

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

AMERICAN SMALL BUSINESS	)	
LEAGUE,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	<b>NO. CV 14-02166-WHA</b>
	)	
DEPARTMENT OF DEFENSE, ET AL.,	)	
	)	
Defendants.	)	
	)	

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San Francisco, California  
Wednesday, November 15, 2017

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff:

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ASSISTANT UNITED STATES ATTORNEYS**

Reported By:

Pamela A. Batalo, CSR No. 3593, RMR, FCRR  
Official Reporter

1 Wednesday - November 15, 2017

1:57 p.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling CV 14-2166, American Small  
5 Business League vs. Department of Defense.

6 Counsel, please come forward and state your appearances.

7 **MR. CUNEO:** Jonathan Cuneo -- Cuneo, Gilbert &  
8 Laduca -- for the plaintiff.

9 **THE COURT:** Okay. Welcome.

10 **MS. WEISEL:** Your Honor, Jessica Weisel for Defendant  
11 Sikorsky.

12 **MS. LONDON:** Ellen London on behalf of the Government.

13 **MS. FRIDAY:** And Kimberly Friday on behalf of the  
14 Government.

15 **THE COURT:** So you're the plaintiff?

16 **MR. CUNEO:** Yes, sir.

17 **THE COURT:** You're the intervenor?

18 **MS. WEISEL:** Defendant intervenor.

19 **THE COURT:** And you two are the U.S. government?

20 **MS. LONDON:** Correct.

21 **MS. FRIDAY:** Correct.

22 **THE COURT:** Well, where are we in this case? What's  
23 left for me to do?

24 **MR. CUNEO:** Well, may I speak?

25 **THE COURT:** Yes.

1           **MR. CUNEO:** Okay. This case has been going on for a  
2 number of years. And as I think the Court would recall, it  
3 previously ruled that the document did not meet the  
4 qualifications for exemption.

5           **THE COURT:** Yes. But you failed to get me affirmed by  
6 the Court of Appeals.

7           **MR. CUNEO:** And the Court of Appeals' opinion, if you  
8 look at it -- if one were to look at it, is based on a  
9 declaration that was filed in this Court by the defendant --  
10 defendant intervenor.

11           **THE COURT:** Not by defendant. It was by Sikorsky,  
12 wasn't it?

13           **MR. CUNEO:** That's correct. It's a Sikorsky document.

14           In any event, the Court of Appeals then said that there  
15 are disputed issues of fact.

16           This Court, very early in the year, April, held a hearing  
17 at which it permitted a limited amount of discovery to go  
18 forward.

19           Now, what the Court's intentions were at that time is a  
20 subject of disagreement --

21           **THE COURT:** You mean, what my intentions were?

22           **MR. CUNEO:** I'm sorry, sir?

23           **THE COURT:** You're talking about me or are you talking  
24 about the Court of Appeals?

25           **MR. CUNEO:** No. I'm talking about you, sir.

1           **THE COURT:** Okay.

2           **MR. CUNEO:** And that is that what you intended is a  
3 matter of dispute.

4           At any rate, the defendants and intervenor produced for  
5 deposition a total of four witnesses of their selection, and on  
6 the basis of that and after that, the defendants determined to  
7 release substantial portions of the documents that they had  
8 previously withheld for a period of years.

9           And it's our position that the deposition testimony calls  
10 into question the accuracy and good faith of the original  
11 declaration or affidavit upon which the Court of Appeals  
12 opinion is based.

13           Before the Court now -- and last Friday night -- excuse  
14 me -- having given Sikorsky extension after extension to try to  
15 block release of the documents, the Government turned the  
16 information over to us after hours on a Friday night.

17           Now, we have the document, and if the Court were to find  
18 it helpful, we have prepared and given to the Government and  
19 Sikorsky a document that is numbered in the same way that we  
20 did before, but at this time, shows what's been released and  
21 what remains to be determined.

22           Now, I have that and could hand it up, if the Court were  
23 interested.

24           **THE COURT:** Not yet. But keep going. I want to hear  
25 your story.

1           **MR. CUNEO:** Now, at the time we last came in here, we  
2 had a request for narrowly-tailored specific discovery that we  
3 wanted to follow up.

4           The Government opposed that, as did Sikorsky, and we  
5 basically said *well, let's see what gets released and come back*  
6 *and meet again on November the 15th.* And that is specifically  
7 where we are. That is my recitation of where we are. If I've  
8 misstated it, I know they'll straighten that out for me, but I  
9 think we've met and we've discussed -- I think we have  
10 different ideas about how the litigation should proceed from  
11 here, but I only have my own position to advance in that  
12 regard.

