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. 90-229 (Erie)

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS

Defendants' "Motion for Sanctions Regarding Plaintiffs' [sic] Failure to Comply with Court Order and Applicable Policies and Procedures" (hereafter "Motion for Sanctions" or "Motion"), ECF No. 109, is frivolous. It is demonstrably false, it misrepresents the record, and it violates the confidentiality rules set forth in the Court's ADR Policies and Procedures and the parties' confidential Mediation Process Agreement. It must be denied.[1]

As the record shows, the United States appeared at the March 8, 2017 mediation in good faith and with the requisite authority to settle the United States' claims that day without further review by government officials. Defendants make false assertions otherwise, but they offer no supporting evidence. Instead, they improperly seek to shift the burden to the United States to disprove their unfounded "beliefs" and establish that the government appeared at the mediation with settlement authority (which it did and which it can demonstrate). Furthermore, despite Defendants' unsupported claim to the contrary, the evidence shows that

[1] On March 16, 2017, counsel for the United States requested in writing Defendants withdraw the Motion. Defendants refused.

[redacted]

[redacted].

Defendants' Motion for Sanctions is nothing more than a baseless attempt to delay the resolution of the United States' pending motion to enforce the court-ordered consent decree that Defendants violated. The Motion for Sanctions must be denied.

BACKGROUND

The United States re-initiated this action to enforce a 1996 Consent Decree signed by the parties and entered by this Court to resolve Defendants' adjudicated liability[2] for violations of Clean Water Act ("CWA") sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, resulting from unauthorized dredging, filling, leveling, and draining waters of the United States, specifically 30 acres of wetlands in Waterford, Erie County, Pennsylvania. The Consent Decree, which is still in effect, requires, among other things, that Defendants pay a civil penalty and restore the impacted 30-acre wetland site. Defendants initially complied with the Consent Decree by paying the penalty and restoring the wetlands, but they are no longer doing so.

In the fall of 2013, the United States discovered that the Defendants had undertaken the same unlawful activities that the Third Circuit had found them liable for twenty years before: Defendants have cleared, ditched, drained, plowed, and planted the very wetlands that they were required to restore pursuant to the Consent Decree. After unsuccessfully attempting to resolve these violations for almost a year without judicial intervention, the United States moved to enforce the Consent Decree, ECF Nos. 82-83. The United States also filed a complaint against Defendants (and one additional defendant, Robert Brace and Sons, Inc.) for separate violations of

[2] *United States v. Brace*, 41 F.3d 117, 130 (3d Cir. 1994) (holding that Defendants liable for violations of the Clean Water Act and remanding to district court to assess penalties.), *cert. denied*, 515 U.S. 1158 (1995).

the CWA in wetlands situated on another property recently purchased by Defendant Robert Brace. That case is civil action number 1:17-00006-BR.

On February 1, 2017, Defendants moved for an order suspending briefing on the United States' motion to enforce until the parties completed the Court's mandatory ADR process in the new civil action (1:17-00006-BR). ECF No. 93. The United States opposed Defendants' motion, chiefly on the grounds that ADR would needlessly delay the Court's resolution of the United States' motion to enforce, even though Defendants had made clear, in the course of the parties' prolonged and unsuccessful settlement discussions, that Defendants were unwilling to resolve this matter in a manner consistent with the 1996 Consent Decree. ECF No. 95. Nevertheless, Judge Schwab ultimately granted Defendants' motion in part and ordered the parties to complete mediation in this matter by March 8, 2017. *See* Order dated February 8, 2017, ECF No. 97. Thereafter, the parties agreed to mediate the issues raised in both this matter and the new civil action (1:17-00006-BR) during the same session.

On February 15, 2017, the parties jointly filed their ADR stipulation, which identified the mediator, David Cook, Esq. (who was suggested by Defendants), and stated that Jeffery Lapp, Associate Director, Office of Environmental Programs; Environmental Assessment and Innovation, for EPA Region III, would attend the mediation as the United States' non-attorney representative. ECF No. 99.

[3] E-mail from Laura Brown, Esq., Counsel for the United States, to Neal Devlin, Esq., Counsel for Defendants (Feb. 24, 2017, 11:33 A.M. EST) (filed under seal as "Exhibit 1"). E-mail from Laura Brown, Esq., Counsel for the United States, to David L. Cook, Esq., Mediator; Neal Devlin, Esq., Counsel for Defendants; Lawrence Kogan, Esq., Counsel for Defendants (Feb. 27, 2017, 1:25 P.M. EST) (filed under seal as "Exhibit 2"). Thereafter, the parties and the mediator entered into the confidential Mediation Process Agreement.

