes the entire Agreement between the parties. Neither party may modify or amend the terms of this Agreement, except by mutual, written agreement. Neither this Agreement nor any rights, duties or obligations described herein shall be assigned by either party hereto without the prior express written consent of the other party. This Agreement shall be construed under the laws of the State of Ohio.

Compensation

A. In consideration of the services to be rendered by Consultant the State covenants and agrees to pay to said Consultant a sum not to exceed Fifteen Thousand and No/100 Dollars (\$15,000.00) in the aggregate payable upon submission of invoices not to exceed Fifteen Thousand and No/100 Dollars (\$15,000.00) by the Consultant, and approved by the Department. Funds for paying for the services have been encumbered by Purchase Order Number _____, and are so certified by the Director of the Office of Budget and Management on _____, 2010. Obligations of the State are subject to the provisions of section 126.07 of the Ohio Revised Code.

B. Consultant shall be paid at the following rates:

- 1) Philip DeGroot, Ph.D., P.E.—One Hundred, Twenty-Eight & No/100 Dollars (\$128.00) per hour.
- 2) Michael Menoes, Ph.D., P.E.—One Hundred, Eight & No/100 Dollars (\$108.00) per hour.

C. Additional compensation for travel costs, including mileage, lodging, or other costs, is expressly waived.

Payment Due Date

A. Payments under this Agreement shall be due on the 30th calendar day after the later of:

- 1) The date of actual receipt of a proper invoice by the State.
 - 2) The date services are accepted in accordance with the terms of the Agreement.
- B. The date of the warrant issued by payment shall be considered the date payment is made.

Invoice Requirements:

- A. Invoices shall be submitted in original and three (3) copies to the State. Proper invoice must include the following information and/or attached documentation:
- 1) Name and address of business concern as designated in the Agreement.
 - 2) Federal Tax Identification Number of business concern.
 - 3) Invoice remittance address.

Improper Invoices

If an invoice contains a defect or impropriety and/or it is not a proper invoice as defined in this Section, a written notification and the improper invoice shall be sent to Consultant for the State within fifteen (15) calendar days after receipt of the invoice. The notice shall contain a description of the defect or impropriety and any additional information necessary to correct the defect or impropriety. If such notification has been sent, the required payment date shall be sixty (60) days after receipt of a proper invoice or service acceptance, whichever is later.

Interest and Overdue Payments

Section 126.30 of the Ohio Revised Code is applicable to this Agreement and required payment of interest on overdue payments for all proper invoices for which the required payment date occurs on or after July 1, 1985. The interest charge shall be at rate per calendar month that equals one-twelfth of the rate per annum prescribed by Section 5703.47 of the Revised Code.

Rights in Data, Patents and Copyrights

The State shall have unrestricted authority to reproduce, distribute and use any submitted report, data or material in whole or in part. No report, document or other material produced in whole or in part with the funds provided to the Consultant by the State shall be subject to copyright by the Consultant in the United States or any other country.

No personnel of the Consultant who exercised any functions or responsibilities in connection with the review or approval of the undertaking or carrying out of any such work shall, prior to the completion of said work, voluntarily acquire any personal interest, direct or indirect, which is incompatible or in conflict with the discharge or fulfillment of their functions or responsibilities with respect to the carrying out of said work. Any such person who, prior to the execution of this Agreement, acquires any such incompatible or conflicting personal interest, or after the effective date of this Agreement voluntarily or involuntarily acquires any such incompatible or conflicting personal interest, shall immediately disclose his or her interest to the Department in writing. Thereafter, he or she shall not participate in any action affecting the work under this Agreement, unless the Department shall determine that, in light of the personal interest disclosed, his or her participation in any such action would not be contrary to the public

interest.

Duration

This Agreement shall terminate on June 30, 2010 unless the Agreement is extended by mutual agreement and in writing. All financial obligations of the State under this Agreement are subject to the appropriation of sufficient funds by the General Assembly and/or approval of the Controlling Board. If at any time sufficient funds are not appropriated to continue funding the payments due under this Agreement, this Agreement will terminate on the date the available appropriation expires without any further obligation by the State.

Termination and Suspension

A. The State may terminate or suspend this Agreement if it appears to the State that the Consultant has failed to perform satisfactorily any requirement of this Agreement or if Consultant is in violation of a specific provision of this Agreement or upon just cause.

B. In the event of termination or suspension of this Agreement, the State shall have ownership and possession of all reports, documents and other materials assembled and prepared pursuant to this Agreement. Upon surrender of such materials, the Consultant will receive compensation for all work performed prior to the date of termination or suspension on a pro rata basis.

In the performance of this contract, the Consultant agrees as follows:

The Consultant shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, disability or military status as defined in section 4112.01 of the Revised Code, national origin, or ancestry. The Consultant shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, age, disability or military status as defined in section 4112.01 of the Revised Code, national origin, or ancestry. Such action shall include, but is not limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination, including apprenticeship. The Consultant agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Department setting forth the provisions of this nondiscrimination clause.

The Consultant shall, in all solicitation or advertisements for employees placed by or on behalf of the Consultant, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, disability or military status as defined in section 4112.01 of the Revised Code, national origin, or ancestry.

The Consultant agrees to comply with all pertinent provisions of the Americans with Disabilities Act and agrees to assume full responsibility for noncompliance therewith.

The Consultant shall attempt to purchase services from minority-owned field service agencies and other companies whenever possible. The Consultant shall attempt to procure

necessary materials from minority-owned businesses whenever possible.

The Consultant agrees that it will fully cooperate with the State Equal Employment Opportunity Coordinator, with any official or agency of the State or Federal Government which seeks to eliminate unlawful employment discrimination, and with all other State and Federal efforts to assure equal employment practices under this Agreement, and said Consultant shall comply promptly with all requests and directions from the State of Ohio or any of its officials and agencies in this regard both before and during performance. Consultant agrees to comply with all provisions of Section 125.111 of the Ohio Revised Code.