13           **THE COURT:** Well, have you -- if you've now gotten the  
14 document that you want, isn't the case over?

15           **MR. CUNEO:** Judge, we have gotten portions of the  
16 document that we want. There still remain very substantial  
17 portions that are withheld.

18           **THE COURT:** All right. Okay. So that's what we're  
19 fighting over now, are the still redacted parts?

20           **MR. CUNEO:** That's correct.

21           **THE COURT:** Okay. Okay. Let's hear from the  
22 Government next.

23           **MS. LONDON:** Thank you, Your Honor.

24           We dispute that there very substantial portions still  
25 remaining. The Government has released very a significant

1 portion of what was redacted. There's very little left. It's  
2 about four to five little sections of text --

3 **THE COURT:** Why don't you just turn it all over? Why  
4 are we even fighting over small things?

5 **MS. LONDON:** The information that has been withheld  
6 the Government at this point has considered and considered and  
7 considered the redactions, and these are pieces of information  
8 that are covered by the exemption. It involves pricing  
9 information of Sikorsky, information that is squarely within  
10 the bounds of the (b) (4) standard.

11 **THE COURT:** Okay. So is your position that the case  
12 is over? What is your position?

13 **MS. LONDON:** The case is not over, unfortunately for  
14 all of us, but we did want to raise with the Court in light of  
15 the substantial change whether Your Honor would be amenable to  
16 discussing additional briefing in lieu of proceeding straight  
17 to a hearing, noting, of course, that Your Honor has already  
18 said that we should go straight to a hearing, so we just -- we  
19 understand you've already said that, but in light of the  
20 substantial change in the case, we did want to float the idea  
21 of whether the Court would consider briefing --

22 **THE COURT:** Well, didn't we have a trial date soon?

23 **MS. LONDON:** I'm sorry?

24 **THE COURT:** When is our trial date?

25 **MS. LONDON:** We don't have one currently, Your Honor.

1           **THE COURT:** What was it we were going to have? What  
2 kind of hearing were we to have then? You said we were going  
3 to go to a hearing.

4           **MS. LONDON:** We originally had a hearing date of  
5 December 11th.

6           **THE COURT:** And that was for what?

7           **MS. LONDON:** I'm sorry?

8           **THE COURT:** For what kind of hearing?

9           **MS. LONDON:** It was going to be an evidentiary  
10 hearing.

11           **THE COURT:** Okay. Well, that's like a trial. That's  
12 what I meant.

13           **MS. LONDON:** I'm sorry. A hearing.

14           **THE COURT:** So you want to do another brief. What  
15 would that brief be about?

16           **MS. LONDON:** It would be further summary judgment  
17 briefing about the small remaining pieces of information left  
18 in the case.

19           We could do it quickly. We could have our -- whatever  
20 fashion the Court would be amenable to --

21           **THE COURT:** So how many redactions are there?

22           **MS. LONDON:** By my count, it's about five paragraphs  
23 of the document and then a series of email addresses and  
24 signatures.

25           **THE COURT:** Five paragraphs?

1           **MS. LONDON:** Correct.

2           **THE COURT:** And how many sentences?

3           **MS. LONDON:** I have not counted sentences. I'm happy  
4 to get you that count, if that's helpful.

5           **THE COURT:** Okay. So your view is that you could  
6 submit declarations, right, that would justify redacting that  
7 material?

8           **MS. LONDON:** Correct.

9           **THE COURT:** And then if you won on that, the case  
10 would be over?

11          **MS. LONDON:** Correct.

12          **THE COURT:** And go back to the Court of Appeals?

13          **MS. LONDON:** Presumably.

14          **THE COURT:** For sure it would be because you're never  
15 going to give up; right?

16          **MR. CUNEO:** I don't want to -- never say *never*, but  
17 not very likely.

18          **THE COURT:** All right.

19                 Now, wait. Let me hear what Sikorsky's view is of what we  
20 should do.

21          **MS. WEISEL:** Yes, Your Honor.

22                 We also agree that summary judgment briefing should be  
23 done.

24                 Part of the issue is that the -- all of the discovery that  
25 has taken place has been focused on the identity of the

1 subcontractors, which the Government has now disclosed as part  
2 of its recent disclosure, which I will say was over Sikorsky's  
3 objections.

