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

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

DEFENDANTS' RESPONSE AND OPPOSITION TO UNITED STATES MOTION FOR EXTENSION OF TIME TO FILE RESPONSE/REPLY TO MOTION TO ENFORCE AND STAY BRIEF ON MOTION TO VACATE

Defendants Robert Brace and Robert Brace Farms, Inc., through their attorneys, file this Response and Opposition to the United States' Motion for Extension of Time to File Response/Reply to Motion to Enforce and Stay Briefing on Motion to Vacate (ECF No. 217).

The United States, once again, misrepresents to this Court the facts surrounding this case, including the facts underlying Defendants' recent filings revealing numerous other of the United States' misrepresentations to this Court, affirmative acts of misconduct against Defendants, and multiple intentional violations of this Courts' September 23, 1996 Order, during the course of the last twenty-three (23) years. Apparently, the United States did not anticipate that Defendants would be able to unravel the Gordion Knot the Government had tied long ago, and it is currently seeking this Court's protection in its latest request to prolong the more than thirty (30)-year sinister nightmare it has ruthlessly imposed on this small farming family.

Now, the United States and its counsels are knowingly engaged in misrepresentation of facts before this Court in defiance of the rule of law, in abject disregard and disdain for the

administration of justice, and, apparently, with fear that this Court will grant the relief Defendants' have requested in their recently filed Rule 60 motions.

1. The United States knowingly misrepresents the number of attached exhibits accompanying Defendants' recent filings (ECF Nos. 214, 215 and 216) with which it is unfamiliar and requires additional time to review and respond to.

2. Contrary to the United States' disingenuous and false assertions, of the ninety-one (91) exhibits accompanying ECF No. 214 (Defendants' Response/Opposition), the Government has been either *the author or the recipient of* eighty-one (81) of said exhibits prior to and/or during the recently completed discovery period. Contrary to the United States' disingenuous and false assertions, the United States is not familiar with *only* the following ten (10) exhibits accompanying ECF No. 214: 214-4, 214-13, 214-67, 214-68, 214-70, 214-71, 214-74, 214-75, 214-82 (*except for pp. 80-81*), and 214-88. Consequently, this Court may confidently conclude that the United States <u>*is*</u> familiar with eighty-one (81) of the exhibits accompanying ECF NO. 214, for which the United States requires NO additional time to review and prepare a response.

3. Contrary to the United States' disingenuous and false assertions, of the twenty-two (22) exhibits accompanying ECF No. 215 (Defendants FRCP 60(b)(5) Motion to Vacate), the Government has been either *the author or the recipient of* ALL twenty-two (22) of said exhibits prior to and/or during the recently completed discovery period. Consequently, this Court may confidently conclude that the United States <u>*is*</u> familiar with ALL twenty-two (22) exhibits accompanying ECF No. 215, for which the United States requires NO additional time to review and prepare a response.

4. Contrary to the United States' disingenuous and false assertions, of the fifty-one (51) exhibits accompanying ECF No. 216 (Defendants Memo of Law Supporting FRCP 60(b)(5) Motion to Vacate), the Government has been *the author or the recipient of* forty-five (45) of said exhibits prior to and/or during the recently completed discovery period. Contrary to the United States' disingenuous and false assertions, the United States is not familiar with *only* the following five (5) exhibits accompanying ECF No. 216: 216-6, 216-17, 216-33, 216-34, and 216-47 (except for pp. 80-81). Consequently, this Court may confidently conclude that the United States *is* familiar with forty-six (46) of the exhibits accompanying ECF NO. 214, for which the United States requires NO additional time to review and prepare a response.

5. Contrary to the United States' disingenuous and false assertions, of the one-hundred sixty-four (164) exhibits accompanying Defendants' recent filings (ECF No. 214, 215 and 216), the United States is not familiar with only fifteen (15) exhibits IN TOTAL. Indeed, of the fifteen (15) exhibits accompanying ECF Nos. 214, 215 and 216, with which the United States is unfamiliar, three (3) of fifteen (15) said exhibits are duplicates (ECF No. 214-74 = ECF No. 216-33), (ECF No. 214-75 = ECF No. 216-34), and (ECF No. 214-82 = ECF No. 216-47).

