

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

UNITED STATES OF AMERICA,)	Civil Action No. 1:90-cv-00229-BR
)	Civil Action No. 1:17cv6
Plaintiff)	
)	
v.)	
)	
ROBERT BRACE, ROBERT BRACE)	
FARMS, INC., and ROBERT BRACE and)	
SONS, Inc.,)	
)	
Defendants)	

**DEFENDANTS’ REPLY TO
UNITED STATES’ MOTION TO SEAL REFERENCES TO THE PARTIES’
CONFIDENTIAL MEDIATION PROCESS AGREEMENT FROM ECF NO. 109
AND LEAVE TO FILE PORTIONS OF THE MEDIATION PROCESS
AGREEMENT UNDER SEAL**

Introduction

On March 17, 2017, Defendants filed with this Court a Motion for Sanctions Regarding Plaintiff’s Failure to Comply with Court Order and Applicable ADR Policies and Procedures (Doc. 109). The motion explained how Plaintiffs had ignored and violated Sections 2.7A, 2.7.A.2 and 2.7.D of this Court’s ADR Policies and Procedures and this Court’s clear verbal instructions regarding mediation in this case delivered during the February 8, 2017 argument preceding mediation, requiring all Parties “to have ‘necessary decision makers’ physically present for the mediation session,” by failing to secure the presence of any such persons representing the DOJ and/or USEPA at the March 7, 2017 scheduled session. The motion also explained how Plaintiffs had ignored and violated Section 2.7.E of this Court’s ADR Policies and Procedures by failing to file the required motion with the assigned Judicial Officer no fewer than 15 days before the date set for the mediation session, seeking excuse from the selected ADR process for necessary decision makers who were unable to attend the session based on a showing

that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. Having failed to file said motion, Plaintiffs, yet again, ignored and violated Section 2.7.E of this Court's ADR Policies and Procedures by failing to ensure this Court, Defendants' counsels and the neutral that a necessary decision maker(s) would be available to participate by telephone.

Given Plaintiffs' multifold noncompliance with this Court's Order and these ADR Court Policies and Procedures, Defendants filed their Motion for Sanctions, consistent with Section 2.7.A.3 of this Court's ADR Policies and Procedures, requesting sanctions in the form of the costs and expenses associated with the mediation session.

1. To substantiate the allegations set forth in Defendants' Motion for Sanctions, namely, that none of the USDOJ or USEPA officials physically present at the scheduled March 7, 2017 mediation session or believed to be present by telephone at that session were the "necessary decision makers" required by this Court's Order and Sections 2.7, 2.7.A.2 and 2.7.D, and by 2.7.E of this Court's ADR Policies and Procedures, Defendants' motion (ECF No. 109) compared those identified officials then present (three DOJ trial counsels, one EPA Region III regulatory counsel, and one Region 3 EPA NEPA Contact) with the definition of "necessary decision maker" set forth in Section 2.7.A.2 thereof (i.e., "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 und which the governmental unit decides whether to accept proposed settlements"), and with the first three material, publicly available, nonconfidential and essentially boilerplate sentences contained in Section 8(c) of the Parties' Mediation Process Agreement entered into on February 23, 2017.

2. Plaintiffs' Motion to Seal References to the Parties' Mediation Process Agreement from Defendants' Motion for Sanctions, which alleges Defendants' had violated the Parties' Stipulated Protective Order (ECF No. 107) and Sections 6(C)(1-2) of this Court's ADR

Policies and Procedures “by quoting Section 8(c) of that Agreement in their public filing,” when stripped to its essence, is merely a disguised effort to deceive this Court into ordering Defendant’s withdrawal of their Motion for Sanctions for purposes of shielding from public view, scrutiny and opinion the United States Governments’ own apparent disregard of this Court’s Order and ADR Policies and Procedures the Government’s violation of which, both before and during the scheduled ADR, had denied Defendants what this Court had intended as a constructive, thoughtful and *good faith* mediation session designed to help resolve this litigation.

3. Consistent with Sections 9(a)-(b) of the Mediation Process Agreement, the Parties filed their Joint Motion for Leave to File under Certain Settlement Confidential Information (ECF No. 112) which requested that this Court grant the Parties leave to file under seal specifically identified email communications that are directly relevant to Defendants’ Motion for Sanctions. Defendants justifiably did not consent to include within those communications the three sentences of Section 8(c) of the Mediation Process Agreement previously quoted in its Motion for Sanctions because such information does not constitute “confidential information” as defined by Section 9(b) of the Agreement (treating the entire Mediation Process Agreement as “confidential”), consistent with Section 6.D.8 of this Court’s ADR Policies and Procedures.