4 The remaining information in here --

5 **THE COURT:** Can I interrupt you?

6 You didn't bring any reverse FOIA or anything, so you're  
7 just going to complain, but not do any lawsuit?

8 **MS. WEISEL:** Yes, Your Honor.

9 Under the circumstances given the standard of review of  
10 the Government action, we decided that there was very limited  
11 purpose to trying to pursue that.

12 However, the remaining information consists of financial  
13 information: How much Sikorsky pays to particular  
14 subcontractors, how much it invests in certain programs. And  
15 that information is not based on the identity of the  
16 subcontractors. It hasn't been the subject of any of  
17 plaintiffs' discovery, despite their ample opportunity to do  
18 so.

19 The other information is information that's exempt under  
20 FOIA Exemption 6. The Ninth Circuit has said that our  
21 employees have a privacy interest in signatures, current  
22 business addresses, and -- I'm sorry -- current email addresses  
23 and phone numbers. All of those continue to be redacted.

24 **THE COURT:** Okay. Can I interrupt you?

25 There's no way I'm going to let you have signatures, phone

1 numbers, that kind of personal identifying information. No  
2 way. Because that would lead to fraud. Not by you. I trust  
3 you. But I'm not going to let that kind of information get out  
4 there where hackers can get it. No way. No way.

5 Okay. So you're going to win on that one, at least in  
6 front of me all day long, but that's just part of it; right?

7 **MS. WEISEL:** Your Honor, aside from that, the only  
8 remaining issue are about the five paragraphs that have the  
9 financial information.

10 **THE COURT:** But that's not employee. That's your  
11 information.

12 **MS. WEISEL:** That's Sikorsky information. That's  
13 exempt under Exemption 4.

14 **MS. LONDON:** Your Honor, I didn't mean to interrupt.  
15 In addition to signatures, there is also (b) (6) contact  
16 information.

17 **MS. WEISEL:** Yes. It's business email addresses and  
18 business phone numbers for -- and those are for current  
19 employees. For former employees, we removed redactions.

20 **THE COURT:** I'm not so sure about why you would get to  
21 keep business phone numbers. I'd have to think about that one,  
22 but personal things should not be in the hands of anybody.

23 **MS. WEISEL:** Your Honor, we would argue the Ninth  
24 Circuit -- the Ninth Circuit held that there may be -- the  
25 privacy interests in that information may be small. However,

1 the Court said there is no countervailing interests that the  
2 plaintiffs have offered.

3 **THE COURT:** Could be right. Okay. That's for summary  
4 judgment. We can work that out.

5 But let me go back to the plaintiff. You did take some  
6 depositions. You took four; right?

7 **MR. CUNEO:** Correct.

8 **THE COURT:** So I did give you discovery. You made it  
9 sound like I didn't give you discovery, but you did get  
10 discovery.

11 **MR. CUNEO:** I didn't mean to make it sound that way.  
12 You gave us limited discovery, and to be honest with you, that  
13 discovery raised more questions than it answered.

14 And it is not true that that discovery was solely focused  
15 on the names of the suppliers. It was also focused on the  
16 measures that Sikorsky took to protect its allegedly  
17 proprietary information from the public view.

18 And one of the reasons we want follow-up discovery in the  
19 form of limited 30(b)(6) depositions of Sikorsky and the  
20 Justice Department -- this is the -- excuse me -- the Defense  
21 Department -- this isn't the only reason, but it's an important  
22 reason -- is that the witnesses were so devoid of information  
23 on this very important topic that we are afraid, when it comes  
24 to trial, that we will find ourselves in the trap that is  
25 outlined in Rule 20 of Alsup -- Judge Alsup Rule 20, and that

1 is that we have a witness who's testified *I don't know, I don't*  
2 *know, I don't know*, and then we get here and the witness has  
3 all kinds of information --

4 **THE COURT:** That's called a sudden burst of  
5 recollection.

6 **MR. CUNEO:** Right. Or getting smart.

7 **THE COURT:** No, no. A sudden burst of recollection.

8 **MR. CUNEO:** Right. And we want to nail these things  
9 down.

10 I can give you an example, a specific example or two, if  
11 you're curious.

12 **THE COURT:** Sure.

13 **MR. CUNEO:** Okay.

14 One -- just from recollection -- we asked their witnesses  
15 about whether Sikorsky required subcontractors to sign a -- a  
16 statement that prohibited them from discussing with the public,  
17 the community, the nature of their contracting relations with  
18 Sikorsky, and the witnesses -- one witness said, "Well,  
19 sometimes we do, sometimes we don't."