6. Consequently, this Court may confidently conclude that of the one-hundred sixty-four (164) exhibits accompanying Defendants' recent filings (ECF No. 214, 215 and 216), the United States is not familiar with only twelve (12) exhibits IN TOTAL, for which the United States requires NO additional time to review and prepare a response.

7. The United States, moreover, has falsely and disingenuously alleged that merely because some of Defendants' exhibits are not Bates-stamped that the United States does not recognize whether they were received during the discovery period. (ECF No. 217, para. 6).

This allegation is nothing, but a bold-faced lie intended to persuade this Court to issue a ruling that should NOT be issued, for the specific purpose of disrupting the administration of justice in this case and further harassing Defendants. It is part and parcel of a long history of intentional lies and misrepresentations the United States has perpetrated upon this Court in the hope that it would rule in favor of the United States in the current action. The United States knows full well that it had received ALL exhibits accompanying Defendants' recent filings except for the twelve (12) exhibits noted above in para. 6, and any statement to the contrary constitutes a misrepresentation to this Court.

8. The United States, furthermore, falsely accuses Defendants of modifying exhibits from their original form – "exhibits that appear to have been modified from their original form, *see, e.g.,* Defs' Resp., Ex. 6, 8 and 72." (ECF No. 217, para. 6). This, statement, as well, is nothing, but a bold-faced lie intended to persuade this Court to issue a ruling that should NOT be issued, for the specific purpose of disrupting the administration of justice in this case and further harassing Defendants.

9. The United States neglects to mention, however, that ECF No. 214-6, a 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, is most likely a typed version of the prior handwritten draft correspondence prepared by former FWS biologist David Putnam. Mr. Putnam previously testified under oath that he had typically drafted in pen (prior to the internet days) correspondences for his Supervisor and Assistant Supervisor Charles Kulp and Edward Perry, respectively, of the State College, Pennsylvania Offices of FWS. (Ex. 1 – Putnam Depo 1-26-18, at 30-31 48-51).

10. The United States neglects to mention, however, that ECF No. 214-8, a letter correspondence dated July 17, 1987 from FWS State College Pennsylvania Office Assistant Supervisor, Edward Perry, to Defendant Robert Brace, is also mostly likely a typed version of the prior handwritten draft correspondence prepared by former FWS biologist David Putnam for Mr. Perry. (Ex. 1 – Putnam Depo 1-26-18, at 80-84). Indeed, the United States neglects to mention that Mr. Putnam testified under oath that the draft letter's "wording is very consistent with what we would have wrote" and that he "probably would have been" the person to have drafted that letter for Mr. Perry. (Ex. 1 – Putnam Depo 1-26-18, at 82). And, as stated above, Mr. Putnam previously testified under oath that he had typically drafted in pen (prior to the internet days) correspondences for his Supervisor and Assistant Supervisor, Charles Kulp and Edward Perry, respectively, of the State College, Pennsylvania Offices of FWS. (Ex. 1 – Putnam Depo 1-26-18, at 30-31 48-51).

11. The United States neglects to mention, however, the prior practice of federal agency officials, including those of the Environmental Protection Agency ("EPA"), to prepare draft letter correspondences in pen before having them typed into final form. EPA Region III Enforcement Coordinator of the Wetlands Program, James Butch, previously testified under oath that a letter dated July 15, 1987 from Greene A. Jones, Director of Environmental Services Division, EPA to Defendant Robert Brace (ECF No. 216-7), was most likely a typed version of the handwritten copy of the "cover letter of the Administrative Order, or at least, a draft of it," which had accompanied the EPA Violation Notice and Oder for Compliance of the same date. (Ex. 2 – Butch Depo 3-5-92, at 31-33).

12. The United States neglects to mention, however, that Mr. Butch previously testified under oath that he had made several phone calls during May 1987 to former

FWS representative David Putnam (Ex. 2 – Butch Depo 3-5-92, at 27-28) during the early days of this case, which likely resulted in Mr. Putnam's drafting for FWS State College, PA Supervisor Charles Kulp a March 1, 1988 letter correspondence to EPA Region III Enforcement Coordinator of the Wetlands Program, James Butch. (ECF No. 216-9). Indeed, Mr. Putnam testified under oath that this "[w]ould […] have been a letter that [he] would have written for Mr. Kulp." (Ex. 1 - Putnam Depo 1-26-18, at 90-92).

