

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, et al.,	)	
Defendants	)	

STATUS CONFERENCE

Proceedings held before the HONORABLE  
SUSAN PARADISE BAXTER, U.S. Magistrate Judge,  
in Judge's Chambers, U.S. Courthouse, Erie,  
Pennsylvania, on Friday, April 7, 2017.

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Ronald J. Bench - Official Court Reporter

APPEARANCES:

LAURA J. BROWN, Esquire, (via Phone),  
U.S. Department of Justice,  
Environment and Natural Resources Division,  
appearing on behalf of the Plaintiff.

BRIAN UHOLIK, Esquire, (via Phone),  
U.S. Department of Justice,  
Environment and Natural Resources Division,  
appearing on behalf of the Plaintiff.

KENNETH C. AMADITZ, Esquire, (via Phone),  
U.S. Department of Justice,  
Environment and Natural Resources Division,  
appearing on behalf of the Plaintiff.

NEAL R. DEVLIN, Esquire,  
Knox, McLaughlin, Gornall & Sennett,  
appearing on behalf of the Defendants.

LAWRENCE A. KOGAN, Esquire,  
The Kogan Law Group, P.C.  
appearing on behalf of the Defendants.

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P R O C E E D I N G S

(Whereupon, the proceedings began at 11:00 a.m.,  
on Friday, April 7, 2017, in Judge's Chambers.)

THE COURT: This is Civil Action 90-229 Erie,  
United States of America versus Robert Brace, et al. In my  
chambers I have the court reporter, my staff attorney, Cynthia  
Sander, Esquire. We have Mr. Kogan for Mr. Brace, along with  
Mr. Devlin. On the line I assume I have Laura Brown, is that  
correct?

MS. BROWN: Yes, your Honor. I also have Mike  
Colville, Brian Uholik, as well as Ken Amaditz, who's the  
assistant section chief in my office.

THE COURT: So the last gentleman would not be on  
the docket, is that correct?

MR. AMADITZ: That's correct, your Honor.

THE COURT: We're going to have to get that taken  
care of.

My first discussion with you is this. I have a lot  
cases that come to me by way of Judge Schwab, but this is a  
first, the oldest. Let me say this to get started. All of the  
briefing and moving regarding the events at your mediation is  
something that I do not rule on. We have a policy in this  
district that because so many issues may occur that could color

1 the trial judge, that the ADR committee judges take turns on  
2 those motions. And today I've entered an order referring this  
3 to the next ADR judge on the list. I'm thinking it's Judge  
4 Hornak, I'm not sure. Mark Hornak, but I'm not sure. The next  
5 ADR judge will take and will decide the motion. It's also that  
6 judge's decision on issues of things that are confidential and  
7 under seal. So those things will go to that judge.

8 But I want to say that I skimmed those things and to  
9 defendants' counsel who are here, there is not a docketed  
10 motion, there is not a docketed event, that is a motion to  
11 seal. I mean a motion to unseal. I meant that, I'm sorry.  
12 There is a discussion of unsealing in an errata, as I recall  
13 the errata, but there isn't an actual motion. And I can assure  
14 you there's not a federal judge in the country that does a  
15 motion that's not docketed with a little gavel on it. That's  
16 our little symbol to make sure we decide it. We just don't  
17 notice it typically when that's not there. So please make sure  
18 if that is part of your briefing, you take care of that.

19 MR. DEVLIN: Thank you, your Honor.

20 THE COURT: The erratas were confusing to me  
21 somewhat, they didn't track necessarily the document that the  
22 errata was filed to correct. But that's not my motion, I'm  
23 just going to throw that out there, you may hear that from the  
24 judge who takes that on. You can, also, there are cases out  
25 there, I used to have the names of them, one was done by

1 Magistrate Judge Kelly, one by Magistrate Judge Lenihan,  
2 because magistrate judges and district judges are on the  
3 committee, they take them in turn without notice of whether  
4 it's a district judge or a magistrate judge. But some of those  
5 cases that decide these motions for sanctions are out there to  
6 look at, depending on who you get. I have a feeling it's Judge  
7 Hornak that's next, we'll see. But that will be passed me.