20 "But did you in this case?"

21 "I don't know. I've seen those, but I don't know."

22 So we don't know what strictures exist, and we have tried  
23 to find out. And we don't know also, Your Honor, whether  
24 they've ever tried to enforce those strictures.

25 Now, the expert report that we have put before the Court

1 basically says that this contracting community is a pretty  
2 small community and there may be some trade secrets in it, but  
3 the analogy I would like to think of is it's like the judge/law  
4 clerk community. Every law clerk -- every third-year law  
5 student here knows whether this judge prefers students from  
6 Harvard or from Berkeley or from Santa Clara, veterans, okay,  
7 but it's not published anywhere, but it's just something that's  
8 out there that is --

9 **THE COURT:** And half of which is incorrect info.

10 **MR. CUNEO:** That may be right, but nonetheless, it's  
11 not public but it's known.

12 And that's what our expert witness says, is that many of  
13 these things are known.

14 And so what we want to do is to get -- and we have  
15 submitted them to this Court -- a limited number of 30(b)(6)  
16 depositions.

17 And we also think, respectfully, that that was  
18 contemplated within this Court's initial order in April.

19 **THE COURT:** Well, didn't the federal -- didn't the  
20 Court of Appeals say there were fact issues?

21 **MR. CUNEO:** Yes.

22 **THE COURT:** Right?

23 **MS. WEISEL:** The Court held that Sikorsky and the  
24 Government had raised genuine issues of fact, yes.

25 **THE COURT:** So normally when that happens, I give some

1 discovery so each side can work out the fact issues, and then  
2 we have a hearing, an evidentiary hearing. So why shouldn't I  
3 give the plaintiff some -- let me hear from you? Why shouldn't  
4 I give them some more discovery?

5 **MS. LONDON:** Your Honor, the parties first negotiated  
6 a discovery order between themselves that this Court then so  
7 ordered.

8 That discovery order specifically says that discovery  
9 should be limited to the issues of whether the exemptions  
10 apply, which makes sense given that this is what the case is  
11 about.

12 The discovery that they are now seeking, first of all, is  
13 not limited and it goes well beyond those issues. It seeks  
14 information about the Government's processes for making  
15 decisions about whether to release information, what's publicly  
16 available. None of it is relevant at this point, and, again,  
17 it goes beyond the scope of the issue in this case, which is  
18 whether this information should be redacted.

19 **MS. WEISEL:** Your Honor, if I could add, in addition,  
20 the limited discovery provided that plaintiffs could take --  
21 could serve 10 discovery requests for documents. The parties  
22 were then going to have the deposition of Sikorsky's declarant.  
23 Then they had 30 days to identify witnesses who had relevant  
24 information that would be presented at the hearing. And then  
25 there would be depositions of those witnesses.

1           That what was we agreed upon and that was in April.

2           **THE COURT:** But did they say *I don't remember, I don't*  
3 *know* a lot?

4           **MS. WEISEL:** I don't -- I can't say overall. I think  
5 within the scope of what they were testifying about -- because  
6 we designated witnesses to testify to certain topics. And if  
7 they were asked questions that were outside what we had  
8 designated them for, they perhaps didn't know.

9           **THE COURT:** But within the topic, did they always know  
10 the answer?

11           **MS. WEISEL:** I don't think on every question, no.  
12 But, again, you're asking about a lot of different information,  
13 and I'm not sure even a 30(b)(6) would possibly know every  
14 possible question or answer --

15           **THE COURT:** Usually there's a -- I would say out of 10  
16 questions, a 30(b)(6) witness ought to be able to answer 8 to 9  
17 of the questions within the topic and then maybe 1 or 2 not  
18 know. That's okay. I'd accept that. But if it's 50/50,  
19 that's not enough, if the questions are within the topic.

20           **MS. LONDON:** Your Honor, as to the Government witness,  
21 she did not say *I don't know* very often, just speaking for the  
22 Government. She spoke clearly and addressed the topics for  
23 which we had offered her.

24           And, again, they're seeking a 30(b)(6) from the Government  
25 about the Government's processes for making FOIA decisions.

1 That's not at all relevant to the question of whether the  
2 remaining information is --

3 **THE COURT:** Do you have the document that's -- the  
4 paragraphs in question? Can I just look at them right now?

5 **MS. WEISEL:** The paragraphs in question in the --

6 **THE COURT:** Yes. So I can just, for myself, take a  
7 quick look at it. While I'm sitting here on the bench, maybe I  
8 can help you resolve this case.