In the event of the Consultant's noncompliance with the nondiscrimination clauses of this Agreement, this Agreement may be cancelled, terminated or suspended in whole or in part and the Consultant may be ineligible for further State Contracts, and other such sanctions may be imposed and remedies instituted as otherwise provided by law.

The Consultant agrees to comply with all applicable state and federal laws regarding drug-free workplace. The Consultant shall make a good faith effort to ensure that all Consultant employees while working on the Agreement will not purchase, transfer, use or possess illegal drugs or alcohol or abuse prescription drugs in any way.

The Consultant certifies that neither it nor its employees are public employees of the Department under federal and state law for tax, retirement deduction, and Workers' Compensation purposes and that the Consultant carries Workers' Compensation coverage.

The Consultant shall be wholly responsible for any and all claims, actions, damages, liability and expense in connection with and arising from work performance under this Agreement.

The Consultant affirms that, as applicable to it, no party listed in Division (I) or (J) of Section 3517.13 of the Ohio Revised Code or spouse of such party has made, as an individual, within the two previous calendar years, one or more contributions totaling in excess of \$1,000 to the Governor or to his campaign committees.

The Consultant affirmatively represents and warrants to the State that it is not subject to a finding for recovery under R.C. 9.24, or that it has taken appropriate remedial steps required under R.C. 9.24 or otherwise qualifies under that section. Contractor agrees that if this representation or warranty is deemed to be false, the Contract shall be void *ab initio* as between the parties to this Contract, and any funds paid by the State hereunder immediately shall be repaid to the State, or an action for recovery immediately may be commenced by the State for recovery of said funds.

This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original and taken together shall be deemed to be one and the same instrument. This Agreement may be executed and delivered by facsimile or electronically in Microsoft Word or PDF format.

If required to do so pursuant to Section 2909.33 of the Ohio Revised code, the Consultant hereby represents and warrants that Consultant: (1) has not provided material assistance to an organization listed on the Terrorist Exclusion List of the State Department of the United States; (2) has obtained a current copy of the Terrorist Exclusion List; and, (3) truthfully has answered "No" to every question on the Ohio Department of Public Safety's form "Declaration Regarding Material Assistance/Nonassistance to a Terrorist Organization." If this representation is deemed false, this Agreement is void *ab initio* and Consultant immediately shall repay to the State any and all funds paid under this Agreement. Information and forms concerning the Declaration may be found at: http://www.homelandsecurity.ohio.gov/dma/dma_general_info.asp

In accordance with Executive Order 2007-01S, the Consultant, by signature on this document, certifies that it: (1) has reviewed and understands Executive Order 2007-01S, (2) has reviewed and understands the Ohio ethics and conflict of interest laws as found in Ohio Revised Code Chapter 102 and in Ohio Revised Code Sections 2921.42 and 2921.43, and (3) will take no action inconsistent with those laws and/or the Executive Order. The Consultant understands that failure to comply with Ohio's ethics and conflict of interest laws or with Executive Order 2007-01S is, in itself, grounds for termination of this Agreement and may result in the loss of other contracts or grants with the State of Ohio. The Executive Order can be found at: <http://governor2.ohio.gov/Portals/0/ExecutiveOrder2007-01S.pdf>

IN TESTIMONY WHEREOF, the said parties hereto set their hands as of the day indicated hereinbelow.

Hydrosphere Engineering
P.O. Box 360530
Cleveland, Ohio 44136
(440) 973-4054

STATE OF OHIO
DEPARTMENT OF NATURAL RESOURCES


Philip DeGroot, Ph.D., P.E.


Sean D. Logan, Director (or)
Richard Milleson, Assistant Director

Date: Feb 10, 2010

Date: Feb. 22, 2010.

Federal Tax Identification Number:
269503087

William J. Cole

From: Dorsey, Jay [Jay.Dorsey@dnr.state.oh.us]
Sent: Tuesday, February 23, 2010 1:28 PM
To: Henson, Tadd; Ringley, Bryon
Cc: William J. Cole; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Rowan, Charles; Mohr, Dave; Dorsey, Jay
Subject: FW: CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION AND ATTORNEY WORK PRODUCT Doner update
Attachments: Hydrosphere Comments 23 Feb 2010.pdf

Tadd,

See attached comments on hydrologic model.

All,

Please see second set of comments/suggestions on presentation of findings and focus on more frequent (1, 2, 5, 10-year) events.

Jay

-----Original Message-----

From: Michael C. Menoes [mailto:mikemenoes@zoominternet.net]
Sent: Tuesday, February 23, 2010 1:05 PM
To: Dorsey, Jay
Subject: Re: CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION AND ATTORNEY WORK PRODUCT Doner update

Jay,

Attached is a PDF file with comments from Phil and I regarding the Stantech model and report. Let me know if you have any questions. Thanks.

Mike



5/19/2010



HYDROSPHERE ENGINEERING

P.O. Box 360530
Cleveland, Ohio 44136-0009
440-973-4054 or 330-721-2722

February 23, 2010

ATTORNEY-CLIENT WORK PRODUCT: CONFIDENTIAL

To: Jay Dorsey
From: Phil De Groot and Mike Menoes
Subject: Comments about the hydrologic model developed for GLSM

REDACTED

- H2. The peak flows determined by the hydrologic model should be checked against the peak flows in the FEMA flood studies and the peak flows predicted by the equations of Koltan (2003). If significant differences exist, Stantec should provide documentation to support those differences.

