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Sent: Friday, January 19, 2018 5:07 PM
To: Cox, Alexander K.; Devlin, Neal; 'lkogan@koganlawgroup.com'
Cc: Brown, Laura J.S. (ENRD); Uholik, Brian (ENRD); Kolman, Chloe (ENRD)
Subject: Brace - United States' Third Requests for Production
Attachments: ENV_DEFENSE-#832910-v1-Brace_Final_Third_RFPs_to_Robert_Brace_(17).PDF;
 ENV_DEFENSE-#832913-v1-Brace_Savoy_Order.PDF; ENV_DEFENSE-#832915-v1-
 Brace_Final_(90)_Third_RFPs_to_Robert_Brace.PDF

Counsel:

Please find attached the United States' Third Requests for Production directed to Defendant Robert Brace in both the 17-cv-006 and 90-229 actions. We note that we believe the documents sought in paragraphs 7 and 8 of the new 17-cv-006 requests and 1 and 2 of the new 90-229 requests would be responsive to the United States' outstanding requests for production, specifically paragraphs 7, 8, and potentially 4, 17, and 18 of the first set of RFPs in the '90 and '17 actions. Nevertheless, we reiterate these requests with greater particularity in the attached.

In addition, we reiterate our request for bank statements and receipts from Mr. Brace, Brace Farms, Inc., and Brace & Sons, Inc. Such documents are responsive to the United States' First Requests for Production to all Defendants, specifically paragraph 16 of the first set of RFPs in the '17 action, which states:

"All financial statements (audited and unaudited) and other financial Documents prepared by or on behalf of You since January 1, 2012, including but not limited to Documents showing balance sheets; income statements; cashflow statements; notes, auditor opinions; financial summaries; financial compilations; descriptions of annual revenue; costs and expenses; description of Assets (including their origin, date of transfer, original owner, and fair market value); description of liabilities; loan applications; and statements for bank accounts, investment accounts, retirement accounts, credit accounts, and loans."

As recapitulated here, the United States' First Requests for Production expressly request bank statements; receipts that, for example, memorialize Defendants' "costs and expenses" or represent a "description of Assets" would also be responsive to this request.

It is the United States' position that the requested bank statements are discoverable and are relevant and proportional to the needs of this case. First, Mr. Brace indicated in his deposition that he intends to assert an inability to pay defense. Second, the Clean Water Act itself makes such records relevant. Issues in the '17 action will include, among other things, whether Defendants benefitted economically from their violations of the Clean Water Act, the extent of Defendants' financial ability to pay a monetary penalty, and the amount of such penalty that would be appropriate to carry out the purposes of the CWA. Indeed, the CWA states that, in determining the amount of a civil penalty, "the court shall consider . . . the economic benefit (if any) resulting from the violation . . . [and] the economic impact of the penalty on the violator." 33 U.S.C. § 1319(d). The United States routinely requests the production of these types documents in CWA Section 404 enforcement actions, and courts have routinely found that such documents, including bank and brokerage account statements, invoices, purchase orders, receipts, etc., are discoverable. See attached order in *United States v. Savoy Senior Housing Corp.*, No. 6:06-cv-31 (W.D. Va.); see also *Rockin Artwork LLC v. Bravado Intl. Grp. Merch. Servs., Inc.*, 2016 WL 10649213, at *2-3 (W.D. Wash. Oct. 24, 2016); *State Farm Mut. Auto. Ins. Co. v. Fayda*, 2016 WL 4530890, at *1-3 (S.D.N.Y. Mar. 24, 2016); *Cohen v. Hansen*, 2015 WL 5731893, at *2 (D. Nev. Sept. 30, 2015); *Westbrook v. Charlie Sciara & Son Produce Co., Inc.*, 2008 WL 839745, at *2-4 (W.D. Tenn. Mar. 27, 2008); *Security Ins. Co. of Hartford v. Meyer Trading Co., Inc.*, 1987 WL 8207, at *1-2 (E.D. Pa. Mar. 20, 1987).



Best,
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