

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

UNITED STATES OF AMERICA,)	Civil Action No. 1:90-cv-00229
)	Civil Action No. 1:17-cv-00006
Plaintiff)	
)	
v.)	
)	
ROBERT BRACE, ROBERT BRACE)	
FARMS, INC., and ROBERT BRACE and)	
SONS, Inc.)	
)	
Defendants)	

**DEFENDANTS MOTION FOR SANCTIONS REGARDING PLAINTIFFS' FAILURE
TO COMPLY WITH COURT ORDER AND APPLICABLE ADR POLICIES AND
PROCEDURES**

AND NOW, come the Defendants, by and through their undersigned counsels, and file the following Motion for Sanctions Regarding Plaintiffs' Failure to Comply with Court Order and Applicable ADR Policies and Procedures.

Introduction

This Court's ADR Policies and Procedures, Order (Doc. No. 97) and verbal instructions regarding mediation in this case required that all Parties to this matter ensure that necessary decision makers were physically present for the mediation session that was conducted on March 8, 2017. Despite this instruction, Plaintiffs attended this session with trial counsel, a witness, and separate counsel for the EPA. Despite repeated requests, Plaintiffs would not indicate how that attendance satisfied the requirement that individuals with decision making authority regarding a compromise or settlement were in attendance at this session. Defendants, on the other hand, had all necessary decision makers (and their spouses) in attendance at the session. Defendants believe that necessary decision makers were not present on behalf of Plaintiffs as required, and, if Plaintiffs are unable to establish that such individuals were physically present or that such

persons were properly excused by motion seeking excuse from being physically present, request sanctions in the form of the costs and expenses associated with the mediation session.

1. On February 8, 2017, the Court issued an Order Granting, in Part, Defendant's Motion to Continue Deadlines to Allow for Completion of ADR in Related Case, Including Request for Expedited Treatment of this Motion. (Doc. No. 97). This Order, in part, directed the Parties to attend a mediation session scheduled on or before March 8, 2017, to be convened by a mutually agreed upon neutral mediator at a mutually agreed upon location, pursuant to the ADR Policies and Procedures of this District.

2. During the February 8th argument that preceded the Court's Order directing the Parties to attend mediation, the Court made it clear that all Parties were required to have "necessary decision makers" physically present for the mediation session.

3. The Parties proceeded to negotiate the date and location of the mediation session, as well as the selection of the mediator.

4. Plaintiffs' made it clear that the schedules of the individuals needed at that mediation session necessitated that the session occur at a location that was as close as possible to Philadelphia and Washington D.C.

5. To accommodate this, Defendants agreed to conduct that mediation in Harrisburg Pennsylvania.

6. Prior to the mediation, Defendants' counsels inquired of Plaintiffs' counsels seeking assurance that necessary decision makers would be physically present during the

mediation session. Counsel for the Plaintiffs indicated that the United States would be complying with the order, Local Rules, and ADR Policies and Procedures.¹

7. On March 8, the Parties and mediator met at in Harrisburg, Pennsylvania and participated in an all-day mediation session. .

8. Section 2.7.A of the ADR Policies and Procedures of this Court states that, “*Each party must attend* the selected ADR process session *unless* excused under paragraph D below” (emphasis added).

9. Section 2.7.A.2 of the ADR Policies and Procedures of this Court states that, “[a] unit or agency of government satisfies this attendance requirement *if represented by a person who has, to the greatest extent feasible, full settlement authority, and* who is knowledgeable about the facts of the case, the governmental unit’s position, *and* the procedures and policies under which the governmental unit decides whether to accept proposed settlements” (emphasis added).

10. Section 2.7.D of the ADR Policies and Procedures of this Court states that, “[a] person who is required to attend the selected ADR process session may be excused from attending in person *only after a showing* that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused *must* file a motion with the assigned Judicial Officer, no fewer than 15 days before the date set for the session, simultaneously copying the Arbitration Clerk (if applicable), all other counsel and unrepresented parties and the neutral(s). The motion seeking excuse from the selected ADR process session *must*: 1. Set forth with specificity all considerations that support the request; 2. State realistically

¹ The emails containing this exchange also refer to aspects of the confidential settlement positions of the Parties and, therefore, Defendants have not attached those emails to this motion. Further, at the request of all parties, the Court has entered a protective order specifically insulating mediation communications from public disclosure. (Doc. No. 107) If review of those emails is necessary, Defendants can supplement this Motion with a filing under seal, or in another manner acceptable to the Court.

the amount in controversy in the case; 3. Indicate whether the other party or parties join in or object to the request; and 4. Be accompanied by a proposed order” (emphasis added).

11. Section 2.7.E of the ADR Policies and Procedures of this Court states that, “[a] person excused from attending the selected ADR process session in person *must be available* to participate by telephone.