REDACTED

Subject: Comments about the hydrologic model developed for GLSM (continued)

REDACTED

Received	To	From	CC	Description	Privilege
01/26/10	Jennifer Croskey	Henson, Tadd	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
01/26/10	Jennifer Croskey	Mohr, Dave	Ringley, Bryon; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
01/26/10	'Mohr, Dave'	Jennifer Croskey	Ringley, Bryon; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
01/26/10	Ringley, Bryon	Jennifer Croskey	Mohr, Dave; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
02/01/10	William J. Cole; Dale T. Vitale; Daniel J. Martin; Rachel H. Stelzer; Mindy Worry	Jennifer Croskey	Wells, Gene; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
02/02/10	William J. Cole; Daniel J. Martin; Mindy Worry; Dale T. Vitale; Rachel H. Stelzer	Jennifer Croskey	Wells, Gene; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
02/02/10	Henson, Tadd	Jennifer Croskey	Daniel J. Martin	E-mail	Attorney Work Product
02/02/10	Soltes, Nicholas	Henson, Tadd		E-mail	Attorney Work Product
02/02/10	Jennifer Croskey	Henson, Tadd	Daniel J. Martin	E-mail	Attorney Work Product
02/02/10	Henson, Tadd	Soltes, Nicholas		E-mail	Attorney Work Product

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3-F

Received	To	From	CC	Description	Privilege
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02/08/10	'Wells, Gene'; 'Mohr, Dave'; 'Dorsey, Jay'; Henson, Tadd; Ringley, Bryon; 'keith.banachowski@dnr.state.oh.us'	Rachel H. Stelzer	Daniel J. Martin	E-mail	Attorney Work Product and Attorney Client Privilege
02/09/10	Rachel H. Stelzer; 'Wells, Gene'; 'Mohr, Dave'; 'Dorsey, Jay'; Ringley, Bryon; 'keith.banachowski@dnr.state.oh.us'	Henson, Tadd	Daniel J. Martin	E-mail	Attorney Work Product and Attorney Client Privilege
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02/17/10	Philip De Groot; Mike Menoes	Jay Dorsey		E-mail	Attorney Work Product
02/17/10	William J. Cole; Stelzer, Rachel; Martin, Daniel; Rowan, Charles; Jennifer Croskey; Dale T. Vitale; Mindy Worly	Mohr, Dave	Dorsey, Jay; Henson, Tadd; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/17/10	Mohr, Dave; William J. Cole; Stelzer, Rachel; Martin, Daniel; Rowan, Charles; Jennifer Croskey; Dale T. Vitale; Mindy Worly	Henson, Tadd	Dorsey, Jay; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/17/10	William J. Cole; Stelzer, Rachel; Martin, Daniel; Rowan, Charles; Jennifer Croskey; Dale T. Vitale; Mindy Worly	Mohr, Dave	Dorsey, Jay; Ringley, Bryon; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
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02/23/10	Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Rowan, Charles	William J. Cole	Mohr, Dave; 'Dorsey, Jay'; Henson, Tadd; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/23/10	William J. Cole; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Rowan, Charles	Henson, Tadd	Mohr, Dave; 'Dorsey, Jay'; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/23/10	William J. Cole; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Rowan, Charles	Henson, Tadd	Mohr, Dave; 'Dorsey, Jay'; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/23/10	Henson, Tadd; Ringley, Bryon	Dorsey, Jay	William J. Cole; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Stelzer, Rachel; Martin, Daniel; Rowan, Charles; Mohr, Dave; Dorsey, Jay	E-mail	Attorney Work Product and Attorney Client Privilege
02/23/10	Henson, Tadd; William J. Cole; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Stelzer, Rachel; Martin, Daniel; Rowan, Charles	Dorsey, Jay	Mohr, Dave; Ringley, Bryon; Philip De Groot; mike@hydrosphere-engineering.com	E-mail	Attorney Work Product and Attorney Client Privilege
02/23/10	Henson, Tadd; William J. Cole; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Rowan, Charles	Daniel J. Martin	Mohr, Dave; Dorsey, Jay; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/24/10	Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; 'Rowan, Charles'	William J. Cole	Henson, Tadd; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/24/10	Henson, Tadd; Ringley, Bryon	William J. Cole	'Dorsey, Jay'; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; 'Rowan, Charles'	E-mail	Attorney Work Product and Attorney Client Privilege
02/24/10	Mindy Worly	Henson, Tadd	William J. Cole	E-mail	Attorney Work Product
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02/25/10	Philip De Groot	Jay Dorsey		E-mail	Attorney Work Product
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02/25/10	Soltes, Nicholas	Henson, Tadd		E-mail	Attorney Work Product and Attorney Client Privilege
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02/25/10	Jennifer Croskey; William J. Cole; Dale T. Vitale; Mindy Worthy; Rachel H. Stelzer; Daniel J. Martin; Rowan, Charles	Henson, Tadd	Mohr, Dave; Dorsey, Jay; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
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02/26/10	Jennifer Croskey; Ringley, Bryon	Henson, Tadd	Daniel J. Martin; Dale T. Vitale; William J. Cole; Rachel H. Stelzer; Mindy Worthy; Mohr, Dave	E-mail	Attorney Work Product and Attorney Client Privilege

