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

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT BRACE, ROBERT BRACE FARMS, Inc., ROBERT BRACE AND SONS, Inc., Defendants.	)	Civil Action No. 17-006 (Erie)

UNITED STATES' RESPONSE TO DEFENDANTS' MOTION FOR ADDITIONAL TIME

The Court should deny Defendants Robert Brace, Robert Brace Farms, and Robert Brace and Sons' ("Defendants") Motion for Additional Time ("Motion"), ECF No. 47, because it is meritless and untimely. The Motion—filed three weeks after the extended discovery period closed—seeks to reopen discovery and provide Defendants with an additional four months to respond to expert reports that were timely served in mid-December, and is based upon issues that Defendants had every reason to know about when they sought (and received) an extension to complete expert discovery in January 2018. Defendants have already had two months beyond the original discovery schedule to engage in expert discovery, and they have had more than sufficient time (over 13 months) to complete any discovery that might be relevant to this case. Furthermore, Defendants' claims of improper conduct by the United States ("Plaintiff") are preposterous. Rather, it is Defendants who have continually attempted to impede discovery in this matter. For these reasons, and as further discussed below, the Court should 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 reopen discovery until June 29, 2018, to provide Defendants additional time to conduct additional "scientific" discovery. The Court has already twice extended discovery and explicitly stated that "*[t]here shall be no further extensions granted*." ECF No. 38 at 3 (emphasis added). Thus, Defendants' request should be summarily denied consistent with the Court's prior Order.

2. Defendants allege that additional discovery is necessary because Plaintiff purportedly violated the October 3, 2017 stipulation ("Stipulation"). *See* ECF No. 47 ¶ 4. That claim is utterly baseless. The Stipulation resulted from Defendants' attempt to impede Plaintiff's access to the property that is the subject of this litigation (the "Site") as allowed under Fed. R. Civ. P. 34. When proposing dates for the Rule 34 Site inspection, Plaintiff explained that the inspection must occur no later than mid-October because thereafter the ground at the Site would likely freeze, and Plaintiff's experts would not be able to conduct necessary testing. Ex. 1, E-Mail thread between L. Brown and L. Kogan (Sept. 21, 22, and 26, 2017), at 3, 6 (highlights added). Defendants rejected this proposal and challenged the legitimacy of Plaintiff's concern about ground-freeze (a phenomenon upon which they now rely to support their Motion), only offering inspection dates in mid-November. *Id.* at 2-3, 4-5 (highlights added).

3. Plaintiff served its Rule 34 Request for Entry on Land and scheduled the inspection for October 16-17 (attached as Ex. 2). The Rule 34 Request explained the purpose of the Site visit was: "to inspect, measure, photograph, test, and/or sample the land, soil, water, aquatic organisms and/or vegetation" at or near the Site. Ex. 2 at 2. Contemplating that Defendants would have their own experts present at the inspection, Plaintiff offered to "provide portions of any samples collected to Defendants' representatives." *Id.* Shortly after Plaintiff

served the Rule 34 Request, Defendants moved in the 90-CV-229 action (in which Plaintiff served a separate Rule 34 Request) to quash the Rule 34 Requests served in both matters.[1] *See* 90-CV-229, ECF No. 165. Plaintiff opposed the motion, and filed a cross-motion to compel entry. *See* 90-CV-229, ECF No. 174. After Judge Baxter set a hearing on the motions, Defendants conferred with Plaintiff and clarified their concern that the U.S. Army Corps of Engineers ("Corps") would use information collected during the inspection to issue an "Approved Jurisdictional Determination" or a "Jurisdictional Determination" pursuant to their regulatory authority. To avoid a hearing, Defendants suggested that the parties file a stipulation stating that the information obtained during the Site visit would be used for litigation purposes only. *See* Ex. 3, E-Mail from N. Devlin to L. Brown (Oct. 3, 2017).