8 Now, let's go to the matter at hand that is mine.  
9 Obviously, the new case is not on my docket, I'm aware of it,  
10 though. My issue is simply, but not simply, is the motion to  
11 enforce the Consent Order, is that correct?

12 MR. DEVLIN: Yes, the government, your Honor, has  
13 filed a motion to enforce the Consent Order. And then there's  
14 been competing motions, an initial briefly schedule, a case  
15 management order, as to how to get that resolved.

16 THE COURT: I understand. I am concerned that the  
17 motions are taking a turn to open this up beyond what is  
18 required of me. What is required of me is to determine the  
19 contract, I believe. So that issues of parole evidence and  
20 timeliness and those kinds of things are as they would affect a  
21 contract. Now, somebody talk to me about my view, is that  
22 correct, not correct -- let's actually start with the  
23 government?

24 MS. BROWN: Your Honor, we would agree with you that  
25 this is a straightforward motion. Motion to enforce Consent

1 Decree, which is a judicial decree, but has the same contract  
2 law principles apply. And so we believe that this is a  
3 straightforward matter where the court can look at the Consent  
4 Decree and determine whether or not defendants have violated  
5 it.

6 THE COURT: Okay. Gentlemen.

7 MR. DEVLIN: So, your Honor, we do not disagree in  
8 substance that this is essentially a breach of contract claim  
9 that's coming to you in the form of a Consent Order. I've  
10 handled many of those, I know you have presided over many of  
11 them. Generally how that happens is we have some discovery and  
12 figure out if there was in fact a breach. We tried in the  
13 response to the briefing schedule to identify those open  
14 factual issues. There are a number of them. I guess what I  
15 would say, your Honor, I think it's best to see it by the fact  
16 that they have a declaration from Mr. Lutte, which is attached  
17 to their motion to enforce Consent Order, that makes certain  
18 factual assertions. We dispute many of those factual  
19 assertions. We dispute what they claim we did.

20 THE COURT: I expected you would. What do you need  
21 all of this discovery for?

22 MR. DEVLIN: The other thing as to why we need all  
23 of this discovery, your Honor, is we need to depose some folks  
24 who were at this meeting. There was a meeting in 2012, where  
25 my clients were there. And where Ms. Brown and her colleagues

1 and clients were there. They were not the only people, there  
2 were a lot of people at that meeting. Many of whom heard what  
3 was discussed, what was permitted. I think those things go  
4 directly to the issue as to what the government told us we  
5 could do. Additionally, your Honor --

6 THE COURT: How many people were there that you want  
7 to depose?

8 MR. DEVLIN: I think there were a total of eight  
9 people there. At this point, pulling it off the top of my  
10 head, maybe that or less than that, as a rough approximation.

11 THE COURT: From all of them you need a deposition?

12 MR. DEVLIN: I think so, your Honor. Maybe not all  
13 of them, your Honor.

14 THE COURT: Cumulative evidence.

15 MR. DEVLIN: Understood. I believe there's going to  
16 be profound disagreement as to what was said. Profound  
17 disagreement as to the legal import of anything that was said,  
18 what happened there. Additionally, your Honor, we believe the  
19 Consent Order, as a contract, has ambiguities in it. Your  
20 Honor, you made the point, this is a 1990 case, you're correct.  
21 We would like nothing better than not to be here.

22 THE COURT: It's not timely to argue about those  
23 points now.

24 MR. KOGAN: If I may interject, your Honor.  
25 Plaintiffs had a number of years with no complaints about the

1 noncompliance with respect to this Consent Decree. There have  
2 been over the years disagreements of what the meaning of the  
3 terms of the Consent Decree was.

4 THE COURT: You have a soft voice, Ms. Brown, are  
5 you able to hear?

6 MS. BROWN: If I could ask Mr. Kogan to speak up.

7 MR. KOGAN: I can be very loud, I'll put on my New  
8 York voice. There has been a longstanding disagreement as to  
9 the scope and subject matter of the Consent Decree, as to what  
10 is the description of the specific location of the property,  
11 the perimeter of the property. And what condition the property  
12 was to be placed back in at the time the Consent Decree was  
13 executed. And that took place because of the way the  
14 government enforced the Consent Decree, which resulted in  
15 ongoing flooding over the land parcel in question, which then  
16 seeped over to and on contiguous parcels.