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02/26/10	Henson, Tadd; William J. Cole; Dale T. Vitale; Mindy Worthy; Jennifer Croskey; Steitzer, Rachel; Martin, Daniel; Rowan, Charles	Dorsey, Jay	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/26/10	Henson, Tadd; William J. Cole; Dale T. Vitale; Mindy Worthy; Jennifer Croskey; Steitzer, Rachel; Martin, Daniel; Rowan, Charles	Dorsey, Jay	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/26/10	Dorsey, Jay; William J. Cole; Dale T. Vitale; Mindy Worthy; Jennifer Croskey; Steitzer, Rachel; Martin, Daniel; Rowan, Charles	Henson, Tadd	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/26/10	Dorsey, Jay; Henson, Tadd; William J. Cole; Mindy Worthy; Jennifer Croskey; Rachel H. Steitzer; Daniel J. Martin; Rowan, Charles	Dale T. Vitale	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/26/10	Henson, Tadd	Mohr, Dave		E-mail	Attorney Work Product
02/26/10	Henson, Tadd; Dorsey, Jay; William J. Cole; Dale T. Vitale; Mindy Worthy; Jennifer Croskey; Steitzer, Rachel; Martin, Daniel	Rowan, Charles	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/26/10	Rowan, Charles; Henson, Tadd; Dorsey, Jay; William J. Cole; Dale T. Vitale; Mindy Worthy; Jennifer Croskey; Rachel H. Steitzer	Daniel J. Martin	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
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02/26/10	Daniel J. Martin; Rowan, Charles; Henson, Tadd; Dorsey, Jay; William J. Cole; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer	Dale T. Vitale	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/27/10	Dale T. Vitale; Daniel J. Martin; Rowan, Charles; Dorsey, Jay; William J. Cole; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer	Henson, Tadd	Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
02/27/10	Dorsey, Jay	Henson, Tadd		E-mail	Attorney Work Product and Attorney Client Privilege
03/01/10	Jay Dorsey; Jennifer Croskey; Charles Rowan; Mindy Worly; William Cole; Dale Vitale; Daniel Martin	Rachel H. Stelzer	Dave Mohr; Philip De Groot; Mike Menoes	E-mail	Attorney Work Product and Attorney Client Privilege
03/01/10	Henson, Tadd	Jennifer Croskey	William J. Cole	E-mail	Attorney Work Product
03/01/10	Henson, Tadd	Dorsey, Jay	William J. Cole; Mindy Worly; Jennifer Croskey; Dale T. Vitale; Rowan, Charles; Martin, Daniel; Stelzer, Rachel; Mohr, Dave; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
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03/01/10	Jennifer Croskey	Henson, Tadd	William J. Cole	E-mail	Attorney Work Product
03/01/10	Henson, Tadd	Jennifer Croskey	William J. Cole	E-mail	Attorney Work Product
03/01/10	Klusty, Julie	Henson, Tadd		E-mail	Attorney Work Product

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03/02/10	Jennifer Croskey; William J. Cole	Henson, Tadd	Daniel J. Martin; Dale T. Vitale; Rachel H. Stelzer; Mindy Worly; Mohr, Dave; Ringley, Bryon; Dorsey, Jay	E-mail	Attorney Work Product and Attorney Client Privilege
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03/03/10	Henson, Tadd	William J. Cole	Ringley, Bryon; Dale T. Vitale; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Daniel J. Martin; Rowan, Charles; Philip De Groot	E-mail	Attorney Work Product and Attorney Client Privilege
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03/03/10	Jennifer Croskey	Henson, Tadd	William J. Cole; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Daniel J. Martin; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege

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03/03/10	Henson, Tadd	Jennifer Croskey	William J. Cole; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Daniel J. Martin; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
03/03/10	Jennifer Croskey	Henson, Tadd	William J. Cole; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Daniel J. Martin; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
03/03/10	Henson, Tadd	Jennifer Croskey	William J. Cole; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Daniel J. Martin; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
03/09/10	Mike Menoes	Jay Dorsey	Philip De Groot	E-mail	Attorney Work Product
03/09/10	William J. Cole; Mindy Worly; Dale T. Vitale; Martin, Daniel; Stelzer, Rachel; Jennifer Croskey; Rowan, Charles	Dorsey, Jay	Henson, Tadd; Ringley, Bryon; Mohr, Dave	E-mail	Attorney Work Product and Attorney Client Privilege
03/09/10	Jay.Dorsey@dnr.state.oh.us	Henson, Tadd		E-mail	Attorney Work Product and Attorney Client Privilege
03/09/10	Henson, Tadd	Dorsey, Jay		E-mail	Attorney Work Product and Attorney Client Privilege
03/10/10	Henson, Tadd	Dorsey, Jay		E-mail	Attorney Work Product and Attorney Client Privilege
03/10/10	Dorsey, Jay	Henson, Tadd		E-mail	Attorney Work Product and Attorney Client Privilege
03/11/10	Henson, Tadd; Ringley, Bryon	William J. Cole	'Dorsey, Jay'; Mohr, Dave; Mindy Worly	E-mail	Attorney Work Product and Attorney Client Privilege

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03/12/10	William J. Cole; Ringley, Bryon	Henson, Tadd	'Dorsey, Jay'; Mohr, Dave; Mindy Worly	E-mail	Attorney Work Product and Attorney Client Privilege
03/12/10	Henson, Tadd; Ringley, Bryon	William J. Cole	Dorsey, Jay; Mohr, Dave; Mindy Worly	E-mail	Attorney Work Product and Attorney Client Privilege
03/12/10	William J. Cole; Mindy Worly	Dorsey, Jay	Mohr, Dave; Henson, Tadd; Ringley, Bryon	E-mail	Attorney Work Product and Attorney Client Privilege
03/12/10	William J. Cole; Ringley, Bryon	Henson, Tadd	Dorsey, Jay; Mohr, Dave; Mindy Worly	E-mail	Attorney Work Product and Attorney Client Privilege
03/15/10	Henson, Tadd; Ringley, Bryon	William J. Cole	Dorsey, Jay; Mohr, Dave; Mindy Worly	E-mail	Attorney Work Product and Attorney Client Privilege
03/15/10	Mindy Worly; Jennifer Croskey; Martin, Daniel; William J. Cole; Dale T. Vitale; Stelzer, Rachel; Rowan, Charles	Dorsey, Jay	Mohr, Dave; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
03/15/10	'Dorsey, Jay'; Jennifer Croskey; Daniel J. Martin; William J. Cole; Dale T. Vitale; Rachel H. Stelzer; Rowan, Charles	Mindy Worly	Mohr, Dave; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
03/15/10	'Dorsey, Jay'; Jennifer Croskey; Daniel J. Martin; William J. Cole; Dale T. Vitale; Rachel H. Stelzer; Rowan, Charles	Mindy Worly	Mohr, Dave; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
03/16/10	Mindy Worly; 'Dorsey, Jay'; Jennifer Croskey; Daniel J. Martin; William J. Cole; Dale T. Vitale; Rachel H. Stelzer; Rowan, Charles	Henson, Tadd	Mohr, Dave	E-mail	Attorney Work Product and Attorney Client Privilege
03/16/10	'Dorsey, Jay'; Jennifer Croskey; Daniel J. Martin; William J. Cole; Dale T. Vitale; Rachel H. Stelzer; 'Rowan, Charles'	Mindy Worly	'Mohr, Dave'; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege

