STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, MI 49417
616-846-8315
* * * * *

EVOQUA WATER TECHNOLOGIES, LLC,
Plaintiff,
v

M.W. WATERMARK, LLC; MICHAEL GETHIN, individually; **DANIEL JANISSE**, individually; **PAUL MALIK**, individually; **ANDREW HAGEN**, individually; **DAVID HIGGINS**, individually; and **JAMES DRIESENGA**, individually;
Defendants.
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OPINION AND ORDER

File No. 17-4997-CB

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County Courthouse in the City of Grand Haven, Michigan on the 23nd day of July, 2025

PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE

Two motions have been pending before the Court for several years, while related federal litigation winds its way toward a second jury trial after remand from the U.S. Court of Appeals for the 6th Circuit.

Plaintiff Evoqua Water Technologies LLC (Evoqua) moved for an order precluding defendants M.W. Watermark LLC, Michael Gethin, Daniel Janisse, Paul Malik, Andrew Hagen, David Higgins, and James Driesenga (hereinafter, collectively, Watermark) from introducing any evidence or argument regarding the 2016 federal court litigation.[1] Evoqua also moved for leave to supplement Evoqua's prior discovery responses related to the expert report prepared by Michael K. Milani and to supplement the report itself, or, in the alternative, to amend Evoqua's witness list

[1] *Evoqua Water Technologies LLC* v *MW Watermark LLC*, 18-2397/2398; 2019 WL 4926513 (CA 6, 2019).

to substitute a new expert for Mr. Milani. For the reasons stated below, the court denies both motions.

The first motion references the 2016 federal court litigation, filed by Evoqua against defendants Watermark, Gethin, Janisse, and James Vande Wege in the United States District Court for the Western District of Michigan. The complaint in the 2016 federal court litigation pled federal law claims for contempt, trademark infringement, false advertising, and copyright infringement. The complaint also pled Michigan claims for misappropriation of trade secrets, breach of contract, conversion, unfair competition, and unjust enrichment. On March 9, 2017, the federal court dismissed the Michigan claims, and Evoqua refiled the Michigan claims in this Court. The counts of the Michigan complaint that remain viable are count I, misappropriation of trade secrets, count II, breach of contract, and count III, statutory conversion.[2]

The 2016 federal court litigation grew out of an earlier dispute between the parties, i.e., the 2003 federal court litigation.[3] In the prior federal litigation, Evoqua's predecessor in interest[4] alleged that Watermark, Gethin, and their co-defendants misused trademarks belonging to Evoqua.

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[2] The elements of misappropriation of trade secrets are: (1) the existence of a trade secret; (2) acquisition of the trade secret in confidence; and (3) unauthorized use or disclosure. MCL 445.1901 *et seq*; *Henkel Corporation* v *Cox*, 386 F Supp 2d 898, 902 (ED Mich, 2005). The elements of a cause of action in breach of contract are: (1) that there was a contract; (2) which the other party breached; (3) thereby resulting in damages to the party claiming breach. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014); M Civ JI 142.01.

Count II pleads two separate claims in breach of contract. First, count II alleges that each of the six individual defendants in the case at bar breached a "confidentiality and development agreement" with Evoqua. Second, count II alleges that defendants Watermark and Gethin each breached the "Settlement Agreement and Mutual Release" (hereinafter, 2003 Settlement Agreement) entered into by the parties in the 2003 federal court litigation. The Sixth Circuit has held that the interpretation of the 2003 Settlement Agreement is governed by Michigan law rather than by federal law. See *Evoqua Water Technologies LLC* v *M W Watermark LLC*, #18-2397/2398, 2019 WL 4926513 (CA 6, 2019).

The elements of a cause of action in statutory conversion are: (1) that the defendant stole or embezzled or converted property owned by the plaintiff to the defendant's own use, or, in the alternative; (2)(a) that the defendant bought, received, possessed, concealed, or aided in the concealment of property that was stolen, embezzled, or converted; and (2)(b) that at the time that the defendant bought, received, possessed, concealed, or aiding in the concealment of stolen, embezzled, or converted property, the defendant knew that the property was stolen, embezzled, or converted. MCL 600.2919a.

[3] *U.S. Filter/JWI, Inc* v *J-Parts, LLC*, 5:03-cv-0127 (WD Mich, 2003).

[4] Whether or not Evoqua is, in the eyes of the law, the successor in interest to U.S. Filter/JWI, Inc. is a matter that has yet to be finally resolved by the United States Court of Appeals for the Sixth Circuit.

On December 16, 2003, the parties to the 2003 federal court litigation signed the 2003 Settlement Agreement ending that litigation.[5]

Evoqua argues that evidence and argument regarding the legal issues, procedural history, outcome, and pending appeals in the 2016 federal court litigation are not relevant to any issue in the case at bar. Evoqua further argues that mentioning these matters would confuse the issues, mislead the jury, waste time, and prejudice Evoqua. However, Evoqua does not explain how the evidence is irrelevant or how it would confuse, mislead, waste time, and prejudice Evoqua.