4. Section 6.A of this Court’s ADR Policies and Procedures states that, “[e]xcept as provided in subsection D of this Section 6, this Court, the ADR Coordinator, all neutrals, all counsel, all parties and any other person who participates (in person or by telephone) in (i) any ADR process [...] shall treat as ‘confidential information’ (i) the contents of all documents created for or by the neutral, (ii) all communications and conduct during the ADR process, and (iii) all ‘communications in connection with’ the ADR process” (emphasis added).

5. Section 6.B of this Court’s ADR Policies and Procedures states that “[c]ommunications in connection with’ any ADR process’ include “communication[s]

occur[ring...] during any ADR process, or [...] before or after any ADR process and is made by or to the neutral, a member of the neutral's staff..." (underline in original). Defendants agree that each of the email communications specifically identified within the Parties' Joint Motion for Leave to File under Certain Settlement Confidential Information (ECF No. 112) qualify as "communications in connection with" any ADR process, within the meaning of Section 6.B of this Court's ADR Policies and Procedures.

6. Sections 6.C.1 and 6.C.2 of this Court's ADR Policies and Procedures state, respectively, that "confidential information" [...] shall only be disclosed to those involved in the ADR process," and "shall not be used for any purpose, including impeachment, in any pending or future proceeding." Defendants agree that each of the email communications specifically identified within the Parties' Joint Motion for Leave to File under Certain Settlement Confidential Information (ECF No. 112) qualify as "confidential information" within the meaning of Sections 6.C.1-2 of this Court's ADR Policies and Procedures.

7. Section 6.D of this Court's ADR Policies and Procedures entitled, "Limited Exceptions to Confidentiality," states that "[t]his Section 6 *does not prohibit*: [...] 8. [d]isclosure of any document which, although referenced or used in an ADR process, exists independently of the ADR process" (emphasis added). Defendants submit that, since the three sentences of Section 8(c) of the Parties Mediation Process Agreement quoted within their Motion for Sanctions (ECF No. 109) contain information that is widely and publicly available on the internet, that information "exists independently of the ADR process" within the meaning of Section 6.D.8 of this Court's ADR Policies and Procedures, and therefore, is excepted from treatment as "confidential information" and is publicly disclosable, consistent with Sections 6.A and 6.D of this Court's ADR Policies and Procedures.

8. A document dated January 2017 and entitled, “Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation,”¹ created and published jointly by the United States Department of Justice Environment & Natural Resources Division (“USDOJ-ENRD”) and the National Association of Attorneys General National Attorneys General Training & Research Institute (NAGTRI), contains substantially similar, if not identical information to the information contained in the three sentences of Section 8(c) of the Parties’ Mediation Process Agreement quoted in Defendants’ Motion for Sanctions. That information appears in an appendix to the joint USDOJ-ENRD/NAGTRI document designated as attached “Appendix H – ENRD Policy on Use of Mediators for ADR and Model Mediation Process Agreement” (underline in original). Section 8(c) of the “Model Mediation Process Agreement” states as follows:

“It is explicitly recognized that the trial attorneys for the United States Department Justice (and its client agencies) do not have the authority to compromise the claims of the United States. Therefore those attorneys for the United States do not have the ultimate authority to agree to the terms of any proposed agreement or settlement. That authority is vested with the Assistant Attorney General of the Environment and Natural Resources Division and/or, as appropriate, the Deputy or Associate Attorney General of the United States....” (underline added).

The information contained in these first three sentences of the Model Mediation Process Agreement is practically identical to the information contained in Section 8(c) of the Parties’ actual Mediation Process Agreement, save for only two minor textual differences: 1) the addition of the underlined parenthetical phrase “(and its client agencies)”; and 2) the omission of the phrase contained in Section 8(c) of the Parties’ actual Mediation Process Agreement inserted after the period at the end of the first sentence above: “, ~~_____~~”

¹ See United States Department of Justice Environment & Natural Resources Division, National and Association of Attorneys General Training & Research Institute, *Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation* (Jan. 2017), available at: <https://www.justice.gov/file/928531/download>.

as Press Release Point headquartered in Chicago, IL and Chennai, India.⁵ The joint USDOJ-ENRD/NAGTRI document, furthermore, has been discussed in a post appearing on the website of the American College of Environmental Lawyers authored by John Cruden,⁶ *the* former Acting Assistant Attorney General for ENRD who initially authorized this litigation (Civil Actions No. 90-229 (ECF No. 82) and No. 17-006 (ECF No. 1)). The joint USDOJ-ENRD/NAGTRI document, moreover, has been referenced on other publicly available internet websites, including those of the Associated General Contractors of America (“the leading association for the construction industry” [with] a nationwide network of chapters”)⁷ and the National Association of Clean Air Agencies (“the national, non-partisan non-profit association of air pollution control agencies in 40 states, the District of Columbia, four territories and 116 metropolitan areas”).⁸