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03/16/10	Henson, Tadd	Mindy Worly		E-mail	Attorney Work Product
03/19/10	Henson, Tadd; Jay.Dorsey@dnr.state.oh.us	Jennifer Croskey	Mindy Worly; Dale T. Vitale; Daniel J. Martin; Rachel H. Stelzer; William J. Cole	E-mail	Attorney Work Product and Attorney Client Privilege
03/19/10	Jennifer Croskey; Jay.Dorsey@dnr.state.oh.us	Henson, Tadd	Mindy Worly; Dale T. Vitale; Daniel J. Martin; Rachel H. Stelzer; William J. Cole	E-mail	Attorney Work Product and Attorney Client Privilege
03/19/10	Jennifer Croskey	Dorsey, Jay	Mindy Worly; Dale T. Vitale; Martin, Daniel; Stelzer, Rachel; William J. Cole; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
03/19/10	Dorsey, Jay	Jennifer Croskey	Mindy Worly; Dale T. Vitale; Daniel J. Martin; Rachel H. Stelzer; William J. Cole; Henson, Tadd	E-mail	Attorney Work Product and Attorney Client Privilege
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03/23/10	William J. Cole; Mohr, Dave; Dorsey, Jay; Ringley, Bryon; Philip De Groot	Henson, Tadd	Dale T. Vitale; Jennifer Croskey; Daniel J. Martin; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
03/24/10	William J. Cole; Mohr, Dave; Dorsey, Jay; Ringley, Bryon; Philip De Groot	Henson, Tadd	Dale T. Vitale; Jennifer Croskey; Daniel J. Martin; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
03/24/10	William J. Cole	Henson, Tadd	Jennifer Croskey	E-mail	Attorney Work Product
03/24/10	Henson, Tadd	William J. Cole		E-mail	Attorney Work Product

State ex rel. Doner, et al. v. Logan, et al.
 Supplemental Privilege Log
 April 27, 2010

Received	To	From	CC	Description	Privilege
04/22/10	William J. Cole	Henson, Tadd		E-mail	Attorney Work Product
04/23/10	Philip De Groot; Henson, Tadd; 'Dorsey, Jay'	Jennifer Croskey	Dale T. Vitale; William J. Cole; Daniel J. Martin; Rachel H. Stelzer; Mindy Worly	E-mail	Attorney Work Product and Attorney Client Privilege
04/23/10	Henson, Tadd; Ogden, Mark; Dorsten, Steven; Cobb, Glen	Dorsey, Jay	Dale T. Vitale; William J. Cole; Martin, Daniel; Stelzer, Rachel; Mindy Worly; Jennifer Croskey; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
04/23/10	Dorsey, Jay; Ogden, Mark; Dorsten, Steven; Cobb, Glen	Henson, Tadd	Dale T. Vitale; William J. Cole; Martin, Daniel; Stelzer, Rachel; Mindy Worly; Jennifer Croskey; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
04/23/10	Jennifer Croskey; Henson, Tadd; William J. Cole; Martin, Daniel; Stelzer, Rachel; Mindy Worly; Dale T. Vitale; Rowan, Charles	Dorsey, Jay	Philip De Groot; Mohr, Dave	E-mail	Attorney Work Product and Attorney Client Privilege
04/26/10	Jennifer Croskey; William J. Cole; Mindy Worly	Dorsey, Jay	Dale T. Vitale; Martin, Daniel; Stelzer, Rachel; Henson, Tadd; Mohr, Dave; Rowan, Charles; Dorsey, Jay	E-mail	Attorney Work Product and Attorney Client Privilege
04/26/10	Dorsey, Jay	Henson, Tadd	Jennifer Croskey; William J. Cole; Mindy Worly	E-mail	Attorney Work Product and Attorney Client Privilege
04/26/10	Dorsey, Jay; Henson, Tadd; Ogden, Mark; Dorsten, Steven; Cobb, Glen	Dorsey, Jay	Dale T. Vitale; William J. Cole; Martin, Daniel; Stelzer, Rachel; Mindy Worly; Jennifer Croskey; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
04/26/10	Dorsey, Jay; Henson, Tadd; Ogden, Mark; Cobb, Glen; Morton, Craig	Dorsten, Steven	Dale T. Vitale; William J. Cole; Martin, Daniel; Stelzer, Rachel; Mindy Worly; Jennifer Croskey; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege
04/26/10	Dorsten, Steven; Dorsey, Jay; Ogden, Mark; Cobb, Glen; Morton, Craig	Henson, Tadd	Dale T. Vitale; William J. Cole; Martin, Daniel; Stelzer, Rachel; Mindy Worly; Jennifer Croskey; Rowan, Charles	E-mail	Attorney Work Product and Attorney Client Privilege