Over the subsequent weeks, counsel for the United States and their counterparts at EPA Region III and EPA Headquarters put forth substantial effort preparing for the mediation by finalizing a mediation process agreement, developing a settlement position, drafting two settlement documents and a lengthy mediation statement,

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[3] Defendants' Motion has placed the United States in a precarious position by putting at issue the statements the United States made to Defendants regarding its settlement authority in the context of the confidential mediation process. To provide the Court full access to the facts, the United States requested that Defendants waive confidentiality over the e-mails described herein so they could be attached here, pursuant to Section 6(D)(3) of the Court's ADR policies and procedures. In response, Defendants agreed to seek leave to file those communications under seal and proposed including additional e-mail communications they had with the mediator, who consented filing those communications under seal as well. The relevant motion to file under seal, ECF No. 112, was filed on March 27, 2017.

E-mail from Neal Devlin, Esq., Counsel for Defendants, to Laura Brown, Esq., Counsel for the United States; David L. Cook, Esq., Mediator; Lawrence Kogan, Esq., Counsel for Defendants (Mar. 6, 2017, 12:10 P.M. EST) (filed under seal as "Exhibit 3"). *See id.* E-mail from Laura Brown, Esq., Counsel for the United States, to Neal Devlin, Esq., Counsel for Defendants; David L. Cook, Esq., Mediator; Lawrence Kogan, Esq., Counsel for Defendants (Mar. 6, 2017, 5:48 PM EST) (filed under seal as "Exhibit 4").

E-mail from Lawrence Kogan, Esq., Counsel for Defendants, to Laura Brown, Esq., Counsel for the United States; Neal Devlin, Esq., Counsel for Defendants; David L. Cook, Esq., Mediator (Mar. 7, 2017, 10:09 A.M. EST) (filed under seal as "Exhibit 5").

E-mail from Laura Brown, Esq., Counsel for the United States, to Lawrence Kogan, Esq., Counsel for Defendants, Neal Devlin, Esq., Counsel for Defendants, David L. Cook, Esq., Mediator (Mar. 7, 2017, 2:10 P.M. EST) (filed under seal as "Exhibit 6").

[4] E-mail from Lawrence Kogan, Esq., Counsel for Defendants, to Laura Brown, Esq., Counsel for the United States; Neal Devlin, Esq., Counsel for Defendants; David L. Cook, Esq., Mediator (Mar. 7, 2017, 2:55 P.M. EST) (filed under seal as "Exhibit 7"). *Id.* E-mail from Laura Brown, Esq., Counsel for the United States, to Lawrence Kogan, Esq., Counsel for Defendants; Neal Devlin, Esq., Counsel for Defendants; David L. Cook, Esq., Mediator (Mar. 7, 2017, 6:44 P.M. EST) (filed under seal as "Exhibit 8").

[4] *See* ECF No. 110.

On March 8, 2017, the parties met in Harrisburg, Pennsylvania, for the mediation, which was unsuccessful, but not because the United States lacked the necessary settlement authority. *See* ECF No. 110. [5] *See* E-mail from David L. Cook, Esq., Mediator, to Neal Devlin, Esq., Counsel for Defendants; Lawrence Kogan, Esq., Counsel for Defendants (Mar. 10, 2017, 2:11 P.M. EST) (filed under seal as Exhibit 9 at 4) Immediately following the mediation, counsel for the United States and Defendants met to confer on a prospective motion in the other civil action (1:17-00006-BR).

[5] *See Brace v. United States*, 72 Fed. Cl. 337 (2006) (rejecting Defendants' takings claim based upon the 1996 Consent Decree), *aff'd*, 250 Fed. App'x 359 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1258 (2008).

Indeed, as required by the Court's ADR Policies and Procedures, on March 13, 2017, Mr. Cook submitted his "Report of Neutral" stating that case had not resolved and noting that "the parties and counsel appeared at the mediation with . . . settlement authority to resolve the case." ECF No. 110.

On March 13, 2017, Defendants filed the pending Motion without even attempting to first meet-and-confer with the United States.

ARGUMENT

I. The United States Appeared at the Mediation with the Requisite Settlement Authority and Defendants' Assertions to the Contrary Are False and Baseless.

Defendants' unsupported assertion that "[n]one of [the] individuals representing the DOJ and/or EPA was 'a person who has, to the greatest extend [sic] feasible, full settlement authority, *and* who is knowledgeable about the facts of the case, the governmental unit's position, *and* the procedures and policies under which the governmental unit decides whether to accept proposed settlements' as required by Section 2.7(A)(2) of the ADR Policies and Procedures of this Court," is demonstrably false. ECF No. 109 at ¶ 13 (emphasis in original).

consistent with all applicable DOJ policies and procedures, the lead trial attorney assigned to the matter, Laura Brown, had obtained pre-approved authorization from the approving DOJ official to settle the United States' claims at the mediation. Indeed, Ms. Brown obtained that approval in writing, and, though the United States considers that documentation to be confidential and privileged, it is willing to provide the documentation to the Court for *in camera* review, if necessary.

