

In the United States Court of Federal Claims

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)	
)	
Plaintiff,)	
)	
v.)	No.
)	
UNITED STATES,)	Judge
)	
Defendant.)	
_____)	

PARTIES' AGREEMENT REGARDING CONFIDENTIALITY OF SETTLEMENT COMMUNICATIONS

WHEREAS Plaintiff _____(Plaintiff) lodged this action against Defendant United States of America (the United States) on _____ (Date), regarding _____ (Case Name/Case Number);

WHEREAS Plaintiff and the United States (hereinafter the Parties) are engaging in an alternative dispute resolution (ADR) process that may result in a settlement of Plaintiff's claims, without the need for protracted litigation;

WHEREAS the Parties agree that, if they conduct settlement discussions, they will do so with the clear, explicit, and mutual understanding that all settlement communications, whether written or oral, will be kept confidential and will generally not be released to other people or entities;

WHEREAS the Parties agree that they will mark clearly any written communications relating to their settlement discussions with the label "Confidential Settlement Discussions and Communications—Do Not Disclose;" and

WHEREAS the Parties agree that, if they enter into settlement discussions, their ability to resolve or advance the resolution of Plaintiff's claims, in an efficient and resource-conserving manner and without the need for protracted litigation, will be significantly diminished if the Parties cannot rely on the expectation that the settlement discussions will be kept confidential.

THE PARTIES HEREBY JOINTLY STIPULATE AND AGREE TO THE FOLLOWING:

1. Definition. For the purposes of this Order, the term "Settlement Communications" means any communication made, exchanged, or provided—by Plaintiff; Plaintiff's attorneys, representatives, employees, agents, designees, experts, contractors, or consultants; the United States; the United States' officers, attorneys, representatives, employees, agents, designees, experts, contractors, or consultants; or any court personnel including any settlement judge, mediator, or other third-party neutral evaluator—in the settlement or ADR proceedings, regardless of whether the communications are oral, written, electronic, telephonic, or otherwise. "Settlement Communications" include, but are not limited to analyses, data compilations, correspondence, briefs, memoranda, reports, appraisals, or any other materials that are provided for the purpose of settlement or ADR discussions.

2. General Provisions for Confidentiality.

a. All Settlement Communications are for settlement purposes only and shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence.

b. Except as otherwise provided herein, all Settlement Communications and the contents and substance of all settlement or ADR discussions, negotiations, or proceedings shall be deemed confidential and may only be disclosed to any authorized person or entity who is (i) a Party; (ii) a Party's counsel, officer, agent, employee,

representative, designee, expert, contractor, or consultant; and (iii) any court personnel including the Settlement judge, mediator, or other third-party neutral evaluator.

c. Except as otherwise provided herein, Settlement Communications and the contents and substance of any settlement or ADR discussions, negotiations, or proceedings shall be deemed confidential and shall not be (i) filed with any court; (ii) provided to any judge, other than the settlement judge, mediator, or other third-party neutral evaluator in this case; (iii) deemed admissible; or (iv) used as evidence or for impeachment purposes at trial in this case or in any subsequent proceedings.

d. Actions taken, documents divulged, and statements made during the settlement process shall not constitute, nor form the basis for a claim of waiver of the attorney-client, work product, or deliberative process privileges, or confidentiality protections that may exist; and disclosure of information as part of the settlement process that is otherwise privileged shall not alter its privileged character.

e. A Party that inadvertently discloses Settlement Communications, or that becomes aware of an inadvertent disclosure of Settlement Communications by another person, must give prompt notification, in writing, to the other Party. The Party inadvertently disclosing the Settlement Communications must take all reasonable steps to protect the inadvertently disclosed information after the disclosure is discovered. The settlement judge, mediator, or other third-party neutral evaluator shall prescribe further processes for protection of information should any disputes arise between the parties regarding disclosure.