17 THE COURT: That's the new case.

18 MR. DEVLIN: Not entirely. There is one farm, three  
19 differently named attachments, which is the easiest way to  
20 describe it. The Consent Decree deals with whatever the metes  
21 and bounds are for what we call the Murphy farm. Immediately  
22 adjacent to the Murphy farm, across a dirt road, is what is  
23 referred to as the Homestead farm. That's where seepage of  
24 water has occurred.

25 MR. KOGAN: In all actuality it's one farm, one



1 parcel, I'm referring to the Murphy parcel. It's all  
2 Mr. Brace's.

3 MR. DEVLIN: Just to finish, the 2017 case, that  
4 deals with activities on what is called the Marsh property.

5 THE COURT: Which is contiguous?

6 MR. DEVLIN: Which is contiguous to the Homestead  
7 farm, but does not touch the Murphy farm.

8 MR. KOGAN: Through the enforcement actions of the  
9 government, with which Mr. Brace complied, the parcels became  
10 flooded and unusable. The metes and bounds of the areas that  
11 was supposed to be originally the subject area for compliance  
12 was unclear. That only became an issue in 2012 when the  
13 government decided that it wanted to define the boundaries --  
14 with incremental encroachment upon the other parcel for  
15 purposes of regulations under the Clean Water Act.

16 THE COURT: The metes and bounds were not clear when  
17 the Consent Decree was entered into?

18 MR. KOGAN: There was no survey taken.

19 MR. DEVLIN: The Consent Decree indicates an area of  
20 approximately 30 acres in generally a U-shape. It's not clear.

21 MR. KOGAN: One of the issues for discovery is  
22 whether there was even a survey at the time, it was not  
23 appended to the Consent Decree. It was a dark map done with a  
24 marker.

25 THE COURT: That wasn't very clean, Ms. Government.

1 MS. BROWN: Your Honor, I'll address a couple of the  
2 issues raised by opposing counsel. First, addressing the  
3 flooding issue. First of all, defendants had no problem  
4 complying with the Consent Decree that was drafted, as they  
5 agreed to it in 1996. Shortly thereafter, they brought a claim  
6 in the Court of Federal Claims arguing that there was  
7 unintended consequences from the Consent Decree that caused  
8 flooding on other parts of their property, including the  
9 Homestead farm. That was a regulatory taking. And in the  
10 argument in this case, they raised some of the ambiguities that  
11 they addressed now. They also argued that Mr. Brace entered  
12 into the Consent Decree under duress.

13 The Court of Federal Claims heard their arguments  
14 and rejected them. The Circuit Court affirmed. The Supreme  
15 Court denied certiorari. For the defendants to re-litigate  
16 issues that have already been decided, it's our position  
17 they're barred from doing that.

18 THE COURT: Res judicata.

19 MS. BROWN: Exactly. With respect to the July 2012  
20 site visit that the defendants argue authorization was orally  
21 given to defendants, that is demonstrably false. First, I'd  
22 like to make it clear for the record that I was not at that  
23 site visit. I was at the site visit in 2015 after these  
24 violations were discovered. But the 2012 site visit that took  
25 place, it was in July. Mr. Brace himself, in a letter to the

1 EPA, documented what was said and what permission he thought  
2 was given during that site visit. In that letter, which  
3 Mr. Brace penned, he specifically said he was told to stay out  
4 of the 30-acre Consent Decree area.