9 **MS. WEISEL:** This has what is redacted.

10 **THE COURT:** I want to see the unredacted. I want to  
11 see what you're hiding. I don't want to see that. I want to  
12 see the one that has the actual paragraphs.

13 Now, how do I --

14 **MS. LONDON:** The red boxes, Your Honor, are currently  
15 redacted.

16 **THE COURT:** Okay. Let me just go through -- page 1  
17 are signatures. Those should never be given to plaintiff. No  
18 way. Because then somebody might use them to write checks. No  
19 way.

20 Page 4 is the next one. There is a phone number. I don't  
21 think you ought to be turning that -- email address, phone  
22 number, email address. You don't have to turn that over.

23 Same thing on page 5. The only thing that's redacted is  
24 email addresses.

25 Same thing on 6. Phone number -- I don't know why you're

1 whining over that kind of info.

2 Okay. Now we get to something that looks a little bit  
3 more -- same thing on 10, a lot more phone numbers and emails.

4 I don't think you should be asking for that.

5 Okay. Now we get to page 11. There is something that  
6 looks like it's under a heading called *Proportional Allocation*  
7 *Calculation FY 2013*. It's parts -- two paragraphs and a part  
8 of a line. And I can't tell, without knowing more, whether  
9 that's a real trade secret or not, but it's conceivable that it  
10 is, so that one I can see there being a fight over that.

11 Now we go to page 15. I question whether or not that  
12 first paragraph is worthy of being redacted. This is the one  
13 that begins *historically*.

14 The other paragraphs probably -- I can see that is a close  
15 issue, so I can't tell you what I think about that.

16 Then we go to 18. It looks like more phone numbers, more  
17 email addresses.

18 There is some dollar numbers at page 19 that I cannot -- I  
19 mean, I just don't know. I'd have to know more of the  
20 background.

21 That's the same on page 20.

22 Same on page 21.

23 This is a lot more than five paragraphs, by the way.

24 Then 23, there's emails and phone numbers. I don't think  
25 you should turn that over.

1 All right. The one at page 24 called *Sheet Metal*, it  
2 seems like that has got business info, and it might be -- might  
3 or might not qualify. That's hard to say.

4 And then there's more emails, phone numbers.

5 I'm not going to go through the rest, but I've gone  
6 through almost all of it now, I'm going to say 90 percent of  
7 it, and I can see that we -- here's my plan for you. You tell  
8 me what's wrong with this plan.

9 They bring a motion for summary judgment addressing  
10 everything, not just the -- here, I'm going to hand this back  
11 because I don't want -- I don't want to keep it.

12 All right. My plan is this. They bring a motion for  
13 summary judgment and you oppose it and you can do what's called  
14 a 56, I think it's now (g), it used to be (f) -- a 56(g)  
15 affidavit explaining why you need discovery to meet the issues.

16 Now, in your summary judgment motion, you have to describe  
17 the content well enough of the paragraphs so that an  
18 intelligent response can be offered. And then we -- you get to  
19 reply, and the answer will either be yes, they do get more  
20 discovery based on the showing or they don't get more  
21 discovery, and I just decide it.

22 What's wrong with that? I will give the plaintiff a  
23 chance to shoot down my idea.

24 **MR. CUNEO:** Well, first of all, whether something is  
25 exempt in this context is not something that a jurist can

1 easily decide. This isn't like Exemption 5 or Exemption 3.  
2 Exemption 5 is is it pre-decisional. Do I recommend to my boss  
3 that we take this action? And that's something that can be  
4 decided by a judge and a law clerk --

5 **THE COURT:** Can be or cannot be?

6 **MR. CUNEO:** Can be in the abstract.

7 **THE COURT:** Can be.

8 **MR. CUNEO:** Yes, sir. Exemption --

9 **THE COURT:** Then that's what I'm proposing we do.

10 **MR. CUNEO:** But this is Exemption 4 and that's very  
11 different and that is -- and that's one of the reasons we feel  
12 that the Johnson declaration is so misleading.

13 It's one thing to describe what's on a page, but really  
14 with Exemption 4, that has to be placed in the context of what  
15 information is available in the industry.

16 And our, as we see it right now, principal concern at this  
17 time is that this information may be widely available and that  
18 Sikorsky did not take steps to protect it. It's as if they  
19 left the car unlocked and the windows open and the doors open.  
20 That's what we're concerned about.