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 April 27, 2010

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04/26/10	'Dorsten, Steven'; 'Dorsey, Jay'; 'Ogden, Mark'; 'Cobb, Glen'; 'Morton, Craig'	Henson, Tadd	'Dale T. Vitale'; 'William J. Cole'; 'Martin, Daniel'; 'Stelzer, Rachel'; 'Mindy Worthy'; 'Jennifer Croskey'; 'Rowan, Charles'	E-mail	Attorney Work Product and Attorney Client Privilege
04/27/10	Jennifer Croskey; Jay Dorsey	Tadd Henson	William Cole; Mindy Worthy; Dale Vitale; Daniel Martin; Rachel Stelzer; dave Mohr; Charles Rowan; Philip De Groot	E-mail	Attorney Work Product and Attorney Client Privilege

Time sheet for Philip H. De Groot

Date	Task	Hours
10-Feb	Phone conversation with Jay Dorsey	0.5
11-Feb	Meet with Jay Dorsey and Bill Cole	4.0
19-Feb	Review documents obtained from Jay Dorsey	5.0
20-Feb	Report preparation, meet with Mike Menoës	8.0
21-Feb	Report preparation	6.0
22-Feb	Meet with Stantec, Jay Dorsey, Bill Cole, etc...	6.0
24-Feb	Report revisions	2.0
01-Mar	Review and process affidavit	1.0
09-Mar	Review questions developed for attorneys	2.0
Total hours		34.5

Time sheet for Michael C. Menoës

Date	Task	Hours
16-Feb	Download documents from ODNR website	3.0
17-Feb	Review documents	4.0
18-Feb	Review documents, report preparation	7.0
19-Feb	Review documents, report preparation	7.0
20-Feb	Meet with Phil De Groot, report preparation	5.5
21-Feb	Review additional materials	3.0
22-Feb	Meet with Stantec, Jay Dorsey, Bill Cole, etc...	6.0
23-Feb	Edit reports, develop questions for attorneys	4.0
24-Feb	Edit reports, perform peak flow simulations	4.0
25-Feb	Review new material, perform peak flow simulations	3.0
01-Mar	Review Jay's comments, edit reports	1.5
03-Mar	Review affidavit and prepare report	2.0
08-Mar	Prepare questions for attorneys	3.0
Total hours		53.0

Time sheet for Gregory De Groot

11-Feb	Meet with Jay Dorsey and Bill Cole	4 hours
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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ANTOINE D. WILSON,

Plaintiff,

v.

REGINALD WILKINSON, et al.,

Defendants.

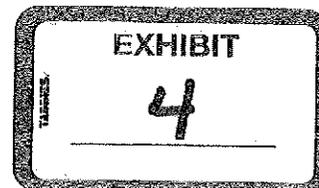
CASE NO. 2:04-cv-00918

MAGISTRATE JUDGE KING

OPINION AND ORDER

Plaintiff, an inmate at the Ross Correctional Institution, brings this action pursuant to 42 U.S.C. §1983 alleging that his rights were violated when defendants compelled him to provide a DNA sample by swabbing the inside of his mouth for collection of buccal cells pursuant to the Ohio DNA Act, O.R.C. §2901.07. This matter is now before the Court on defendants' motion for an order compelling disclosure by and answering of questions by plaintiff's expert, *Defendants' Motion to Compel*, Doc. No. 46, and plaintiff's motion for a protective order limiting the deposition of plaintiff's expert, *Plaintiff's Motion for a Protective Order*, Doc. No. 48. For the reasons that follow, *Defendants' Motion to Compel*, Doc. No. 46, is **GRANTED** and *Plaintiff's Motion for a Protective Order*, Doc. No. 48, is **DENIED**.

At the March 23, 2006, deposition of Dan E. Krane, Ph.D., identified by plaintiff as an expert witness who may testify at trial, *see Plaintiff's Disclosure of Expert Testimony*, Doc. No. 28, counsel for plaintiff objected to inquiry into Dr. Krane's communications with plaintiff's counsel prior to June 2005, *i.e.*, the point at which Dr. Krane was retained as a testifying expert on plaintiff's behalf. *See Deposition of Dan E. Krane, Ph.D.*, March 23, 2006, at 97-99, Doc. No. 50 (filed under



seal)[hereinafter "*Krane Depo.*"].¹ Plaintiff argues that Dr. Krane's communications with counsel prior to June 2005 constitute protected attorney work product within the meaning of Federal Rule of Civil Procedure 26(b)(3),² and that, before conducting the requested discovery, defendants must establish exceptional circumstances requiring the discovery of such information under Federal Rule of Civil Procedure 26(b)(4)(B).³ *Plaintiff's Motion for Protective Order*, at 4. Plaintiff therefore seeks a protective order prohibiting defendants from questioning Dr. Krane regarding any communications with Plaintiff prior to June 2005 absent a showing of exceptional circumstances, and in any event limiting Dr. Krane's deposition to prohibit inquiry into matters related to counsel's

¹The parties conferred with the Court by telephone, and were directed to brief the issue. *Order* (March 23, 2006), Doc. No. 43.

² Federal Rule of Civil Procedure 26(b)(3) provides:

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

³ Federal Rule of Civil Procedure 26(b)(4) provides in relevant part:

Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

litigation strategy or mental impressions as protected work product under Federal Rule of Civil Procedure 26(b)(3). *Plaintiff's Motion for a Protective Order*, Doc. No. 48. In support of his motion, plaintiff's counsel, Thomas H. Fusonie, has submitted an affidavit stating in relevant part:

On May 7, 2005, Dr. Krane's consultation included discussion of other attorneys who understood DNA profiling, and who were involved in similar litigation; litigation strategy; possible expert witnesses; and the protocol and practices of Defendant Jone Monce, Superintendent of the Bureau of Criminal Investigation ("BCI") in preparation for Plaintiff's Motion to Compel Discovery to allow inspection of BCI's London, Ohio, facilities.

On or about June 6, 2005, Plaintiff's counsel concluded it was necessary to obtain an expert witness report from Dr. Krane regarding the impact of including the DNA profile of African Americans into Ohio's DNA database.

