

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

DESCHUTES RIVER ALLIANCE, an  
Oregon nonprofit corporation

3:16-cv-01644-AC

ORDER

Plaintiff,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY, an Oregon corporation,

Defendant.

---

ACOSTA, Magistrate Judge:

This order resolves defendant PGE's contention that plaintiff DRA violated the Confidentiality provision of this court's "Order and Instructions and Information for Settlement Conferences," by posting on the DRA website and disseminating through email and social media characterizations of the parties' negotiations during and following the November 17, 2017 judicial settlement conference in this case. For the reasons explained below, this court finds DRA violated the Confidentiality provision. The remedies and sanctions for this violation are described at the end of this Order.

\\\\\\

### *Background*

The parties and their respective counsel are familiar with the specific communication that prompted PGE's contention. The court will not repeat that communication here because it would perpetuate the harm PGE asks the court to remedy. Instead, the court will describe the communication's content only generally and as necessary to explain its ruling in this Order.

On January 23, 2018, PGE wrote to the court that DRA "is both referencing and characterizing positions taken by the Parties during the judicial settlement conference[.]"<sup>1</sup> In its letter, PGE quoted DRA's communication and included a link to that part of DRA's website in which the communication appeared. Summarized, DRA's communication favorably characterized its own efforts and settlement proposals, and disparaged PGE's efforts and settlement proposals.

On January 23, 2018, the court conducted a phone hearing with the lawyers to discuss PGE's contention. Based on the information the lawyers presented, the court ordered DRA to remove the communication from the DRA website within 24 hours. The court also ordered PGE to submit by January 30, 2018, a letter describing any additional remedies it sought, and ordered DRA to submit a response letter by February 6, 2018.

### *Discussion*

#### I. Violation of the Confidentiality Order.

The court's settlement conference instructions contain a section entitled "Confidentiality," within which section this provision appears: "Confidentiality survives the

---

<sup>1</sup> The Confederated Tribes of the Warm Springs Reservation of Oregon ("Tribe"), an amicus party in this case, also participated in the settlement conference and co-signed PGE's letter.

settlement conference whether or not the case is settled, and it continues to apply to any settlement discussions, written or oral, in which I am involved after the conference.” DRA acknowledges the Confidentiality provision’s requirements, but explains it did not believe the communication it posted on its website violated those requirements. DRA offers that it conferred with its lawyer before posting the communication and that its lawyer opined the communication did not violate confidentiality. DRA’s lawyer, in his February 6, 2018 letter to the court, provides several pages of analysis to explain his opinion.

DRA’s communication violated this court’s Confidentiality provision, both in letter and in spirit. First, DRA disclosed the parties’ proposals and the court rejects DRA’s view that its communication did not do this. DRA’s communication publically characterized and compared the parties’ settlement proposals so as to severely disparage PGE’s proposals and efforts, and commend its own proposals and efforts.

Second, DRA’s communication wrongly blamed PGE for the parties’ failure to reach agreement, an assertion that is decidedly unsupported by the actual negotiations over which this court presided. In doing so, DRA undermined the integrity of the settlement conference process. The parties’ willingness to participate candidly and in good faith in a settlement conference depends on the assurance that their negotiations will not be disclosed outside the process or used against them in any way. DRA’s public mischaracterization of PGE’s negotiating position created the very harm that confidentiality is meant to prevent.

Third, DRA used its public mischaracterization of the parties’ confidential settlement negotiations to reinforce its lawsuit allegations – allegations that are far from being proved. Parties may not use settlement negotiations in any way to support the merits of their claims or

defenses. The court informed the parties and their lawyers of this prohibition in its settlement conference instructions and again orally at the outset of the settlement conference itself.

## II. Remedy.

The court must decide what remedy will sufficiently address DRA's violation of the Confidentiality provision. First, DRA already has taken steps to remedy its communication's damaging effect. On January 23, 2018, DRA removed the communication from its website in response to the court's order earlier that day. Later that same day, in response to an email from PGE's counsel, DRA also removed the communication from its Facebook page and all other social media platforms. Additionally, on February 1, 2018, DRA's counsel notified the court that DRA had posted on its website and through its other social media platforms a retraction statement. DRA's retraction is worded substantially the same as the retraction PGE proposed as one of the remedies requested in its January 30, 2018 letter to the court.

Consequently, the most direct remedies available to the court, removal and retraction of the communication, have been implemented, but those remedies have not prevented the harm from continuing. The effect of DRA's initial communication still echos through the Internet, as evidenced by one individual's recent Facebook reaction to DRA's mischaracterization, a reaction that disparaged PGE and its operation of the Project. Such commentary from members of the public is one of the on-going harms PGE cites and asks the court remedy.

In the Confidentiality provision of its "Order and Instructions and Information for Settlement Conferences," the court informed the parties that "[v]iolation of any aspect of this confidentiality provision will result in sanctions, the form and severity of which to be decided in my sole discretion." The court's authority to impose sanctions also derives from Federal Rule of Civil Procedure 16(f)(1), which provides that the court may impose sanctions if a party or

attorney “fails to obey a scheduling or other pretrial order.” Rule 16(f)(2) empowers the court to impose sanctions against a party, its attorney, or both, including the payment of attorney fees incurred by another party because of any noncompliance with this rule.

Accordingly, after fully considering the parties’ respective arguments regarding DRA’s violation of the confidentiality order and PGE’s proposed remedies, the court finds:

1. DRA violated the Confidentiality provision of this court’s “Order and Instructions and Information for Settlement Conferences.”

2. Corrective measures by and sanctions against DRA for its violation of this court’s settlement conference instructions are appropriate. The court ORDERS the following:

a. DRA’s February 1, 2018 retraction shall remain on DRA’s website in its current location on the website for the duration of this case while the case is pending in the district court.

b. DRA shall post this Order on its website in the same location on its website as the February 1, 2018 retraction appears, and DRA.

c. DRA shall disseminate this Order through all of its social media platforms, no later than February 19, 2018, and the Order shall remain on the social media platforms for the duration of this case while the case is pending in the district court.

d. DRA shall preserve all evidence relating to its public dissemination, in any form, of any reference to the judicial settlement conference and the parties’ settlement negotiations in this case.

e. DRA shall pay attorney fees to PGE and to the Tribe. Payment shall be made to PGE in an amount equivalent to three (3) hours of time for PGE’s counsel of

record, Beth Ginsberg, and payment shall be made to the Tribe in an amount equivalent to three (3) hours of time for the Tribe's counsel of record, Josh Newton. Ms. Ginsberg and Mr. Newton shall inform DRA's counsel of their respective standard hourly rates, and DRA shall pay the attorney fees no later than seven (7) days from the date DRA's counsel receives those standard hourly rates.

f. All parties shall refrain from communicating, disseminating, or characterizing in any way the confidential communications made during the judicial settlement conference held in this case to persons or entities outside the scope of each party's respective attorney-client privilege.

Nothing in this Order shall be deemed to be a finding of bad faith by DRA for purposes of Rule 11 or the Court's inherent contempt power.

Nothing in this Order precludes PGE and the Tribe, or either of them, from pursuing additional sanctions in the future arising from any further public dissemination of information relating to the settlement conference and negotiations by DRA in this case.

IT IS SO ORDERED.

DATED this \_\_\_\_\_ day of February, 2018.

---

JOHN V. ACOSTA  
United States Magistrate Judge