10. Given the domestic and international public promotion, dissemination and ongoing ready availability on multiple internet websites of the joint USDOJ-ENRD/NAGTRI guidelines that feature a reproduction of the full text of the USDOJ-ENRD Model Mediation Process Agreement inclusive of the first three sentences of Section 8(c) thereof, which provision contains information that is substantially similar to, if not, identical in nature, meaning and

⁵ See Press Release Point, *Environment and Natural Resources Division and National Association of Attorneys General Announce Guidelines for Joint State-Federal Civil Environmental Enforcement*, Press Release (Jan. 18, 2017), available at: <http://www.pressreleasepoint.com/environment-and-natural-resources-division-and-national-association-attorneys-general-announce-guide>.

⁶ See John Cruden, *The DOJ Environment Division and State Joint Enforcement*, American College of Environmental Lawyers (Jan. 25, 2017), available at: <http://www.acoel.org/post/2017/01/25/The-DOJ-Environment-Division-and-State-Joint-Enforcement.aspx> (containing a hyperlink to the author’s DOJ-ENRD webpage).

⁷ See The Associated General Contractors of America, *News – The Dangers of Environmental Safety Noncompliance for Your Business* (Feb. 14, 2017), available at: <https://www.agc.org/news/2017/02/14/dangers-environmental-safety-noncompliance-your-business> (referencing the DOJ-ENRD’s and NAAG’s announcement of the “availability of *Guidelines for Joint State/Federal Civil Environmental Litigation*” (emphasis in original). See also Associated General Contractors of America, *About Us*, available at: <https://www.agc.org/about-us>.

⁸ See National Association of Clean Air Agencies, *Washington Update – This Week in Review – January 16-20, 2017, DOJ and Attorneys General Issue Updated Guidelines for Joint Civil Environmental Litigation*, at p. 4, available at: <http://www.4cleanair.org/sites/default/files/Documents/012017wklyupdate.pdf> (noting *inter alia* how the “guidelines provide samples of documents and include other reference materials.”). See also National Association of Clean Air Agencies, *About NACAA*, available at: <http://www.4cleanair.org/about>.

import to the information contained in the first three sentences of Section 8(c) of the Parties' actual Mediation Process Agreement, Plaintiffs cannot now earnestly argue that public disclosure of only these three unalterable boilerplate sentences in Defendants' Motion for Sanctions, which disclosure reveals nothing at all about the subject matter of the strictly confidential communications exchanged in written, verbal, email or other form between the Parties and between the Parties and the neutral mediator, violates the confidentiality of the ADR process. Therefore, this Court should and must conclude that such widely and publicly available information, "although referenced or used in [the] ADR process, exists independently of the ADR process," and consequently, is excluded from the definitions of "confidential information" and "confidential process" contained in Section 9(a)-(b) of the Parties Mediation Process Agreement, consistent with Sections 6.A and 6D.8 of the Court's ADR Policies and Procedures.

CONCLUSION

For the reasons stated herein, Defendants respectfully request that this Court dismiss the United States' Motion to Seal References to the Parties' Confidential Mediation Process Agreement from ECF No. 109 and for Leave to File Portions of the Mediation Process Agreement Under Seal and for issuance of an order requiring Defendants' redaction of paragraphs 14 & 15 from their publicly filed "Motion for Sanctions Regarding Plaintiffs' Failure to Comply with Court Order and Applicable Policies and Procedures" ("Motion for Sanctions") ECF No. 109, as well as, from all versions of that Motion for Sanctions published elsewhere by Defendants or their counsel.

If, however, this Court determines that the sole textual difference between the first three sentences of Section 8(c) of the widely disseminated and publicly available USDOJ-ENRD Model Process Agreement and the first three sentences of Section 8(c) of the Parties' actual Mediation Process Agreement Defendants publicly disclosed in their Motion for Sanctions (i.e.,

the phrase affixed to the end of the first sentence of Section 8(c) of the Parties' actual Mediation Process Agreement that does not appear in Section 8(c) of the Model Mediation Process Agreement, as described in para. 8 above – i.e., “, and are authorized solely to negotiate the terms, and recommend approval (or, on a case-by-case basis to obtain approval beforehand), of proposed compromises on behalf of the United States.”) are material such that this added text does not fall within the limited exception from “confidentiality” provided by Sections 6.A and 6.D.8 of the Court’s ADR Policies and Procedures, and consequently, violated the Stipulated Protective Order (ECF No. 107), the Court should grant Plaintiffs motion with respect only to such textual difference/addition.

Respectfully submitted,

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