Affidavit of Thomas H. Fusonie, attached as exhibit to *Plaintiff's Motion for Protective Order*, Doc. No. 48.

This Court concludes that Dr. Krane's testimony must be available to defendants without the restrictions proposed by plaintiff.

Generally, non-testifying experts are protected from discovery so as to allow a party to feel free to hire and consult with such experts without risking exposing certain information to the opposing party. *See Fed.R.Civ.P. 26(b)(4)(B)*.

Zolensky v. Ametek, Inc., 142 F.3d 438, unpublished, 1998 WL 124047 (6th Cir. March 12, 1998). However, "[a] party may depose any person who had been identified as an expert witness whose opinions may be presented at trial." Federal Rule of Civil Procedure 26(b)(4)(A). Moreover, a testifying expert is required to disclose all information considered by him in forming his opinion:

A *testifying expert* is required to file a report that must contain "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information *considered* by the

witness in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions....” Fed.R.Civ.P. 26(a)(2)(B) (emphasis supplied). Under Rule 26(a)(2)(B), the requirement of disclosure applies not only to information actually relied upon by a testifying expert, but also to information that was not relied upon, but considered by the expert. *See Constr. Indus. Servs. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 50 (E.D.N.Y.2001)... The advisory committee notes to the rule explain the lack of a reliance requirement:

The [expert] report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that material furnished to their experts to be used in forming their opinions- *whether or not ultimately relied upon by the expert*-are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Fed.R.Civ.P. 26(a)(2) advisory committee's note (emphasis supplied)....

Schwab v. Philip Morris USA, Inc., 2006 WL 721368 (E.D.N.Y. March 20, 2006)[emphasis in the original]. Some courts have concluded that it may be possible to discovery of even a testifying expert where that expert's role as a consultant clearly differs from his role as a witness:

A single expert can be both a testifying expert, subject to the disclosure requirements of Rule 26(a)(2)(B) regarding some issues, and a consulting expert, not subject to discovery regarding other issues. *See B.C.F. Oil Ref., Inc. v. Consol. Edison Co.*, 171 F.R.D. 57, 61 (S.D.N.Y.1997) (“It is conceivable that an expert could be retained to testify and in addition to advise counsel outside of the subject of his testimony. Under such a circumstance it might be possible to claim a work product privilege if this delineation were clearly made.” (quoting *Beverage Market v. Ogilvy & Mather*, 563 F.Supp. 1013, 1014 (S.D.N.Y.1983))).

Id. However, that is not the case here. Dr. Krane testified at his deposition to his history of service to this litigation. According to Dr. Krane, he was contacted in the summer of 2004 and asked if he

would serve as a consultant on plaintiff's claim. *Deposition of Dan E. Krane, Ph.D.*, March 23, 2006, at 86, Doc. No. 50 (filed under seal). After about a year, he was asked if he would be willing to serve as an expert witness, and was advised that he would be required to prepare a report. *Id.*, at 87. Two to three months later, he produced the August 2005 expert report that has now been produced to defendants. *Id.* See also *Exhibit A*, attached to *Plaintiff's Disclosure of Expert Testimony*, Doc. No. 28. As a consultant, Dr. Krane discussed general issues about database searches and testimony and reports previously provided by him. He also discussed research conducted by him that was subsequently published in the *Journal of Forensic Sciences* and the *Journal of Jurimetrics*. *Krane Depo.*, at 89-93. Dr. Krane advised plaintiff's counsel of other attorneys who might be helpful to plaintiff's case "because I was either impressed with those attorneys' knowledge and understanding of DNA profiling or knew they were also involved in litigation involving databases...." *Id.*, at 90.

In light of Dr. Krane's testimony, it is impossible to clearly delineate his service as a consultant from his service as an expert witness.

Though it is theoretically possible to distinguish between an expert testifying and consulting, in practice, "the delineation between those roles ... become[s] blurred" when an expert "review[s] documents in his role as an expert that he previously had reviewed in his role as consultant [.]" *B.C.F. Oil*, 171 F.R.D. at 61.

Schwab v. Philip Morris USA, Inc., *supra*. Additionally, "any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery." *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. Of New York, Inc.*, *supra*, 171 F.R.D. at 62. Contrary to plaintiff's characterization of Dr. Krane's roles, this expert appears to have consulted with plaintiff's counsel on the very same issues for which he has now been retained

as an expert witness. *See Plaintiff's Disclosure of Expert Testimony*, Doc. No. 28. Under these circumstances, defendants are entitled to depose Dr. Krane regarding the period prior to June 2005 when he was retained as a testifying expert.

Moreover, Dr. Krane's testimony will not be limited to exclude counsel's mental impressions and trial strategy, if those impressions and that strategy were considered by Dr. Krane in forming his expert opinions. Although authority on this issue is not unsettled, most courts faced with the issue have opted in favor of greater discovery of experts. For example, in *TV-3 v. Royal Ins. Co. Of America*, 193 F.R.D. 490, 491-92 (S.D. Miss. 2000), the court concluded that "any material generated by the testifying expert in connection with the subject litigation" and that all "communications by the expert to the attorneys" was discoverable:

At issue is whether Rule 26(a)(2) requires that a party produce communications of any kind by and between its attorneys and its testifying experts, regardless of whether a claim of attorney work product would ordinarily protect the communications from disclosure. Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure was amended in 1993 to require that reports be prepared for each testifying expert containing, among other things, "the data or other information *considered* by the witness in forming the opinions." (Emphasis added.) The Advisory Committee Notes to the 1993 Amendment, explain this requirement as follows:

The [expert] report is to disclose the data and other information considered by the expert and any other exhibits or charts that summarize or support the expert's opinions. **Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.**

Advisory Committee Notes Fed.R.Civ.P. 26(A)(2), P. 149 (emphasis added).