5 THE COURT: They're saying they don't know where  
6 that is.

7 MS. BROWN: Well, your Honor, prior to that -- first  
8 of all, they do know where it is. We have the documents  
9 attached to the Consent Decree, they respectfully know where it  
10 is. Mr. Brace pointed that out on many occasions to the EPA  
11 investigators when they would go on site. We intend to assist  
12 Mr. Brace, to the extent he may have some confusion, although,  
13 he would be able to comply with the Consent Decree in 1996, he  
14 certainly knew where he needed to go to remove drainage tile in  
15 the '90s, as required by the Consent Decree. We have sent him  
16 additional maps. We have sent him, prior to the July 2012 site  
17 visit, a polygon. Which is the Consent Decree area, drawn on  
18 the area to assist him in determining boundaries, as well as  
19 aerial pictures. I would respectfully argue, your Honor, that  
20 is a red herring, Mr. Brace does know exactly the metes and  
21 bounds.

22 Mr. Brace was a witness in the trial of the 1990  
23 action. He stipulated at that time that this was the site and  
24 that it was 30 acres and that it was wetlands.

25 THE COURT: All right, Ms. Brown, I'm not going to

1     argue the case here in full. And despite what federal courts  
2     are meant to do and in understanding that we follow the law,  
3     may I ask, this man has flooded property on a farm that his  
4     family has farmed for years -- I mean, is there no  
5     accommodation the government can work out?

6             MS. BROWN: Your Honor, I think that the government  
7     would be willing to work with Mr. Brace if he would make  
8     accurate representations to the EPA when they're on site.  
9     He has never asked to modify this Consent Decree. He, despite  
10    defendants' assertions in their brief, has never reached out to  
11    the government regarding modification of the Consent Decree.

12            THE COURT: I want him to. If he hasn't, I want him  
13    to. So let's talk right now about the early ADR process.  
14    What proposal -- we could manipulate an early ADR to be most  
15    useful here. What's your thoughts on that, everyone?

16            MR. DEVLIN: Your Honor, if I may, if that's okay.  
17    So, obviously, we've been to ADR once, that's where the motion  
18    for sanctions came out of, came out of that mediation. I won't  
19    talk about the substance of that mediation.

20            THE COURT: I don't want to know. Did he ask for  
21    more time?

22            MR. DEVLIN: No, Mr. Cook, the mediator felt, I  
23    believe, I guess maybe I'm misreading you, your Honor. I  
24    believe Mr. Cook, the mediator, in his report indicated that he  
25    felt that further ADR could be fruitful after some development

1 of things. We're happy to meet, your Honor, and try to get  
2 this thing resolved. You've just very accurately depicted what  
3 our client would say if he was sitting in the room.

4 Your Honor, I want to raise two brief points, I  
5 think this is directly on discovery. Attorney Brown's  
6 statement about the taking case ignores a key part of that  
7 case, where the EPA witness, I believe it was Mr. Lapp, he  
8 testified as to the exact purpose of the Consent Decree.  
9 Because it is not clear. He said the purpose of the Consent  
10 Decree was to return the property to the hydrological status  
11 that existed in 1984, that's what he said. The judge said in a  
12 footnote, essentially, I'm paraphrasing, we take the EPA at its  
13 word that they will work with Mr. Brace to try to accomplish  
14 that goal. If he does not, we won't venture to say what legal  
15 remedies may be available.

16 Subsequent meetings, culminating in the 2012 meeting  
17 that Ms. Brown was not at and I was not at, culminated in that  
18 meeting, that was the purpose. Did Mr. Brace fulfill Rule 6 to  
19 modify his Consent Order, he did not. Did Mr. Brace engage in  
20 a letter and phone campaign to try to get the EPA to come out  
21 and say where this 30 acres is flooding my property, I can't do  
22 it, yes he did. There was a meeting and there was a very, very  
23 large dispute as to what was said at that meeting.

24 MR. KOGAN: There were requests by Mr. Brace to seek  
25 permitting from the EPA in order to conduct farming activity in

1 an area that wasn't supposedly covered by the Consent Decree.  
2 That permit was denied on multiple occasions. So he was  
3 basically placed in a position where he could not farm on that  
4 parcel. In an area that would have been affected by the  
5 flooding from a parcel due to enforcement, which he would argue  
6 would be over enforcement of the Consent Decree.

