

**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.)	

**UNITED STATES’ RESPONSE TO DEFENDANTS’
MOTION FOR ADDITIONAL TIME**

The Court should deny Defendants Robert Brace and Robert Brace Farms’ (“Defendants”) Motion for Additional Time (“Motion”), ECF No. 208, because it is untimely, inapposite, and meritless. In a nutshell, the Motion—filed three weeks after discovery closed and a week after the United States filed its renewed motion to enforce—seeks a four-month extension of discovery to respond to expert reports that were not filed in this case, on issues that are res judicata in this case, and that Defendants, in any event, had every reason to know about when they sought (and received) an extension to complete expert discovery in January 2018. Defendants were already afforded three (3) months beyond the original discovery schedule, and they have had more than sufficient time (a total of more than eight (8) months) to complete any discovery that might be relevant to this case. Their claims of improper conduct by the United States are facially preposterous. *Enough is enough.* For these reasons, and as further discussed below, the Court should put an end to Defendants’ delay tactics and deny the Motion.

1. Defendants filed this Motion more than three weeks after discovery in this matter closed on February 28, 2018. The Motion asks this Court to re-open discovery until June 29,

2018, to provide Defendants additional time to conduct additional “scientific” discovery.

However, the discovery Defendants request is related only to expert reports proffered in the 17-CV-006 action pending before Judge Rothstein (Dr. Robert Brooks and Mr. Peter Stokely), and is completely irrelevant to this matter. In short, this Motion is filed before the wrong Judge.

2. Judge Rothstein is holding a similar motion under advisement in the 17-CV-006 action and has scheduled a hearing on March 30, 2018, to address that motion.

3. Even if this motion were applicable to the above-captioned matter, Defendants allege that additional discovery is necessary because the United States’ purportedly violated the October 3, 2017 stipulation filed with this Court. *See* ECF No. 208 ¶ 3. That claim is utterly baseless. Pursuant to the stipulation, the United States agreed it would not “use any information or data gathered or obtained during the Inspections for purposes of an ‘Approved Jurisdictional Determination’ or a ‘Jurisdictional Determination’ by the U.S. Army Corps of Engineers as defined in 33 C.F.R. § 331.2.” Ex. 1, ECF No. 175 ¶ 3. The stipulation also provides that it does not impede the United States from using the information for litigation purposes. *Id.*

4. The U.S. Army Corps of Engineers (“Corps”) has not issued an “Approved Jurisdictional Determination” or a “Jurisdictional Determination” utilizing the data gathered during the on-site inspections.¹ Thus, the stipulation was not violated.

5. Instead, the United States used the data collected during the October 2017 inspections as the basis for one expert report in this litigation (authored by Dwayne Edwards) and two expert reports in the 17-CV-006 matter pending before Judge Rothstein (authored by Dr.

¹ Both an “Approved Jurisdictional Determination” and a “Jurisdictional Determination” are written documents issued by the Corps. *See* 33 C.F.R. § 331.2. Defendants have not cited any Corps documents that use the data from the October 2017 inspections in support of their Motion because no such documents exist.

Brooks and Mr. Stokely),² as was permissible and contemplated under the stipulation. *See* Ex. 1, ECF No. 175 ¶ 3.

6. Moreover, Defendants have been in possession of those reports since mid-December, and have waited more than three (3) months, until *after* all experts were deposed, discovery closed, and the United States filed its Second Motion to Enforce the Consent Decree, ECF No. 206, to raise their preposterous claim that the United States violated the stipulation. Nowhere do Defendants explain why, if the United States had actually engaged in the serious misconduct they now allege, Defendants did not raise that issue immediately with the United States and the Court in December 2017. Nor do they explain why they did not raise the issue in January when they moved to extend the expert discovery deadline to February 28, 2018, ECF No. 199. The answer is clear: there was no improper behavior. Defendants are, once again, attempting to delay resolution of this case.

7. According to its practices and procedures, this Court normally allows 120 days for discovery in complex matters. Practices & Procedures of Chief M.J. Susan Paradise Baxter, § III.B.1. This matter was filed on January 9, 2017, ECF No. 82, and the Court issued its first scheduling order on June 15, 2017. ECF No. 146. After 258 days—more than 8 months—discovery closed on February 28, 2018. Those 258 days included two extensions to the Court’s original, self-described “generous” discovery deadlines. *Id.* Therefore, Defendants have had more than twice as much time to conduct discovery than this Court normally affords.

² None of the United States’ experts are affiliated with the Corps, let alone authorized to issue determinations on the Corps’ behalf.

8. Pennsylvania courts have held that discovery should not be re-opened absent the movant's demonstrating that it was impossible to pursue the desired discovery more diligently.³ Defendants cannot make that showing because they could have retained experts to conduct any "scientific" tests they desired *on their own property* at any time during the 415-day period between the filing of the First Motion to Enforce on January 9, 2017, and the close of discovery. Defendants had access to their property at all times—nothing prevented them from taking action in advance of the Court's first scheduling order, and their failure to do so during the 13 months from January 2017 to February 2018 evidences their complete lack of diligence.

9. Additionally, Pennsylvania courts have held that discovery should not be re-opened after the dispositive motion deadline has passed.⁴ The dispositive motion deadline in this matter passed on March 15, 2018, ECF No. 205, upon which date the United States timely filed its Second Motion to Enforce. ECF No. 206.

10. In sum, Defendants' Motion is nothing more than a baseless, last-ditch attempt to delay resolution of the United States' straightforward Second Motion to Enforce.

³ *E.g.*, *Wilson v. TA Operating, LLC*, 2016 WL 4974966, at ¶¶ 9-10 (M.D. Pa. June 14, 2016) (citing *Trask v. Olin Corp.*, 298 F.R.D 244, 268 (W.D. Pa. 2014)); *Creghan v. Procura Mgmt., Inc.*, 2015 WL 12819210, at *3-4 (E.D. Pa. June 22, 2015).

⁴ *See Ickes v. Grassmeyer*, 2016 WL 4197600, at *4 (W.D. Pa. Aug. 8, 2016) (determining that it would be "inappropriate" to allow additional discovery after the deadlines for summary judgment had passed); *Wheeler v. Corbett*, 2015 WL 4952172 (M.D. Pa. Aug. 19, 2015) (denying motion to compel that was filed two weeks after the discovery deadline and explaining that "there was already pending before the court a potentially dispositive summary judgment motion"); *Rose v. City of Allentown*, 2004 WL 250551, at *3 (E.D. Pa. Feb. 10, 2004) (holding that it would be unfairly prejudicial to the defendants to permit plaintiff to reopen discovery where the defendants' motion for summary judgment had already been filed); *see also Cevdet Aksut Ogullari Koll, STI v. Cavusoglu*, 2017 WL 3013257, at *4-6 (D.N.J. July 14, 2017) (denying request to reopen discovery following nine month discovery period and opposing counsel's request for dispositive motion deadlines).

For the reasons set forth above, the United States respectfully requests that the Court deny Defendants' Motion, ECF No. 208.

Respectfully submitted,

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Dated: March 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2018, I served the foregoing United States' Response to Defendants' Motion for Additional Time (ECF No. 208) on the following counsel for Defendants via ECF:

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