On the other hand, Watermark responds that information regarding the 2016 federal court litigation, including decisions and verdicts rendered therein, are relevant to the issues in the case at bar and that this information would not be unfairly prejudicial to Evoqua. Watermark further responds that there are overlapping facts and allegations between the 2016 federal court litigation and the case at bar. This Court agrees. For example, Watermark asserts that

> in the Federal Action, there was extensive litigation regarding the 2003 Injunction that was entered as part of the Settlement Agreement reached in the 2003 litigation between U.S. Filter and Defendants Watermark and Mr. Gethin. In the Federal Action, the court held that Evoqua could not enforce the 2003 Injunction and vacated a prior finding of contempt. In this case, Evoqua has repackaged the 'contempt' proceeding as a breach of contract claim regarding the 2003 Settlement Agreement. . . . Since there has been no ruling by this court whether or not the 2003 Injunction was incorporated into the 2003 Settlement Agreement, Defendants should be able to defend themselves that Evoqua has already tried to enforce this claim in the Federal Action and it did not have standing to do so.[6]

Moreover, there may be individual items of evidence that were introduced by the parties in the 2016 federal court litigation that are relevant to the issues in the case at bar because they bear on the elements of the counts that remain viable in this case or on the defenses thereto. If such items of evidence are offered in evidence by the parties at trial, the Court will consider each item on its own merits, as well as any objections thereto, and will rule thereon at the time that the item

[5] On December 23, 2003, the federal district court entered a "Final Judgment Including Permanent Injunction" enjoining J-Parts LLC and Michael Gethin from using trademarks belonging to US Filter/JWI. The Final Judgment Including Permanent Injunction is in addition to, and is a separate document from, the 2003 Settlement Agreement.

[6] Watermark's Brief, pp 13-14. (internal citations omitted).

is offered. To assist the parties in preparing for trial, the Court will also entertain motions *in limine* regarding specific items of evidence should such motions be forthcoming.

Evoqua also seeks leave to supplement its prior discovery responses related to the expert report prepared by Michael K. Milani and to supplement the report itself or, in the alternative, to amend Evoqua's witness list to substitute a new expert for Mr. Milani.

Evoqua argues that Evoqua should be permitted to supplement Evoqua's prior discovery responses pertaining to Milani's expert report and the expert report itself to provide additional information that addresses the issues raised by the Court in the Court's opinion and order of April 6, 2020, issued after a two-day *Daubert* hearing,[7] striking Milani as an expert witness. In the alternative, Evoqua asks that the Court permit Evoqua to retain a new expert witness to provide expert testimony as to Evoqua's damages. Evoqua asserts that expert testimony as to Evoqua's damages is critical to this case and will aid the jury. In support of this motion, Evoqua cites MCR 2.302(E).[8]

In contrast, Watermark argues that Evoqua's goal is not to update Evoqua's discovery responses but to correct deficiencies in the methodology and the evidence submitted by Evoqua in support of Milani's testimony. Watermark argues that these deficiencies cannot be cured by supplementation.

MCR 2.302(E)(1)(a)(i) provides, in pertinent part: "A party . . . must supplement or correct its disclosure or response . . . if the party learns that in some material respect the disclosure or response is incomplete or incorrect . . . ." The purpose of rule 2.302(E) is " . . . to prevent a party, through artifice, trickery, and deception, from acquiring an unfair advantage over another party at trial by surprise, last minute introduction of new witnesses, new testimony, new evidence, and the like." 2 Longhofer and Quick, Michigan Court Rules Practice (Text) (7th ed), § 2302.25, p 267. "[T]he rule is intended to prevent and punish deception . . . ." *Id.* at p 268.

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[7] *Daubert* v *Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[8] MCR 2.302(E) pertains to a party's duty to supplement or correct discovery disclosures and responses. It does not create a right to supplement or correct after a proposed expert's opinion has been determined unreliable following a *Daubert* hearing, but it does permit a court to order a party to supplement or correct its disclosure or response. MCR 2.302(E)(1)(ii).

The prevention of deception, trickery, and surprise is the goal of rule 2.302(E). "Surprise" includes the "last minute introduction of new witnesses, new testimony, new evidence, and the like." 2 Longhofer and Quick, *supra*. The goal of rule 2.302(E) is not to permit a party to correct deficiencies in the party's prior discovery submissions through the introduction of new evidence and new theories when the evidence and theories previously submitted by that party have been found wanting. It is evident that Evoqua does not wish to update or correct its discovery responses so much as it wishes to plug holes in Evoqua's damages case. This is not the function of rule 2.302(E). Evoqua's motion for leave to supplement Evoqua's prior discovery responses related to the expert report prepared by Michael K. Milani and to supplement the report itself is DENIED.

However, on March 31, 2025, after conducting its own *Daubert* hearing, the United States District Court for the Western District of Michigan issued an Order admitting Evoqua's new expert (its third) on its alleged copyright damages. While the Court expressed concerns about the strength of the expert's methodology, it ultimately found that "the issues exposed during the *Daubert* hearing go to weight, not admissibility. The Court is confident that a jury will be able to weigh the expert testimony appropriately with the benefit of argument from counsel."[9] Therefore, based on the federal *Daubert* hearing and the federal District Court's findings, Evoqua is free to move to amend its witness list to substitute a new expert, and if filed, the court will consider the arguments for and against such a request at a future hearing.

In summary, Evoqua's motion to preclude Watermark from introducing any information regarding the 2016 federal court litigation is DENIED, and Evoqua's motion to supplement its prior expert's report is DENIED. Evoqua's alternative request to amend its witness list to substitute a new expert, due to the change in circumstances wrought by time and the change of status of the federal court litigation, is reserved for a future motion and hearing.

IT IS SO ORDERED.

Dated: July 24, 2025

Hon. Jon A. Van Allsburg, Circuit Judge

[9] *Evoqua Water Technologies, LLC v M.W. Watermark, LLC, et al*, 1:16-cv-14 (WD Mich 2025) pp 2-3.