7 One of the other key points that occurred in the  
8 taking case was the judge actually recognized, actually the  
9 government's own attorney actually recognized that the law was  
10 not clear and that if the property was to be returned to the  
11 status it was, the state it was in 1984, a dry state, not a wet  
12 state, it would then be able to qualify for an exclusion under  
13 the Clean Water Act's jurisdiction totally and would make the  
14 Consent Decree unnecessary.

15 The reason the government now selectively, had then  
16 selectively, has chosen a different date, even though its own  
17 witness disagreed with them, was because they wanted the land  
18 to remain wet, so they could exercise 404 jurisdiction under  
19 the Clean Water Act. They didn't want to recognize the fact  
20 the land had been dry because of prior conservation, which had  
21 been approved by the Soil Conservation Service of the USDA.  
22 That takes it from under the Clean Water Act.

23 THE COURT: Ms. Brown.

24 MS. BROWN: I would argue, first of all, there were  
25 a lot of factual inaccuracies, respectfully, that Mr. Kogan and

1 Mr. Devlin stated there. First of all, the Consent Decree's  
2 purpose is clear from its terms. I think that the court can  
3 presume that reasonably in looking at the Consent Decree.

4 I would also note for purposes of the July 2012  
5 meeting, was not as Mr. Devlin represented, but Mr. Brace  
6 contacted the courts about requesting a jurisdictional  
7 determination so he could clean what he called were clean water  
8 deficiencies on his property. That is why the EPA and the  
9 court went out on a site visit. It had nothing to do with the  
10 Consent Decree, it was whether or not there were certain  
11 ditches on his property that he could clear or whether he  
12 needed a 404 permit.

13 THE COURT: Here's the thing that's going on.  
14 We're now digging into what was said and when it was in effect,  
15 which we have to do as lawyers. But we're losing sight of, in  
16 my mind, of a fix, a fix whereby we keep Elk Creek clean and  
17 Mr. Brace can farm his land. There has to be some middle  
18 ground.

19 MS. BROWN: What I would say, your Honor, and I  
20 certainly understand that. I think that was what we were  
21 trying to do prior to initiating the motion to enforce, filing  
22 the motion to enforce. What we have trouble with is we have  
23 not seen the actual evidence of the contiguous and  
24 unanticipated consequences which caused flooding to the other  
25 areas of the property. To be honest, it would have been

1 considered by the Court of Federal Claims in the taking action,  
2 they also felt the defendants hadn't established that evidence.

3 So it's our understanding that Mr. Brace wants to  
4 farm the 30 acres that are protected by the Consent Decree, I  
5 don't think there is a reasonable way we can do that under the  
6 Clean Water Act.

7 MR. KOGAN: Your Honor, the purpose of the Consent  
8 Decree is in question because it wasn't stated in the Consent  
9 Decree what its purpose really was. But it was understood by  
10 the parties in testimony, subject to sanction for perjury, that  
11 it was to bring the property back to the state it was in in  
12 1984. Factually speaking, that needs to be shown. Factually  
13 speaking, the status of, the actual status of the property at  
14 that point in history needs to be shown. The mind set of the  
15 parties in entering into the Consent Decree needs to be shown.  
16 And counsel for the government says it's already been shown.  
17 We don't have any evidence to see any of that because we don't  
18 have a record. We don't have a record because the court had  
19 destroyed the record after 20 years. The client had a flood in  
20 2012, which destroyed a lot of paperwork in his office. The  
21 only access that we would have to the record would be what the  
22 government has and the government has refused to grant us that  
23 access.

24 THE COURT: Would the government consider redrafting  
25 the Consent Order for today and enter a new Consent Order,



1 because time changes and land changes, circumstances change?

2 MS. BROWN: I'm not going to say -- that we  
3 certainly wouldn't consider it. I'm not prepared at this time  
4 to offer that. It's our position the Consent Decree is not  
5 ambiguous. It's unambiguous.

6 THE COURT: But it may not be relevant, that's my  
7 concern. If the land changes and circumstances change over all  
8 these years.

9 MS. BROWN: I would argue that the defendants have  
10 never moved to modify the Consent Decree, have never moved to  
11 terminate it. But have engaged in self-help and just decided  
12 unilaterally things have changed.

