

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	Civil Action No. 1:90-cv-00229
	)	
Plaintiff	)	
	)	
v.	)	
	)	
ROBERT BRACE, and ROBERT BRACE	)	
FARMS, INC.,	)	
	)	
Defendants	)	

**DEFENDANTS’ BRIEF IN SUPPORT OF  
MOTION FOR LEAVE TO FILE SUR-REPLY**

Defendants Robert Brace and Robert Brace Farms, Inc., through their attorneys, file this Brief in Support of Motion for Leave to File Sur-Reply.

1. United States Misrepresentations

Defendants and their attorneys seek to convey their deep concern regarding what now appears to be a discernible pattern of misrepresentation in the filings of the United States in both this action and related action 1:17-17-cv-0006.

In their Motion for Extension of Time and to Stay Briefing (ECF No. 217) and Reply in Support of United States’ Motion for Extension of Time and to Stay Briefing (ECF No. 227), the United States makes various misrepresentations in apparent effort to persuade this Court that Defendants had improperly filed with this Court an overwhelming number of documents as exhibits accompanying its recent filings (ECF Nos. 214, 215 and 216) that were not previously provided to the United States during the discovery period.

In ECF No. 217 (para. 6), the United States refers to eight (8) documents the United States alleges they may not have been received during the discovery period because they had not

been Bate-stamped – “*see e.g.*, Defs.’ Resp., Ex. [214-] 4, [214-] 20-22, [214-] 67-68, and [214-] 74-75.”

In ECF 227, para. 2, the United States falsely intimates that there are more than twelve (12) documents that Defendants filed as exhibits accompanying ECF No. 214 that had not been provided during the discovery period by stating that,

“Defendants concede that they did not produce—or, as Defendants euphemistically put it, “the United States is not familiar with”—at least ten exhibits that accompany Defendants’ Response to the United States’ Second Motion to Enforce, and two more that accompany Defendants’ two Motions to Vacate under Rules 60(b)(5) and 60(b)(6). *See* Response ¶¶ 2, 5.”

ECF No. 227, at para. 2.

In ECF No. 225 (Defendants’ Response and Opposition to United States Extension of Time to File Response/Reply to Motion to Enforce and Stay Brief on Motion to Vacate), Defendants made clear that, of the one-hundred sixty-four (164) exhibits accompanying Defendants’ filings (ECF Nos. 214, 215 and 216), ONLY twelve (12) exhibits IN TOTAL had not been previously provided during the discovery period. (ECF No. 225, at para. 6). Ten (10) of those exhibits related to ECF No. 214 (Ex. 1).

As Defendants’ Exhibit 1 accompanying this Brief makes clear,<sup>1</sup> these exhibits included the following: three (3) exhibits consisting of four (4) U.S. government documents; one (1) exhibit which consisted of the affidavit of a previously identified potential Defendant witness whom the United States could have deposed but chose not to depose; two (2) exhibits which consisted of the affidavits of Defendant Robert Brace’s sons, Randall and Ronald Brace whom the United States deposed but did not question about the subject matter discussed in the

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<sup>1</sup> Defendants’ Exhibit 1 accompanying this Brief addresses the status of ECF Nos. 214-4, 214-13, 214-67, 214-68, 214-70, 214-71, 214-74, 214-75, 214-82 and 214-88

affidavits; one (1) exhibit consisting of the affidavit of Defendant Robert Brace whom the United States deposed twice during 2018 and previously during 1992 and 2005, but chose not to question about the subject matter addressed in the affidavit; one (1) exhibit consisting of a draft memorandum supporting Defendant's then-proposed motion to seek an after-the-fact Clean Water Action Section 404 permit from the U.S. Army Corps of Engineers ("Corps") in connection with the original 1990 action; one (1) exhibit consisting of a University of Wisconsin pamphlet; and one (1) exhibit consisting of Black's Law Dictionary definition of the term "tacit." Considering the nature of these exhibits and how the United States had actual or constructive notice of them, and notwithstanding the United States' disingenuous claim that Defendants did not need to produce the affidavits of Randall, Ronald and Robert Brace which rely on evidence that Defendants collected after discovery closed (ECF No. 227, para. 5), but about which the United States has long been aware, the United States is hard-pressed to show, and has, thus far, failed to show that the addition of these documents is prejudicial to the United States in the present action.