4. In the resulting Stipulation, Plaintiff 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." ECF No. 29 ¶ 3. The Stipulation provides that it does not impede Plaintiff from using the information for litigation purposes. *Id.*

5. The Corps has not issued an "Approved Jurisdictional Determination" or a "Jurisdictional Determination" utilizing the data gathered during the Site inspections. 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 failed to cite Corps documents that use the data from the October 2017 inspections in support of their Motion because ***no such documents exist***. Thus, the Stipulation was not violated. Rather, Plaintiff has

[1] Although Defendants included this case number on the motion, they filed it only in the 90-CV-229 action.

only used the information collected during the October 2017 inspections to support two expert reports in this matter (authored by Robert Brooks and Peter Stokely) and one expert report in the 90-CV-229 action pending before Judge Baxter (authored by Dwayne Edwards) as was contemplated under the Stipulation.[2] ECF No. 29 ¶ 3. Given the nature of this litigation—wherein Plaintiff claims that Defendants violated the Clean Water Act ("CWA") by filling waters of the United States—those expert reports unsurprisingly address whether wetlands are present on the Site; they are not (and indeed cannot be) "Jurisdictional Determinations."

6. Moreover, Defendants have possessed Plaintiff's reports since mid-December, and have waited more than three months, until *after* all experts were deposed and discovery closed to raise their claim that Plaintiff violated the Stipulation. Defendants fail to explain why, if they believed Plaintiff had engaged in the serious misconduct that they now allege, they did not raise that issue immediately with Plaintiff and the Court in December 2017 when they received Plaintiff's expert reports. Nor do they explain why they did not raise the issue in January when they moved to extend and complete discovery by February 28, 2018, ECF No. 35. The answer is clear: Plaintiff did not engage in any misconduct.

7. Defendants' claim that Plaintiff "intentionally provided late delivery of their expert reports . . . to provide Plaintiffs [sic] with a significant one-sided pre-trial advantage prior to the close of discovery," ECF No. 47 ¶ 4, is patently untrue. The parties *agreed* to serve their affirmative reports by December 18, 2017 (in advance of the discovery deadline). Ex. 4, E-Mail

[2] None of Plaintiff's experts are affiliated with the Corps, let alone authorized to issue determinations on the Corps' behalf.

thread between A. Cox and L. Brown (Nov. 30 and Dec. 5, 2017), at 1-2 (highlights added). Plaintiff honored that agreement. *See* Ex. 5, E-Mail from L. Brown to A. Cox (Dec. 18, 2017).[3]

8. Defendants' baseless accusations of misconduct in the Motion[4] are particularly outrageous given Defendants' own attempts to impede discovery. For example, Defendants continually failed to provide available deposition dates for their witnesses (*i.e.*, Robert Brace, Beverly Brace, Randall Brace, Ronald Brace and the Fed. R. Civ. P. 30(b)(6) corporate designees), and then insisted that, because their witnesses were busy with the fall harvest at Defendants' commercial farm, they could not be deposed until December 2017 (shortly before the initial close of discovery). Ex. 1 at 7 (highlights added). Yet, in contradiction to that assertion, Robert and Beverly Brace attended seven depositions taken by Defendants between October 2, 2017, and November 30, 2017, four of which required hours of travel to either Pittsburgh or Valley Forge, PA). Once Plaintiff was finally able to schedule Defendants' witnesses' depositions, Defendants' counsel failed to prepare the corporate Defendants' 30(b)(6) witness, Ex. 9, Dep. of R. Brace (Jan. 9, 2018) 285:23-287:20 (as Mr. Brace later admitted, Ex. 10, Dep. of R. Brace (Jan. 31, 2018) 9:17-10:9). Plaintiff was accordingly forced to incur considerable expense in returning to Erie, PA, two weeks later to complete the depositions.

[3] Ironically, Defendants were the only party to disclose expert reports late—despite representing to the Court that they would serve their rebuttal reports no later than February 21, 2018, Defendants served them one day late on February 22, 2018. *Compare* ECF No. 35 ¶ 2 *with* Ex. 6, E-Mail from L. Kogan to L. Brown (Feb. 22, 2018).