12. Plaintiffs were represented at the March 8, 2017 mediation session by three Washington, D.C. U.S. Department of Justice trial counsels (Laura Brown, Brian Uholik and Chloe Kolman) and one EPA-Region III regulatory counsel (Pamela Lazos), and also by U.S. Environmental Protection Agency Region 3’s Associate Director, Office of Environmental Programs, identified on the EPA website as the designated “Region 3 EPA NEPA Contact” (Jeffrey Lapp).

13. None of these individuals representing the DOJ and/or USEPA was “a person who has, to the greatest extent feasible, full settlement authority, *and* who is knowledgeable about the facts of the case, the governmental unit’s position, *and* the procedures and policies under which the governmental unit decides whether to accept proposed settlements,” (emphasis added), as required by Section 2.7.A.2 of the ADR Policies and Procedures of this Court.

14. On February 23, 2017, the Parties and the neutral mediator entered into a Mediation Process Agreement. Section 8(c) of said Agreement clearly states which persons have full settlement authority on behalf of the Plaintiffs.

15. 8. Agreement of the Parties

[REDACTED]

[REDACTED]

16. None of the officials identified in Section 8(c) of the Mediation Process Agreement entered into by the Parties were physically present at the March 8, 2017 mediation session or believed to be present by telephone as required by Section 2.7.E of the ADR Policies and Procedures of this Court. . Further, Plaintiffs did not file a motion with this Court seeking to have necessary decision makers (i.e., individuals with requisite compromise or settlement authority) excused from the March 8, 2017 mediation session as required by Section 2.7D of this Court’s ADR Policies and Procedures.

17. Unlike Plaintiffs, the Defendants’ necessary decision maker(s) traveled long distances and many hours and incurred considerable travel, lodging and other expenditures, as well as, attorney fees and related costs, to attend and fully participate at the scheduled March 8, mediation session as required by this Court’s ADR Policies and Procedures.

18. Section 2.7.A.3 of the ADR Policies and Procedures of this Court states clearly that, “[a]ny party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions.”

19. Based on the best information available to Defendants, sanctions would appear to be called for in the present case because Plaintiffs “fail[ed] to have physically in attendance the necessary decision maker(s),” and failed to file the required “motion seeking excuse from the selected ADR process session.”

20. Defendants therefore request that, if Plaintiffs are unable to establish that they complied with the requirement that necessary decision makers be physically present during the

March 8 mediation session, that it be ordered to pay to Defendant sanctions in an amount sufficient to fully cover all of the expenditures Defendants incurred to attend the March 8, 2017 mediation session, including all attorney fees and related costs.

WHEREFORE, Defendants respectfully request that this Court impose sanctions on Plaintiffs.

<p>Respectfully submitted,</p> <p>THE KOGAN LAW GROUP, P.C..</p> <p>By: <u>/s/ Lawrence A Kogan</u> Lawrence A. Kogan, Esq. (<i>Pro Hac Vice Pending</i>) (NY # 2172955) 100 United Nations Plaza Suite #14F New York, New York, 10017</p> <p>(t)(212) 644-9240 (f)(646) 219-1959 Email: lkogan@koganlawgroup.com</p> <p>Attorneys for Defendants, Robert Brace, Robert Brace Farms, Inc., and ROBERT BRACE and SONS, Inc.</p>	<p>Respectfully submitted,</p> <p>KNOX McLAUGHLIN GORNALL & SENNETT, P.C.</p> <p>By: <u>/s/ Neal R. Devlin</u> Neal R. Devlin, Esq. (PA ID No. 89223) Alexander K. Cox, Esq. (PA ID No. 322065) 120 West Tenth Street Erie, PA 16501-1461 Telephone: (814) 459-2800 Fax: (814) 453-4530 Email: ndevlin@kmgslaw.com</p> <p>Attorneys for Defendants, Robert Brace, Robert Brace Farms, Inc., and ROBERT BRACE and SONS, Inc.</p>
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UNITED STATES OF AMERICA,)	Civil Action No. 1:90-cv-00229
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ROBERT BRACE, ROBERT BRACE)	
FARMS, INC., and ROBERT BRACE and)	
SONS, Inc.)	
)	
Defendants)	

ORDER

AND NOW, this ___ day of _____, 2017, upon consideration of the Defendants Motion for Sanctions regarding Plaintiffs' Failure to Comply with Court Order and Applicable ADR Policies and Procedures, it is hereby ORDERED that said Motion is GRANTED. It is further Ordered that Defendants shall, within 7 days of this Order, file with this Court a statement of the costs and expenses incurred by Defendants for participation in the March 8 mediation session, along with a proposed order which indicates the amount of the sanction sought. Plaintiffs shall file any response to that statement within 7 days of its filing. The Court will enter an order setting this amount of the sanction.

BY THE COURT
