

**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, and)	
ROBERT BRACE FARMS, Inc.)	
)	
Defendants.)	
_____)	

**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**

Pursuant Local Civil Rule 5.2(H), Plaintiff United States of America (“United States”), respectfully requests that the Court issue an order: (1) requiring Defendants redact the discussions of the parties’ confidential Mediation Process Agreements 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 from all versions of the Motion for Sanctions published elsewhere by Defendants or their counsel; and (2) granting the parties leave to file under seal sections 8(c) and 9(a)-(b) of the parties’ confidential Mediation Process Agreement for the Court’s review only. In support of this motion, the United States submits as follows:

1. On March 8, 2017, the Parties appeared at the Court-ordered mediation. *See* ECF Nos. 97, 110.

2. The parties and the Mediator, David L. Cook, Esq., executed a confidential Mediation Process Agreement to govern the mediation proceedings.

3. On March 7, 2017, the Court entered a Stipulated Protective Order, ECF No. 107, which expressly provides that, “[c]onsistent with Section 6 of Court’s ADR Policies and Procedures, **the nonpublic information received and/or reviewed by the mediator related to this ADR process is confidential**, and the mediator shall treat is as such, including, but not limited to, refusing to disclose such information to any third party” (emphasis added).

4. On March 13, 2017, Defendants filed their Motion for Sanctions. ECF No. 109. In their Motion for Sanctions, Defendants violate section 6(C)(1)-(2) of the Court’s ADR Policies and Procedures, the confidentiality terms of the parties’ Mediation Process Agreement, and the Stipulated Protective Order, by quoting section 8(c) of the parties’ confidential Mediation Process Agreement in their public filing. *See* ECF No. 109 at ¶¶ 14-15.

5. On March 16, 2017, counsel for United States notified Defendants that they violated section 6(C)(1)-(2) of the ADR Policies and Procedures and the terms of the parties’ Mediation Process Agreement by quoting section 8(c) of that Agreement in their public filing and requested, among other things, that Defendants withdraw their motion. *See* E-mail from Laura Brown, Esq., Counsel for the United States, to Neal Devlin, Esq., Counsel for Defendants; Lawrence Kogan, Esq., Counsel for Defendants; Brian Uholik, Esq., Counsel for the United States; Chloe Kolman, Esq., Counsel for the United States (Mar. 16, 2017, 1:28 PM EST) (attached hereto as Exhibit 1).

6. In response, Defendants refused to withdraw their motion, but agreed to jointly move the Court for leave to file under seal the communications related to the United States’ settlement authority. However, Defendants did not address their improper quotation and

discussion of the Mediation Process Agreement in their Motion for Sanctions. *See* E-mail from Neal Devlin, Esq., Counsel for Defendants, to Laura Brown, Counsel for the United States; Lawrence Kogan, Esq., Counsel for Defendants; Brian Uholik, Esq., Counsel for the United States; Chloe Kolman, Esq., Counsel for the United States (Mar. 20, 2017, 2:31 PM EST) (attached hereto as “Exhibit 2”).

7. In response, the United States reiterated that Defendants had violated the parties’ confidential Mediation Process Agreement and the Court’s confidentiality rules and requested that Defendants voluntarily remove or redact (pending a motion for leave to seal) their discussion of the Mediation Process Agreement from the publicly filed version of their Motion for Sanctions, as well from all versions of that Motion published elsewhere by Defendants or their counsel, including on Mr. Kogan’s law firm’s website. *See* E-mail from Laura Brown, Esq., Counsel for the United States, to Neal Devlin, Esq., Counsel for Defendants; Lawrence Kogan, Esq., Counsel for Defendants; Brian Uholik, Esq., Counsel for the United States; Chloe Kolman, Esq., Counsel for the United States (Mar. 22, 2017, 11:34 AM EST) (attached hereto as “Exhibit 3”).

8. On March 22, 2017, counsel for the United States identified to Defendants certain e-mail communications that counsel sought to file under seal in connection with Defendants’ Motion for Sanctions. The United States also identified sections 8(c) and 9(a)-(b) of the Mediation Process Agreement as confidential information that the United States would agree to provide to the Court under seal. *See* Exhibit 3.

9. The following day, on March 23, 2017, counsel for the United States e-mailed Defendants’ counsel a draft joint motion seeking leave to file under seal sections 8(c) and 9(a)-(b) of the Mediation Process Agreement and certain e-mail communications related to the

United States' authority at the March 8, 2017 mediation. *See* E-mail from Laura Brown, Esq., Counsel for the United States, to Neal Devlin, Esq., Counsel for Defendants; Lawrence Kogan, Esq., Counsel for Defendants; Brian Uholik, Esq., Counsel for the United States; Chloe Kolman, Esq., Counsel for the United States (Mar. 23, 2017, 12:29 PM EST) (attached hereto as Exhibit 4).

10. On March 27, 2017, Defendants' counsel circulated to the United States their revisions to the draft joint motion that, among other things, deleted the request for leave to file under seal sections 8(c) and 9(a)-(b) of the parties' Mediation Process Agreement. Defendants' counsel asserted that those provisions are not confidential because a form "model" mediation process agreement is available on the Department of Justice's website. *See* E-mail from Neal Devlin, Esq., Counsel for the Defendants, to Laura Brown, Esq., Counsel for the United States; Lawrence Kogan, Esq., Counsel for Defendants; Brian Uholik, Esq., Counsel for the United States; Chloe Kolman, Esq., Counsel for the United States (Mar. 27, 2017, 8:53 AM EST) (attached hereto as Exhibit 5).