[4] This is not the first time Defendants have falsely accused Plaintiff of misconduct. They also filed a frivolous motion for sanctions in the 90-CV-229 matter. In that motion, Defendants alleged that Plaintiff's counsel appeared at mediation without the required settlement authority—despite the mediator's statement, filed with this Court, that Plaintiff's counsel had appeared with the necessary authority, ECF. No. 16. Defendants ultimately withdrew the baseless motion (at the Motion Judge's urging) but only after Plaintiff expended considerable resources defending against it. *See* Docket for 90-CV-229, ECF No. 160.

9. Additionally, Defendants' suggestion that the Court should *sua sponte* sanction Plaintiff, *see* ECF No. 47 ¶ 24, is beyond the pale. Plaintiff did not "improper[ly] misuse . . . discovery information obtained under false pretense." Rather, it is Defendants who have engaged in objectionable conduct throughout the course of this litigation. In addition to failing to prepare their 30(b)(6) designees, Defendants' counsel has also: (1) questioned an EPA witness about his deposition testimony during a break without Plaintiff's counsel present;[5] (2) badgered and threatened witnesses with claims of perjury;[6] (3) told deposition witnesses that Plaintiff has withheld evidence;[7] (5) suggested government employees lack work ethic;[8] and (6) routinely used discourteous language to describe Plaintiff's counsel, including (but not limited to) "an arrogant little . . .," "obnoxious[]," "smug," and "cruel and insensitive."[9]

10. Finally, even if the Court considers the merits of the Motion, it should be denied. Pennsylvania courts have held that discovery should not be reopened absent the movant's demonstrating that it was impossible to pursue the desired discovery more diligently.[10] 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

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[5] Ex. 11, Dep. of T. Lutte 127:6-128:14.

[6] *See, e.g.*, Ex. 12, Dep. of P. Stokely 164:16-167:7; Ex. 13, Dep. of J. Smolko 138:13-21; Ex. 14, Dep. of L. Steckler 64:4-73:1.

[7] *See* Ex. 12 at 310:22-311:17; Ex. 15, Dep. of D. Edwards 137:20-138:6, 157:18-158:10; Ex. 16, Dep. of S. Dudzic 138:19-22; Ex. 17, Dep. of A. Johnson 105:12-106:11.

[8] *See* Ex. 18, E-Mail thread between L. Kogan and L. Brown and B. Uholik (Jan. 5, 2018), at 1, 5 (highlight added).

[9] *See, e.g.*, Ex. 13 at 135:13-136:3; Ex. 15 at 39:21-40:1, 118:21-119:5; Ex. 19, E-Mail thread between L. Kogan and L. Brown (Jan. 10, 2018), at 2 (highlight added).

[10] *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).

between the filing of the Complaint on January 9, 2017, and the close of discovery.[11] Nothing prevented Defendants 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.

11. In sum, Defendants' Motion for a third discovery extension lacks merit. It is simply a brazen attempt to cast blame upon Plaintiff for Defendants' own failure to diligently conduct expert discovery, delay resolution of this litigation, and impede the restoration of important aquatic resources Defendants disturbed in violation of the CWA.

For the reasons set forth above, Plaintiff respectfully requests that the Court deny Defendants' Motion, ECF No. 47.

Respectfully submitted,

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[11] Defendants' claim that they could not have previously anticipated that they would need to conduct a wetlands assessment is farcical. First, Plaintiff repeatedly recommended that Defendants retain a qualified wetlands consultant to delineate the wetlands on the Site prior to filing the Complaint. *See, e.g.*, Ex. 7, Letter from P. Lazos to N. Devlin (May 19, 2014), at 1 (highlight added); Ex. 8, Letter from J. Lapp and S. Hans to R. Brace (Aug. 29, 2013), at 4 (highlight added). Additionally, Plaintiff's Complaint and Rule 34 Request, served in January and September 2017 respectively, clearly put Defendants on notice that Plaintiff asserts that wetlands are present on the Site.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2018, I served the foregoing United States' Response to Defendants' Motion for Additional Time (ECF No. 47) on the following counsel for Defendants via ECF:

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