

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 90-229 (Erie)
	)	
ROBERT BRACE,	)	
ROBERT BRACE FARMS, Inc.	)	
	)	
Defendants.	)	

**REPLY IN SUPPORT OF UNITED STATES’ MOTION FOR EXTENSION OF TIME  
AND TO STAY BRIEFING**

In their “Response and Opposition to United States Motion for Extension of Time and to Stay Brief[ing] on Motion to Vacate” (ECF No. 225) (“Response”), Defendants’ counsel continues their pattern of recklessly firing off baseless misconduct allegations against the United States and its counsel. Despite the specious bluster, the Response in fact concedes many of the circumstances that warrant granting the United States’ Motion for Extension of Time and to Stay Briefing (ECF No. 217).

1. Defendants admit that “some of Defendants’ exhibits are not Bates-stamped.” Response ¶ 7. Indeed, that is a significant understatement. By the United States’ count, 79 of 91 exhibits do not bear Bates stamps. Of those, 22 are documents that Defendants did not need to produce in discovery, such as affidavits, deposition transcripts, and expert reports. Removing those 22 documents leaves 57 documents that were or should have been produced in discovery and that do not bear Bates stamps indicating if or by whom they were actually produced.

2. Some of these 57 documents are not Bates stamped because, as Defendants admit, they simply were *not* produced in discovery. 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. Based on its initial review, the United States 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.<sup>1</sup> That makes a total of at least 19 exhibits that Defendants now proffer as evidence, even though they never produced the documents to the United States in over nine months of discovery. Defendants’ reliance on evidence not produced in discovery is contrary to Federal Rules of Civil Procedure 26(a)(1)(A)(ii) and 26(e)(1)(A) and must be barred under Rule 37(c)(1).

3. 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.” Fed. R. Evid. 901(a). For instance, the available evidence—and Defendants’ own admission—shows that the document at ECF Number 214-6, is *not* the “May 11, 1987 letter from Field Supervisor Charles Kulp of the U.S. Fish & Wildlife Service (‘FWS’) to District Engineer Colonel Clark of the U.S. Army Corps of Engineers.” Response ¶ 9. The

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<sup>1</sup> The United States has requested that Defendants provide Bates ranges for all of the exhibits, but in particular these eight. Defendants’ counsel have advised government counsel that they plan to provide the Bates ranges.

document is not on letterhead, bears no signature, and is typed in Calibri font that “was not widely available until 2007.” Ross Arbes, *Calibri’s Scandalous History*, THE NEW YORKER, July 31, 2007, available at <https://www.newyorker.com/magazine/2017/07/31/calibris-scandalous-history> (last accessed May 4, 2018). When Defendants’ counsel asked former U.S. Fish & Wildlife Service employee David Putnam about this document at his deposition, Mr. Putnam could not authenticate the document, stating:

Let me just look at it for a minute. I would agree this is the form that -- and the type, the type of letter I would write, but I don’t -- I just never saw -- it almost acts like -- almost looks like it’s been retyped or something. I just -- it is a mystery to me that we would ever have produced a letter that wasn’t on letterhead, it wasn’t signed, and used this font. We would always used [sic] Times New Roman font.

Putnam Dep. 50:15-22 (Ex. A); see also *id.* at 49:16-19 (“I’m telling you I don’t recognize the font or the -- this doesn’t look like an official letter from the Fish and Wildlife Service. There’s no logo on it.”). No evidence supports Defendants’ alternative assertion that the document is, perhaps, “a typed version of the prior handwritten draft correspondence prepared by former FWS biologist David Putnam.” Response ¶ 9.<sup>2</sup>

4. Unless these deficiencies are remedied, the United States plans to file a motion to preclude those exhibits that have not been produced and those that are inauthentic. In addition, the United States will request that the Court decide that motion before the United States is obligated to respond to Defendants’ filings.

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<sup>2</sup> The United States has identified what appear to be the original, authentic letters, as documents produced by the United States in discovery in September and December 2017. Government counsel has provided these documents to Defendants’ counsel and requested that Defendants substitute the authentic documents for the deficient exhibits. Defendants’ counsel replied that he will “consider it.” See Ex. B.

5. Although not raised as a ground for the extension sought here, the United States' motion to preclude certain exhibits will also address the April 16, 2018 affidavits of Randall, Ronald, and Robert Brace (ECF Nos. 214-75, 214-75, 214-82), which rely on evidence Defendants purportedly collected after discovery closed. Specifically, the affidavits discuss an April 2 and April 9, 2018 investigation of the concrete check dam within the property subject to the consent decree the United States seeks to enforce. This investigation took place two to three weeks after the United States filed its Second Motion to Enforce (ECF No. 206), and more than a month after the close of discovery and after the depositions of those affiants, and thus the testimony and other evidence related to that investigation must be excluded.

6. The deficiencies in Defendants' filings are not only unexplained and contrary to the Federal Rules of Civil Procedure, but they already have been prejudicial to the United States and, absent our requested extension and stay, will continue to be so. In particular, due to the absence of Bates stamps, government counsel has had to spend substantial time and effort to determine which of Defendants' exhibits were actually exchanged in discovery and which were not, and which of Defendants' exhibits are actually genuine—all because Defendants' counsel chose, without explanation, to disregard commonly-accepted practice and attach unmarked documents to their filings. To make matters worse, those unmarked documents include some documents that Defendants failed to produce and others that are inauthentic. Now, with no apparent sense of irony, Defendants' counsel contends that the United States "knowingly misrepresented" information and made "false assertions." Resp. ¶¶ 1-2. As Defendants' own concessions demonstrate, that contention is plain wrong.

7. For these reasons and the reasons articulated in the United States' Motion for Extension (ECF No. 217), the Court should grant the United States' Motion and thus (1) allow

the United States until June 16, 2018, to respond to Defendants' voluminous Response to the United States' Second Motion to Enforce, and (2) stay briefing on Defendants' Motions to Vacate pending resolution of the Motion to Enforce.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 10, 2018, I served the Reply In Support of United States' Motion for Extension of time and to Stay Briefing on the following counsel for Defendants via the Court's ECF filing system:

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