13. The United States neglects to mention, however, that Mr. Butch had previously testified under oath that he had received a copy of the May 11, 1987 letter correspondence from FWS State College, PA Supervisor Charles Kulp to District Engineer Colonel Clark of the U.S. Army Corps of Engineers (Ex. 2 – Butch Depo 3-5-92, at 21-25). Defendants included this document in its Response/Opposition to the United States Motion to Enforce Consent Decree and For Stipulated Penalties, as ECF No. 214-6. As described above in para. 9, this document appears to be the typed version of a handwritten draft correspondence former FWS biologist David Putnam had prepared on behalf of his former FWS Supervisor, Mr. Kulp.

14. The United States, furthermore, neglects to mention that Mr. Putnam had referred to the May 11, 1987 correspondence which the United States now disavows as inauthentic in another correspondence he had prepared and dispatched to Jim Pabody of the U.S. Army Corps of Engineers, Cleveland OH. Defendants included this document in its Response/Opposition to the United States Motion to Enforce Consent Decree and for Stipulated Penalties, as ECF No. 216-2.

15. The United States, moreover, neglects to mention that ECF No. 214-72 is actually a Pennsylvania Department of Environmental Protection map that the United States

provided to Defendants during discovery which is labeled "USACE 0000090." (Ex. 3 – USACE 0000090).

16. The United States falsely and disingenuously alleges that Defendants engaged in self-help activities in violation of the Consent Decree prior to seeking to vacate the Consent Decree via FRCP 60(b)(5). As Defendants have clearly shown in their Response/Opposition to the United States Motion to Enforce Consent Decree and Stipulated Penalties, their Motion to Vacate Consent Decree and their Memorandum of Law Supporting their Motion to Vacate (ECF Nos. 214, 215 and 216), the United States fraudulently induced Defendants, vis-à-vis the making of false representations, to engage in activities within the Consent Decree area that the United States knew Defendants would rely upon and which Defendants did, in fact, rely upon as authorization to conduct activities the United States now alleges constitute Consent Decree and Clean Water Act violations. As Defendants have clearly shown, these United States acts constitute affirmative acts of misconduct which provide this Court with more than adequate justification to exercise its equitable powers to equitably estop the United States from disavowing and reneging upon its prior authorizations, and from falsely alleging that Defendants' acts were acts of self-help.

17. The United States, finally, neglects to mention how it committed multiple violations of the Consent Decree in December 1996 when it directed its agent former USDA representative Lewis Steckler to: 1) ensure that the check dam feature of the Consent Decree Wetland Restoration Plan had been substantially relocated and installed approximately five hundred (500) feet from the area designated on the hand drawn map ("Exhibit 1") accompanying the Wetlands Restoration Plan; and 2) ensure that the check dam feature of the Consent Decree Wetland Restoration Plan was substantially overbuilt so that it was much larger at installation

than the design specifications of the Wetland Restoration Plan had required. The United States blatantly ignored its legal obligation under the Consent Decree to secure written approval from Defendants and this Court prior to undertaking those modifications. Since this Court had entered the Consent Decree and Wetland Restoration Plan as a judgment on September 23, 1996, the United States' intentional and unilateral actions in violation of the Consent Decree constitute blatant violations of this Court's prior Order. As Defendants have argued in their Rule 60 motions, and as the case law clearly shows, this Court possesses the power and ability to convene contempt hearings to determine whether prospective penalties are appropriate to prevent the United States from engaging in any further affirmative misconduct against Defendants and in any further violations of this Court's September 23, 1996 Order. (ECF No. 216). The United States is attempting to avoid this result by seeking unneeded time and delay in this case to continue to inflict harm on the Defendants. This Court must refuse to grant the United States ANY extension of time which the United States can utilize to further harass Defendants and to undermine the administration of justice.

WHEREFORE, Defendants respectfully request that: 1.) this Court reject the United States' request for extension of time until June 16, 2018 to reply in support of its Motion to Enforce (ECF No. 206); 2.) this Court reject the United States' request to stay briefing of Defendants' Motion to Vacate pending the resolution of the United States' Motion to Enforce; and 3.) this Court reject the United States' request for extension of time until July 16, 2018 to respond to Defendants' Motion to Vacate Consent Decree and Deny Stipulated Penalties, should this Court decline to stay briefing of Defendants' Motion to Vacate. 3

Respectfully submitted,

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