As Defendants' Exhibit 2 accompanying this Brief clearly shows,<sup>2</sup> contrary to the United States' misrepresentations, these exhibits included three satellite images that the United States had provided to Defendants during expert discovery as part of the United States expert reports which Defendants provided back to the United States in greater resolution than the United States provided to Defendants, as Defendants had disclosed in ECF No. 214, para. 24, footnotes 8-10. (Ex. 2). Considering the nature of these exhibits and how the United States had actual or constructive notice of them, the United States is hard-pressed to show, and has, thus far, failed to show that the addition of these documents is prejudicial to the United States in the present action.

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<sup>2</sup> Defendants' Exhibit 2 accompanying this Brief addresses the status of ECF Nos. 214-20, 214-21 and 214-22.

In ECF No. 227 para. 2, the United States then asserted that it “believes an additional seven exhibits (or portions thereof) beyond those identified by Defendants may also have not been produced in discovery: ECF Nos. 214-6, 214-8, 214-10, 214-41, 214-47, 214-50 and 214-51.” Contrary to this United States misrepresentation, as Defendants’ Exhibit 3 accompanying this Brief clearly shows,<sup>3</sup> these exhibits contain documents that Defendants actually provided to the United States during discovery or which refer to documents about which the United States is most certainly aware (Ex. 3). They include exhibits accompanying the depositions of former United States Fish and Wildlife Service (“FWS”) representative David Putnam, current Corps representatives Michael Fodse and Scott Hans, and current U.S. Environmental Protection Agency (“EPA”) representatives Jeffrey Lapp, Todd Lutte and Peter Stokely, and an email from current EPA Region III Counsel, Pamela Lazos referred to in exhibits accompanying the depositions of Messieurs Fodse and Lutte. Considering the nature of these exhibits and how the United States had actual or constructive notice of them, the United States is hard-pressed to show, and has, thus far, failed to show that the addition of these documents is prejudicial to the United States in the present action.

## 2. United States’ False Accusations

Defendants and their attorneys seek to convey their deep concern regarding what now appears to be a discernible pattern of false accusations of dishonesty against Defendants’ counsels, in both this action and related action 1:17-17-cv-0006.

In ECF No. 217, para. 6, the United States falsely accuses Defendants and their counsels of modifying exhibits from their original form – “exhibits that appear to have been modified from their original form, *see, e.g.*, Def’s Resp., Ex. [214-] 6, [214-] 8 and [214-] 72.” It doubles

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<sup>3</sup> Defendants’ Exhibit 3 accompanying this Brief addresses the status of ECF Nos. 214-6, 214-8, 214-10, 214-41, 214-47, 214-50 and 214-51.

down on this accusation in ECF No. 227 para 3, by falsely accusing Defendants and their counsels of fabricating evidence:

“Defendants further admit that they have no evidence that would establish the origin or admissibility of some of their exhibits. Defendants speculate that ECF Numbers 214-6 and 214-8 are “most likely a typed version of the prior handwritten draft correspondence,” Response ¶¶ 9, 11, but have neither testimony nor circumstantial evidence authenticating these letters—that is, they lack “evidence sufficient to support a finding that the item is what the proponent claims it is.”

ECF No. 227, para. 3

Much to the contrary, however, in ECF No. 225 paras.9-14, Defendants *did* provide circumstantial evidence of the nature of the correspondences in question, referring to the prior deposition testimonies of former FWS representative David Putnam and former EPA representative James Butch. In particular, Defendants explained how both officials testified under oath about: 1) their and other officials’ prior practices of drafting handwritten versions of correspondences for themselves and/or other officials prior to having them typed into draft and final correspondences issued on agency letterhead; and 2) about how they had corresponded with one another during the period in question and had been aware of the May 11, 1987, July 15, 1987, July 17, 1987 and March 1, 1988 correspondences between Messieurs Kulp, Perry, Butch, Clark and Robert Brace now in question. While the United States cites the testimony of Mr. Putnam to characterize the font-based unofficial correspondences bearing the names of United States officials as other than “an official letter” from the FWS, the United States has failed to show how Mr. Putnam’s testimony establishes that the font-based correspondence was not a draft of the final official document, especially considering Mr. Putnam’s testimony that he often engaged in preparing letters for former FWS representatives Charles Kulp and Edward Perry that addressed such subject matters. Therefore, contrary to the United States’ false characterization,

Defendants have NOT admitted they have no evidence that would establish the origin or admissibility of these exhibits.