11. In response, counsel for the United States notified Defendants' counsel that the language in the executed Mediation Process Agreement and the "model" differed, and reminded them that the Agreement the parties executed contained an express confidentiality provision. The United States also repeated its request that Defendants voluntarily remove or redact (pending a motion for leave to seal) their discussion of the Mediation Process Agreement from the publicly filed version of their Motion for Sanctions, as well from all versions of that Motion published elsewhere by Defendants or their counsel, including on Mr. Kogan's law firm's website. *See* E-mail from Laura Brown, Esq., Counsel for the United States, to Neal Devlin, Esq., Counsel for Defendants; Lawrence Kogan, Esq., Counsel for Defendants; Brian Uholik,

Esq., Counsel for the United States; Chloe Kolman, Esq., Counsel for the United States (Mar. 27, 2017, 11:03 AM EST) (attached hereto as Exhibit 6).

12. Declining the United States' request, Defendants counsel asserted that the Mediation Process Agreement and the "model" were identical (which they are not), and reiterated that, due to the availability of the "model" agreement, the Mediation Process Agreement was not confidential. *See* E-mail from Lawrence Kogan, Esq., Counsel for Defendants, to Laura Brown, Esq., Counsel for the United States; Neal Devlin, Esq., Counsel for Defendants; Brian Uholik, Esq., Counsel for the United States; Chloe Kolman, Esq., Counsel for the United States (Mar. 27, 2017, 12:28 PM EST) (attached hereto as Exhibit 7).

13. On March 27, 2017, the parties filed their Joint Motion for Leave to File under Seal Certain Settlement Confidential Information, ECF No. 112, in which the parties jointly request that the Court grant the parties leave to file under seal specifically identified e-mail communications that are directly relevant to Defendants' Motion for Sanctions. Because Defendants would not agree to include sections 8(c) and 9(a)-(b) of the Mediation Process Agreement in that joint motion, the United States moves here separately for leave to file those provisions under seal.

14. Section 6(A) of the Court's ADR Policies and Procedures provides that "this Court, the ADR Coordinator, all neutrals, all counsel, all parties and any other person who participates in" the Court's ADR program "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."

15. Section 6(B) of the Court's ADR Policies and Procedures defines "communications in connection with" the ADR process, which includes written

communications by, between, or among counsel for a party or with the neutral, and it further includes communications “before or after any ADR process” when that communication “is made by or to the neutral”

16. Section 6(C) of the Court’s ADR Policies and Procedures prohibits disclosure of “confidential information,” as used in Section 6(A), to any other person, including the Judicial Officer, or her staff, unless (among other things), pursuant to Section 6(D)(3) of the Court’s ADR Policies and Procedures, the parties “agree in writing that such specifically identified information may be disclosed.”

17. Pursuant to Section 6(C) of the Court’s ADR Policies and Procedures, the Mediation Process Agreement, including sections 8(c) and 9(a)-(b), contains “confidential information.”

18. Defendants’ assertion that sections 8(c) and 9(a)-(b) of the Mediation Process Agreement are not “confidential information” because a form “model” agreement is available on the United States Department of Justice’s website is baseless. The parties did not execute the form “model” document. Rather, as expected (and necessary) the parties modified and revised the model language, which resulted in the unique confidential Mediation Process Agreement executed by the parties and the mediator.¹ In particular, the section quoted by Defendants in their Motion for Sanctions varies from the model language. Furthermore, the Defendants explicitly agreed to the confidentiality of the Mediation Process Agreement when they executed it.

¹ Mr. Cook, the mediator, has consented to providing sections 8(c) and 9(a)-(b) to the Court under seal.

19. Additionally, the Stipulated Protective Order, agreed to by Defendants and entered by this Court, provides that “the nonpublic information received and/or reviewed by the mediator related to this ADR process is confidential. . .” and should be treated as such. ECF No. 107.

20. By quoting and discussing such “confidential information” in a publicly filed document, Defendants have violated section 6(C)(1)-(2) of the Court’s ADR Policies and Procedures, the confidentially terms of the parties’ Mediation Process Agreement, and the Stipulated Protective Order.

21. Local Civil Rule 5.2(H) governs the sealing of documents. Pursuant to that Rule, the moving party must identify the specific documents that it seeks to seal.

22. Pursuant to Local Civil Rule 5.2(H), the United States seeks leave to file under seal sections 8(c) and 9(a)-(b) of the Mediation Process Agreement. Furthermore, to the extent the United States discusses the content of those sections of the Mediation Process Agreement in its opposition to Defendants’ Motion for Sanctions, the United States requests leave to redact such discussions from the publicly filed brief and file a complete, un-redacted brief under seal.

23. The United States further requests that the Court issue an order requiring Defendants to redact the quotation and discussion of the parties’ Mediation Process Agreement from the publicly filed version of their Motion for Sanctions as well from all versions of that Motion published elsewhere by Defendants or their counsel, and requiring Defendants to file a un-redacted version of their motion under seal.

CONCLUSION

For the reasons stated herein, the United States respectfully requests that the Court grant 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 issue an order: (1) requiring that Defendants redact all discussions related to the parties' confidential Mediation Process Agreements (specifically, 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 from all versions of that Motion for Sanctions published elsewhere by Defendants or their counsel; and (2) granting the parties leave to file under seal sections 8(c) and 9(a)-(b) of the parties' confidential Mediation Process Agreement for the Court's review only.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I served the foregoing 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 on the following counsel for Defendants via ECF:

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