13 THE COURT: That's a problem. I'm thinking the  
14 right answer in this case may not be a decision on the current  
15 Consent Decree, it might be to try to find a better way  
16 forward.

17 MR. KOGAN: Your Honor, if I may. If I may step  
18 forward and say, refer to the documents that were exchanged  
19 during mediation without actually mentioning the document.  
20 The government had put forth a proposal. If a new Consent  
21 Decree that you are indicating could perhaps be possible -- not  
22 in a way that would resemble that which they included as an  
23 example in the proposed position paper, that Consent Decree  
24 which would be 24 pages long, compared to 8 pages, if the  
25 government rethought the Consent Decree like if it was drafted

1 properly.

2 THE COURT: Did that give relief to the client?

3 MR. KOGAN: No, it actually was more onerous than  
4 the existing one.

5 MR. DEVLIN: If I could add two points. Again, I'm  
6 not going to talk about these mediation discussions, settlement  
7 discussions we had beforehand. There was significant movement  
8 with Mr. Brace on the physical aspects of the property, as to  
9 what he could do. He's lived 30 years with fighting this.  
10 I'm sure you're well aware of that. We have been unable to  
11 reach an agreement with the government, which has been held up  
12 in part by penalties. That's part of the real issue with my  
13 client and feeling that his property in the past, he has been  
14 given no just compensation -- people took certain positions on  
15 what the property should be like in the taking case. When he  
16 goes to meet with them, he gets a letter by the government  
17 indicating that what you folks were told was not right. Now,  
18 here's an enforcement action. There also have been physical  
19 changes. There was a culvert going right into that -- that was  
20 done by the township, Mr. Brace had nothing to do with it. The  
21 township went in to alter the culvert by raising it up, which  
22 caused the water level to adjust.

23 We got 30 days of not just legal developments, of  
24 factual developments, that have nothing to do with Mr. Brace.  
25 I know that Mr. Brace has utilized my services throughout this

1 period of time here. But Mr. Brace is a farmer. Mr. Brace  
2 does not know about the filing of a Rule 6 on modification of  
3 his judgment. He does not know those types of things. When he  
4 is on site with Mr. Lapp saying here's where I think the  
5 Consent Order applies, and Mr. Lapp is telling him, I'm saying  
6 this. But what we intend on showing with discovery, Mr. Lapp  
7 is telling him, Bob, we don't really care exactly where it  
8 is -- 30 acres, 25 acres, it doesn't really matter, what can we  
9 do to make it work. He's feeling really good about that,  
10 feeling that's going to be successful. And then 18 months  
11 later, he gets a letter from a lawyer saying what he told you  
12 was wrong, you're not allowed to do it. Two years later we're  
13 sitting here in front of you. One of the reasons we believe  
14 the government, based on their characterization that this is a  
15 cut and dry case --

16 THE COURT: This is why people in the heartland want  
17 to blowup government. I'm a federal employee, too, Ms. Brown.  
18 Let's try to go about this in a way that will satisfy the  
19 regulations that you are sworn to uphold and to give this  
20 farmer some relief from government interference. Deal?

21 MR. DEVLIN: Fine by us.

22 MS. BROWN: I'm willing to work with them. I just  
23 would reiterate that we tried to do this for about a year and,  
24 unfortunately, we got stuck. That is why we had to file this  
25 motion.

1 THE COURT: Because I'm the assigned judge, it's  
2 hard for me to do that. Who was the mediator?

3 MR. DEVLIN: His name is David Cook, your Honor,  
4 he's out of Rochester. We utilized him because it's very hard  
5 to find someone who has both Clean Water Act knowledge,  
6 agricultural, how farming works.

7 THE COURT: How did you do it when he was not on  
8 ECF?

9 MR. DEVLIN: We filed, actually Attorney Brown was  
10 kind enough to, she filed the appointment. The rules provide  
11 that they don't have to be in the Western District.