In its email to Defendants' counsels dated, May 8, 2018, the United States, furthermore, asserts that it has "identified authentic versions of the letters attached as Exhibits 6, 8, and 10 to Defendants' Response in Opposition to the Motion to Enforce (ECF Nos. 214-6, 214-8, 214-10)." (ECF No. 227-2). However, the United States neglects to mention that Defendants' had already provided the official March 1, 1988 FWS correspondence (ECF No. 214-10) as Exhibit Putnam-10 accompanying the 1-26-18 deposition of former FWS representative David Putnam, as Exhibit D-6 accompanying the 10-2-17 deposition of current EPA representative Jeffrey Lapp, and as Exhibit D-43 accompanying the 10-10-17 deposition of current EPA representative Peter Stokely. While Defendants are willing to supplement the Court record with what the United States claims are "authentic versions" of ECF No. 214-6 and 214-8, Defendants already provided the authentic version of ECF No. 214-10 to the United States. (Ex. 3). Considering the nature of the first two exhibits and how the circumstantial evidence Defendants established show the United States had actual or constructive notice of them, the United States is hard-pressed to show, and has, thus far, failed to show that Defendants' supplementation of the unofficial versions of these documents with what the United States refers to as the "authentic versions" will prejudice the United States in the present action.

Moreover, contrary to the United States' false accusation in ECF No. 217, para. 6, Defendants have NOT modified ECF No. 214-72, which is actually a Pennsylvania Department of Environmental Protection map that the United States provided to Defendants during discovery which is labeled "USACE 0000090." (ECF No. 225, para. 15, Ex. 3).

3. Defendants Require Additional Time for Expert Scientific Discovery Due to Circumstances Beyond Their Control

Defendants and their attorneys also seek a fair opportunity to conduct, for the first time, scientific discovery on Defendants' Waterford, Pennsylvania farm as described in ECF No. 208 in the present action, to which this Court has not yet definitely responded. Defendants also sought such a fair opportunity in related action 1:17-17-cv-0006, to which this Court responded by granting Defendants an extension of time to perform the required scientific analysis and produce a report until May 25, 2018, which the Honorable Judge Barbara Rothstein granted in a text-only Order dated March 30, 2018.

Defendants, through their counsels, have corresponded extensively with hydraulic/hydrologic engineers located in Idaho, New York and Texas<sup>4</sup>. Due to circumstances beyond their control, and despite their vigorous ongoing efforts since the end of the discovery period on February 28, 2018, however, Defendants have been unable to secure an available qualified hydraulic engineer to undertake the type of scientific discovery detailed in ECF No. 208 pursuant to reasonable and workable terms and at an affordable rate.

Although Defendants, on May 3, 2018, finally secured the verbal and emailed written commitment of a qualified hydraulic/hydrologic engineering firm from Texas to conduct such analysis under tight time constraints, this qualified expert informed Defendants that they require until July 31, 2018 to conduct said analysis and to produce a report that Defendants can deliver to the United States. As of this filing, Defendants counsels await a formal proposal from the

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<sup>4</sup> Copies of these privileged communications will be made available for the Court's *in camera* review upon the Court's request.

Texas hydraulic/hydrologic engineering firm to undertake an onsite visit, perform the analysis required, and produce a report by July 31, 2018, pursuant to workable and affordable terms.

In conclusion, Defendants request that this Court grant it an extension until July 31, 2018 to enable the only hydraulic/hydrologic expert that Defendants can secure to undertake the hydraulic/hydrologic analysis required to develop for Defendants a fair and adequate scientifically-informed defense in the both the current and related actions.

Respectfully submitted,

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