But neither generating nor providing that documentation should be necessary. Nothing in the Court's rules suggest that government attorneys must provide such documentation in writing

to the mediator or opposing counsel. And, even if requiring such documentation may be appropriate in some circumstances, this is not that case: the mediator was satisfied with the United States' representations of settlement authority, counsel for the United States [redacted] [redacted] had obtained the necessary approvals, and Defendants have identified no legitimate basis to question the United States' representations. Ms. Brown appeared on behalf of the United States at the mediation with "to the greatest extend [sic] feasible, full settlement authority," and was fully "knowledgeable about the facts of the case, the [United States'] position, and the procedures and policies under which the [United States'] decides whether to accept proposed settlements." ADR Policies and Procedures § 2.7(A)(2). The pre-approved authorization provided to Ms. Brown satisfied the requirement set forth by the Court's February 8, 2017 order and exceeds the attendance requirements for government parties required by Local Rule 16.2 and the Court's ADR Policies and Procedures.

As their Motion makes clear, Defendants have absolutely no legitimate basis to challenge Ms. Brown's authority to settle the United States' claims in this case and the related case. Defendants' Motion is instead rife with equivocal and subjective statements about Defendants' *beliefs*, but offers no actual evidence. *See, e.g.*, ECF No. 109 at 1 ("Defendants *believe* that necessary decision makers were not present") (emphasis added), ¶ 19 ("*Based on the best information* available to Defendants, sanctions *would appear to be called for* . . .") (emphasis added). Rather than providing any evidence, Defendants improperly attempt to turn sanctions law on its head by placing the burden on the United States to prove that it appeared with the requisite authority and, thus, should not be sanctioned. *See id.* at ¶ 20 ("Defendants therefore request that, if *Plaintiffs are unable to establish* that they complied with the requirement . . . that it be ordered to pay to Defendant sanctions . . .") (emphasis added). These statements and the

record demonstrate that Defendants filed a motion for sanctions for which they knowingly lacked support, despite the fact that Defendants have the burden establishing that they are entitled to the relief sought in their Motion. *See, e.g.*, *TEGG Corp. v. Beckstrom Elec. Co.*, 2008 WL 5216169, at *3 (W.D. Pa. Dec. 10, 2008) ("[T]he burden of proof and persuasion rests on the party moving for sanctions") (citing *Rich Art Sign Co. v. Ring*, 122 F.R.D. 472, 474 (E.D. Pa. 1988)); G. Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE, § 17(A)(5) (2008)); *see also Jacobs v. City of Pittsburgh*, 143 F. Supp. 3d 307, 311 (W.D. Pa. 2015) ("The party seeking sanctions bears the burden of proving spoliation of evidence occurred"); *Anderson v. Bd. of Sch. Directors of Millcreek Twp. Sch. Dist.*, 2013 WL 4455496, at *2 (W.D. Pa. Aug. 16, 2013) ("The burden of proving a Rule 11 violation falls on the party moving for sanctions under the Rule"), *aff'd*, 574 Fed. App'x 169 (3d Cir. 2014). Unsubstantiated beliefs do not meet that burden.

Nor does Defendants' reliance on language from the parties' confidential Mediation Process Agreement (which Defendants quote in violation of the Court's ADR Policies and Procedures and the terms of that Agreement itself, as discussed below). The language quoted by Defendants actually undermines their argument and is fully consistent with the fact that the United States appeared at the mediation with the requisite authority. The portion of the Mediation Process Agreement quoted by Defendants provides:

ECF No. 109 at ¶ 15 (emphasis in italics added). while the United States' trial attorneys generally do not have the ultimate authority to settle claims on

behalf of the United States, they may obtain such authority through pre-approval, which is exactly what Ms. Brown did here, [redacted] [redacted].

Defendants' unfounded complaints about the EPA representative who attended the mediation session should also be rejected. Defendants knew since February 15, 2017, when the parties filed their joint ADR stipulation, that Jeffery Lapp would appear as the non-attorney representative on behalf of the Agency. Defendants never once raised any concern to the United States about Mr. Lapp's authority to appear on behalf of EPA. Additionally, Defendants' attempted diminution of Mr. Lapp's role at the mediation, by identifying him simply as a "witness," is contrary to fact. *See* ECF No. 109 at 1. As Associate Director, Office of Environmental Programs; Environmental Assessment and Innovation, for EPA Region III, Mr. Lapp is responsible for overseeing the day-to-day operations of the Region's CWA section 404 program, including, but not limited to, programmatic enforcement of the CWA and the regulations thereunder, permit review, and interagency communications with other Federal agencies such as the Army Corps of Engineers, Fish and Wildlife Service, and state agencies such as the Pennsylvania Department of Environmental Protection and Fish and Boat Commission, among others. Mr. Lapp's technical and programmatic advice at the mediation was critical with respect to any injunctive relief (*i.e.*, restoration of the affected water resources) that may have been negotiated as part of a settlement.