12 THE COURT: I thought they had to be off this  
13 approved list.

14 MR. DEVLIN: Actually I thought the same thing. And  
15 when we were looking for someone outside of that list, I got  
16 concerned and I went back and looked at the policies. They say  
17 the list is provided for convenience. Convenience as to folks  
18 that are qualified. But if a person is otherwise qualified,  
19 you can make that request and the court can grant it.

20 THE COURT: Did the person have the ability to get  
21 on ECF?

22 MR. DEVLIN: My belief is that Ms. Brown is the  
23 likely one who filed the mediator's report.

24 THE COURT: That's of interest to me -- sorry for  
25 that aside. It would be helpful to put a judicial officer on

1 it for an attempt, before we get going on the motion.

2 MS. BROWN: Your Honor, one thing I would raise.  
3 I think that might be helpful. And I do not want to get into  
4 discussions with what happened at the mediation. At the  
5 mediation, defendants presented a claim against the government  
6 that wasn't filed, which made this a very difficult mediation.  
7 I think it would be helpful to have someone, a mediator  
8 selected. We are happy to work with him again. But it might  
9 be helpful to have a judicial officer involved.

10 THE COURT: Judicial officers aren't the experts in  
11 the business, either. We decide these cases, too. This is a  
12 thought. That whoever has been assigned your motions regarding  
13 the ADR, might be the person that, rather than have to deal  
14 with them uncomfortably, you might want to try and sit down and  
15 hammer things out. Let's see if we can do that. What is the  
16 time period you want for discovery?

17 MR. DEVLIN: Your Honor, I believe I requested six  
18 months. I recognize that is a fair period of time. To be  
19 completely candid, part of that is because the first three  
20 months of those summer months I know I have some trials. That  
21 is why I requested that. I will assure you that we will work  
22 diligently. In addition to simply being a farmer -- well,  
23 there's lots of reasons that Mr. Brace being a farmer is  
24 relevant. Part of it, this is not a giant corporation dealing  
25 with legal fees. The process, as I stated, we are going to

1 depose eight people. I am mindful of being a good steward of  
2 my client's resources. We are not going to do unnecessary  
3 work.

4 THE COURT: Ms. Brown, you don't think there should  
5 be any discovery?

6 MS. BROWN: That's correct. We don't think there  
7 should be six months of discovery, if the court were to grant  
8 discovery. We feel this is a delay tactic, to be completely  
9 honest.

10 THE COURT: During the summer planting season you  
11 mean?

12 MS. BROWN: Just in not getting this case decided,  
13 I think there's some consideration that opposing counsel thinks  
14 that at some point the United States is going to withdraw their  
15 claims.

16 THE COURT: Here's what I'm going to do. I'm going  
17 to hold up putting together an order to go forward with  
18 discovery until I determine, which I will do quickly, whether  
19 ADR with a judicial officer would be a good first response.  
20 I will send out an order with that time line when I make that  
21 decision. And if I decide that this should not occur, then I  
22 will list a case management order. I will do one of those  
23 things in either a week to 10 days. I know that there are  
24 responses due and those sorts of things. Let's hold off on  
25 that until -- there would be a lot of supplemental things going

1 on. But let's just hold off on all of that for now until I  
2 send out the case management order that lists those things.

3 THE COURT: You were going to say something?

4 MR. KOGAN: The government, your Honor, believes  
5 that this is a case of major significance within the lexicon of  
6 the Department of Justice. Were it not true, they would not  
7 have filed this action within 10 days of the inauguration of an  
8 administration with distinctly different policies. There are  
9 other issues beyond that, though.

10 THE COURT: They're not going to affect me. My  
11 interest is to get a good resolution here that follows the law  
12 and doesn't put Mr. Brace under. So that's my concern as a  
13 judicial officer.

14 MR. DEVLIN: I have one procedural question.

15 THE COURT: Certainly.

16 MR. DEVLIN: It deals with the other case.

17 THE COURT: I can't do anything about that case.

18 MR. DEVLIN: When you talk about deadlines, for  
19 instance, we have a deadline to respond to the motion with  
20 regard to affirmative defenses. I will call Attorney Brown to  
21 meet and confer about the possibility of consolidating these,  
22 at least for pretrial purposes.