3. Qualifications and Exceptions to the General Provisions of Confidentiality.

a. Facts and evidence that are not privileged and that are otherwise independently discoverable from a Party or a non-party or that are admissible evidence shall not lose that characteristic or be rendered immune from discovery or inadmissible as a result of their use in the settlement or ADR proceedings or because of their inclusion in Settlement Communications. The Parties shall maintain as confidential any documents or data that is created or produced as part of settlement discussions between the Parties, subject to the right of either Party to seek, under the procedures set out in Paragraphs b. and c., to use such documents or data outside of settlement discussions.

b. A Party may offer for admission or have admitted into evidence in this or any subsequent proceedings a Settlement Communication or portion thereof:

i. that the Party has made, generated, produced, or obtained independently of the other Party, if the Settlement Communication or portion thereof does not attach, quote, paraphrase, or rely upon the contents or substance of any Settlement Communication or portion thereof provided by the other Party, the disclosure of which is precluded by this Order; or

ii. if the Party has received written confirmation from the other Party that the Settlement Communication or portion thereof may be offered for admission into evidence or used in the manner proposed.

c. In the case that a Party uses consultants or contractors to assist in the settlement or ADR proceedings (“Settlement Consultants or Contractors”) and then proceeds to offer them as testifying fact or expert witnesses at trial, the Parties shall meet and confer about which, if any, materials created or relied upon by the Settlement

Consultants or Contractors in the course of their engagement in the settlement or ADR proceedings shall be discoverable and admissible. Unless approved by the other Party, no Party may seek testimony from the other party's Settlement Consultants or Contractors arising from (a) work conducted by that Settlement Consultant or Contractor for the purposes of settlement or ADR proceedings, and (b) any Settlement Communication made by or to that Settlement Consultant or Contractor.

d. Nothing in this agreement prejudices or limits the right of the United States to take any action to enforce the laws of the United States.

e. In the event that a Party concludes in good faith that applicable law—including without limitation: the Freedom of Information Act (FOIA), 5 U.S.C. § 552, a subpoena, a court order, or other lawful process—requires disclosure of the settlement or Settlement Communications to a third party, such Party must provide, as far as is practicable, advance written notice to the other Party of the intent to disclose, including a description of the applicable law or a copy of the subpoena, process, or order requiring disclosure.

4. Communications with ADR Neutral.

a. All ex parte Settlement Communications with a settlement judge, mediator, or other third-party neutral evaluator will be deemed confidential as to the other Party. To facilitate successful negotiations, however, the Parties shall alert the settlement judge, mediator, or other third-party neutral evaluator about any information that can be treated as non-confidential and shared with the other Party. Whenever any Party develops a formal written settlement proposal, the settlement judge, mediator, or other third-party neutral evaluator shall not disclose or communicate any such proposal to the other Party, unless

and until counsel for the proposing Party has authorized such disclosure.

b. In this case or any subsequent proceedings, the Parties will not subpoena or seek, in any way, the testimony of the settlement judge, mediator, or other third-party neutral evaluator regarding the contents and substance of the settlement or ADR proceedings or any Settlement Communications.

5. Duration of the Confidentiality Provisions.

a. Until further order of this Court, the confidentiality provisions of this Joint Stipulation and Order shall remain in full force and effect, even after termination of settlement or ADR proceedings and after dismissal of this case.

b. In an action or proceeding to enforce a settlement or invoke the remedy of compromise and settlement, this agreement shall not render inadmissible a written settlement agreement that is reached as a result of this settlement process.

6. Handling of Settlement Materials. When a Party terminates its participation in this agreement, or upon the conclusion of settlement negotiations, each Party may request the destruction of written or electronic Settlement Communications that it disclosed, including all extracts, summaries, and descriptions of the information contained in Settlement Communications or portions thereof. Any Participant so requested must take all reasonable and necessary steps to promptly return or destroy the specified Settlement Communications, to the extent doing so does not violate federal recordkeeping requirements, regulatory or other legal obligations. The Participants acknowledge that the United States may retain Settlement Communications that constitute federal records pursuant to the Federal Records Act, 42 U.S.C. §§ 3301–07.

[Plaintiff]

[Date]

[Plaintiff's Counsel]

[Date]

[Plaintiff's Authorized Representative]

[Date]

[Defendant]

[Date]

[Defendant's Counsel]

[Date]

[Defendant's Authorized Representative]

[Date]