The undersigned recognizes that the authorities differ as to this issue....

...[see] *Magee v. Paul Revere Life Insurance Co.*, 172 F.R.D. 627 (E.D.N.Y.1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D.Mich.1995); *All West Pet Supply Co. v. Hill's Pet Products Division*, 152 F.R.D. 634 (D.Kan.1993). The Defendants cite these cases, as well as *Nexus Prods. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 9 (D.Mass.1999), and cases which predate the 1993 amendments....

We.. . instead adopt the opposite approach... that is that Rule 26, requiring disclosure of material "considered," allows discovery of all communications between counsel and a retained testifying expert, **even if those communications contain the attorneys' mental impressions or trial strategy or is otherwise protected by the work product privilege.** Authorities supporting this position... include *Karn v. Rand*, 168 F.R.D. 633, 635 (N.D.Ind.1996) (the expert disclosure requirements of 26(a)(2) "trump" any assertion of work product or privilege"); *B.C.F. Oil Refining v. Consol. Edison Co. of N.Y.*, 171 F.R.D. 57 (S.D.N.Y.1997) (holding that all material considered by a testifying expert, including communications from counsel containing attorney work product, must be disclosed); *Lamonds v. General Motors, Corp.*, 180 F.R.D. 302 (W.D.Va.1998) (same); *Furniture World, Inc. v. D.A.V. Thrift Stores*, 168 F.R.D. 61 (D.N.M.1996) (same); *Culbertson v. Shelter Mut. Ins. Co.*, No. 97-1609, 1999 WL 109566 (E.D.La. March 2, 1999) (same); *Johnson v. Gmeinder*, 191 F.R.D. 638 (D.Kan.2000) (same); *Barna v. United States*, No. 95 C 6552, 1997 WL 417847 (N.D.Ill. July 28, 1997) (same); *Musselman v. Phillips*, 176 F.R.D. 194, 202 (D.Md.1997) ("[W]hen an attorney furnishes work product--either factual or containing the attorney's impressions--to [a testifying expert witness], an opposing party is entitle to discovery of such a communication"); *Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, No. CV91-4178-RG, 1993 WL 360674 (C.D.Cal., August 6, 1993) (citing the amendments to Rule 26(a)(2) as requiring "automatic disclosure of all information considered by the trial experts" in forming their opinions).

Id. See also *Western Resources, Inc., v. Union Pacific Railroad*, unpublished, 181494 (D.Kansas, January 31, 2002):

[A]ny type of work product or other privileged information lose their privileged status when disclosed to, and considered by, a testifying expert. *Johnson v. Gmeinder*, 191 F.R.D. 638, 645-47 (D.Kan. 2000) (holding investigative report and other materials prepared by a non-testifying expert in connection with investigation of an automobile accident loses privileged status when disclosed to testifying expert) (citing Fed.R.Civ.P. 26(a)(2)(B) and advisory committee notes appended thereto; *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305 (W.D.Va. 1998) (applying rule to opinion work product); *Musselman v. Phillips*, 176 F.R.D. 194, 202 (D.Md. 1997) (same); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997) (same); *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639-40 (N.D.Ind.1996) (same); *Barna v. United States*, No. 95 C 6552, 1997 WL 417847 (N.D.Ill. July 28, 1997) (same); 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2016.2 at 250-52 (1994) (“[W]ith respect to experts who testify at trial, the disclosure requirements of Rule 26(a)(2), adopted in 1993, were intended to pretermitt further discussion and mandate disclosure despite privilege”); Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 *Creighton L.Rev.* 773, 808 (1994)).FN11

FN11. See, also, *In re Air Crash at Dubrovnik*, No. MDL 1180, 3:98:CV-2464 (AVC), 2001 WL 777433, at *3 (D. Conn. June 4, 2001); *QST Energy, Inc. v. Mervyn's and Target Corp.*, No. C-00-1699MJJ (EDL), 2001 WL 777489, at *3-5 (N.D.Cal. May 14, 2001) (in naming former consultant as witness, party waives attorney client privilege in regard to all subjects on which expert likely to offer testimony); *Vaughan Furniture Co. v. Featureline Mfg., Inc.*, 156 F.R.D. 123, 128 (M.D.N.C.1994) (waiver of privilege resulting from designation of attorney as expert witness applies to those documents expert reviewed at any time and that would be relevant to formulation of expert opinion) (emphasis added); *Chemical Bank v. Affiliated FM Ins. Co.*, No. 87-Civ-0150 (SHS), 1996 WL 445362 (S.D .N.Y. Aug. 7, 1996); *Douglas v. Univ. Hosp.*, 150 F.R.D. 165, 168 (E.D.Mo.1993) (once non-testifying expert is designated as testifying expert, non-testifying expert subject to cross-examination); *County of Suffolk v. Long Island Lighting Co.*, 122 F.R.D. 120, 123

(E.D.N.Y.1988) (Party cannot proffer consultant as disinterested expert and at same time shield his major role in formulation of case.)

Id.

In view of the Advisory Committee Notes to the 1993 Amendments to Federal Rule of Civil Procedure 26, *see supra*, this Court agrees with those courts that have concluded that neither the “exceptional circumstances” of Federal Rule of Civil Procedure 26(b)(4), nor the work product doctrine of Federal Rule of Civil Procedure 26(b)(3) apply to a consulting expert who has been designated as an expert witness, particularly where, as here, his role as a consultant is closely intertwined with his role and opinions as a testifying expert

For all the foregoing reasons, *Defendants’ Motion to Compel*, Doc. No. 46, is **GRANTED**.
Plaintiff’s Motion for a Protective Order, Doc. No. 48, is **DENIED**.

IT IS SO ORDERED.

s/ Norah McCann King

Norah McCann King
United States Magistrate Judge

May 19, 2006