23 THE COURT: She is not allowed to refer me a case  
24 pretrial when I wasn't polled on it originally.

25 MR. DEVLIN: Thank you, your Honor, I understand.

1           THE COURT: The reason I think that she may not  
2 understand, she's not a judge in our court. That puts me in an  
3 awkward position. I do think it would be worthwhile, I think  
4 she would be quite happy to hear that you'd be willing to go in  
5 front of a judicial officer in the Western District of  
6 Pennsylvania and attempt to settle both cases. So that is  
7 something to ask for her to do. I'm going to look at that  
8 possibility and talk to some of my colleagues to see if they  
9 would be willing to take it on.

10           MR. DEVLIN: Judge Schwab actually, I believe  
11 entered the ADR in both dockets, which is why we were filing  
12 all those motions with both docket numbers under them. We  
13 agreed that if we were going to go into mediation, we agreed to  
14 go to mediation, it simply made sense to try to get the entire  
15 thing resolved.

16           THE COURT: All right. Let's hold off on the things  
17 not decided today. Let's hold off on any of the deadlines in  
18 this case. No. 17-6 I can't get involved in. I'm not even  
19 sure Judge Rothstein understands that we have these weird, not  
20 weird, very cool magistrate judge rules in this circuit.

21           MR. DEVLIN: I'm not going say we would go one way  
22 or the other. But if we consented to your jurisdiction, you  
23 could get involved, if you became the judicial officer handling  
24 the case?

25           THE COURT: The problem with that -- try to work



1 that out. When you sign a consent, you're signing a consent to  
2 a magistrate judge, not necessarily me.

3 MR. DEVLIN: Even if it's an Erie case?

4 THE COURT: I do believe so. I believe so, yes.  
5 Technically, we'd have to work that through. I agree it would  
6 make more sense for it to come to me. I'm just trying to tread  
7 water. As you know, three-and-a-half years of not having a  
8 district judge in this seat. We will do our best, however that  
9 works. I'm not giving Ms. Brown a chance to make her comments,  
10 I will do that now.

11 MS. BROWN: Well, your Honor, it's my understanding,  
12 if I could reiterate what I think you're doing, just to make  
13 sure I understood it correctly. You will issue a case  
14 management order. Are you deciding now that discovery is  
15 appropriate or are you tabling that?

16 THE COURT: No, I am going to look into further ADR  
17 at this point. That doesn't even entail me. I do not think  
18 any new discovery is necessary for that. Because you can place  
19 in front of that judicial officer your ideas of what went on at  
20 the meeting, all of that stuff, without having it on a  
21 deposition record. But I think the judicial officer would have  
22 a better shot of coming to a conclusion that would be positive  
23 for the government and not devastating to Mr. Brace, also, all  
24 right. I also want to say that in my entire life, God bless  
25 Judge Schwab, I've never seen an order quite like this one, I'm

1 talking about docket entry 97.

2 MS. BROWN: I have never seen one like that in my  
3 years of practice. Your Honor, just as a request, if the court  
4 could refer this to a judicial officer for mediation, that it  
5 be done in a short timeframe. We already have spent a lot of  
6 time preparing for mediation and going to mediation. We were  
7 there in good faith, despite the statements made in the motion  
8 for sanctions. I felt like for some reason, which I won't  
9 discuss, defendants were there with different purposes. But  
10 I'd like to just keep this moving as quickly as possible.

11 THE COURT: I think that's right. I'm more about  
12 getting this right. I really think you need to go back to  
13 whoever is working with you on it. I do not believe that the  
14 worst of government regulations should reign down on this man.  
15 And I want to try to come to an agreement that will take care  
16 of the concerns of the government, which are real, as well as  
17 making sure this man doesn't go under, all right, and that's  
18 real. All right. We will do our best. Thank you very much,  
19 we're adjourned.

20 ALL COUNSEL: Thank you, your Honor.

21

22 (Whereupon, at 11:40 a.m., the proceedings were  
23 concluded.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in dark ink, appearing to read 'Ronald J. Bench', is written over a horizontal line.

Ronald J. Bench