In sum, the record establishes that the United States appeared at the mediation with the requisite authority to settle one or both cases that day. Indeed, the mediator (who was identified and suggested by Defendants) [redacted], and confirmed in his "Report of [the] Neutral," that "the parties and counsel appeared at the

mediation with . . . settlement authority to resolve the case." ECF No. 110. Defendants' hollow and reckless claims to the contrary must be rejected.

II. Counsel for the United States [REDACTED]:

Given the utter lack of evidence for Defendants' Motion, the Court should dismiss the Motion without further ado. However, if there were any doubt as to the missing factual basis for Defendants' assertions, one need look no further than Defendants' representation that [REDACTED] ECF No. 109 at 1.

That statement is false. As described above, on multiple occasions, [REDACTED] *See* Sealed Exhibits 2, 4, 6. Defendants' statements on this point simply cannot be reconciled with the parties' written communications; thus, they further demonstrate the baseless nature of Defendants' Motion and, at a minimum, call into question Defendants' counsels' truth and candor to the Court, *see, e.g., Keister v. PPL Corp.*, 2015 WL 9480455, at *16 (M.D. Pa. Dec. 29, 2015), and their fairness when dealing with opposing counsel, *see, e.g., Nanavanti v. Cape Reg'l Med. Ctr.*, 2013 WL 4787221, at *7 (D.N.J. Sept. 6, 2013).

III. Defendants Have Violated the Court's ADR Policies and Procedures and the Parties' Mediation Process Agreement.

In addition to being baseless, Defendants' Motion breached the confidentiality of the ADR process. Without even seeking the United States' assent, Defendants have disclosed in their public filing several items that qualify as "confidential information" under Section 6 of the

Court's ADR Policies and Procedures and, therefore, "shall not be disclosed to any other person, specifically including the assigned Judicial Officer or his or her staff" and "shall not be used for any purpose, including impeachment, in any pending or future proceeding." ADR Policies and Procedures § 6(C)(1)-(2).[6] In particular, Defendants' Motion relies upon a confidential Mediation Process Agreement that the parties and the mediator signed to govern the mediation proceedings.[7] ECF No. 109 at ¶¶ 14-15. Not only is the Mediation Process Agreement "confidential information" under the ADR Policies and Procedures,

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[6] On March 16, 2017, the United States requested that Defendants immediately withdraw their frivolous Motion for Sanctions and notified Defendants that they violated the confidentiality provisions of the Court's ADR Policies and Procedures and the parties' Mediation Process Agreement. 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 A"). Defendants refused to withdraw the Motion. E-mail from Neal Devlin, Esq., Counsel for 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. 20, 2017, 2:31 PM EST) (attached hereto "Exhibit B"). 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 remove or redact (pending a motion for leave to seal) their discussion of confidential settlement communications and the Mediation Process Agreement from the publicly-filed version of the Motion, as well from all versions of that Motion published elsewhere by Defendants or their counsel, including on Mr. Kogan's law firm's website. 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 C"). Defendants refused.

[7] After Defendants breached the confidentiality of the process, the parties agreed to file under seal certain communications between the parties and the mediator related to the United States' settlement authority. *See* Note 3 *supra*. In addition, after Defendants unilaterally disclosed a provision from the parties' Mediation Process Agreement, the United States agreed that provision could be disclosed to the Court, but only under seal. As such, the United States has filed a motion, ECF No. 113, seeking an Order from the Court requiring Defendants to redact from their publicly-filed Motion for Sanctions the quotation and discussion of the Mediation Process Agreement and file an un-redacted version under seal. The United States has also sought leave to file under seal with the Court section 9(a)-(b) of the Mediation Process Agreement, . *See id.*

Mediation Process Agreement at § 9(b) (filed under seal as "Exhibit 10"). Similarly, Defendants' Motion relies upon and cites e-mail communications between the parties and the mediator that qualify as "confidential information."

. By quoting the parties' confidential Mediation Process Agreement and referring to other confidential ADR information in their publicly-field Motion without the United States' or the mediator's consent, Defendants have violated Section 6 of the Court's ADR Policies and Procedures as well as the terms of the Agreement itself. That Defendants have repeatedly breached the rules that they now purport to enforce (with no basis for doing so) is further reason for the Court to deny their baseless Motion.

CONCLUSION

For these reasons, the United States respectfully requests that the Court deny Defendants' "Motion for Sanctions Regarding Plaintiffs' [sic] Failure to Comply with Court Order and Applicable ADR Policies and Procedures," ECF No. 109.

Respectfully submitted,

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Dated: March 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2017, I served the foregoing United States' Opposition to Defendants Motion for Sanctions to the following counsel for Defendants via ECF:

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