21 So it has to be placed into context. A judge or somebody  
22 sitting in your position can only look at what they say about  
23 the information.

24 **THE COURT:** Well, but if you lay out your argument in  
25 a 56(g) declaration, you might convince me that you get some

1 discovery on that.

2 **MR. CUNEO:** May I ask --

3 **THE COURT:** You've already done the discovery that you  
4 agreed to and that you had a plan, a stipulated plan, and now  
5 you want more than that.

6 **MR. CUNEO:** That's not our version of events. That is  
7 true with respect -- we are really, really, really -- what's  
8 that word -- jamming together two concepts. It's true that we  
9 served -- my law firm came in late. When we -- we served  
10 document requests, a limited number, but after the deadline.  
11 We don't deny that. Okay. We're not trying to hide that.

12 The question of what deposition discovery was authorized  
13 is a question that involves the interpretation of the words of  
14 this Court.

15 At the time the Court made its ruling, there was only one  
16 declarant, and Sikorsky had not yet intervened. And in some  
17 way, the Court said you can have two depositions. And there  
18 then became multiple declarants. So our position is that what  
19 the Court intended was that we get the declarants plus two.  
20 And now -- for each of them. But we're only asking for one.

21 So I don't think it is correct that it's our position that  
22 we agreed to this discovery on the depositions.

23 **THE COURT:** All right. How about this: Whatever  
24 declarants that you use on your motion before they get -- he  
25 gets to depose them no matter what.

1           **MS. WEISEL:** Well, Your Honor, the witnesses we would  
2 use are the witnesses who have already been deposed.

3           **THE COURT:** Yeah, but he hasn't deposed them on what  
4 they're about to say in their declaration. Look, it's just  
5 going to save time. You file your motion. Put in a  
6 declaration. He gets to depose them. Then he puts in his  
7 opposition. That will be faster in the long run.

8           **MS. LONDON:** I think we are a little confused because  
9 they've already taken full-day depositions of these witnesses.

10          **THE COURT:** Are they going to put in new declarations?

11          **MS. WEISEL:** If they were going to be our witnesses at  
12 the evidentiary hearing so --

13          **THE COURT:** You are trying to talk me out of the --  
14 you say you don't want an evidentiary -- now you want more  
15 declarations.

16          **MS. WEISEL:** We would submit declarations in support  
17 of the summary judgment likely from those witnesses.

18           I guess what I'm trying to understand is if the  
19 information that is at issue here has always been redacted,  
20 plaintiff had plenty of opportunity to depose these witnesses  
21 and ask them what is this redaction, what's in there, and how  
22 is --

23          **THE COURT:** Are you willing to rely on the old  
24 declarations?

25          **MS. WEISEL:** These witnesses haven't provided

1 declarations before. In the initial summary judgment in  
2 support of the Government's summary judgment, Sikorsky offered  
3 one witness declaration, and the Ninth Circuit held that that  
4 declaration, which -- if the Court may recall, the issue on  
5 summary judgment was the Court held that the declarant didn't  
6 say that the information would be used by competitors and cause  
7 a likelihood of harm. The Ninth Circuit said it was sufficient  
8 that the declarant had said that it could be used. That was  
9 the issue in the appeal.

10 So for summary judgment purposes, the witness made the  
11 showing. Now, if now we're going beyond what that showing is  
12 to somehow allow plaintiff to --

13 **THE COURT:** Look, either -- look, I'm almost about go  
14 back to the other -- just have a trial.

15 You talked me into summary judgment, but you want to have  
16 it both ways. You want to put in new declarations, but you  
17 want to hide those people from being deposed on those  
18 declarations. No.

19 **MS. WEISEL:** They testified --

20 **THE COURT:** You're going to -- look, here's the way  
21 it's going to work. I'm tired of this. You're being  
22 unreasonable over there.

23 File your motion for summary judgment. You get to depose  
24 them, but it's two hours per declarant. Two hours. Two hours  
25 per declarant.

1           And then you file your opposition, and if you want to do a  
2 56(g), go ahead.

3           Then you file your reply, and then we come back here.

4 That's the way it will be. End of story.

5           When can you file your motion?

6           **MS. LONDON:** Is December -- sometime in December, is  
7 that acceptable?

8           **THE COURT:** Sure. December 7th.

9           Now, who knows what December 7th is? You probably do.  
10 How about you three? Do any of you know December 7th is?

11           **UNIDENTIFIED SPEAKER:** Pearl Harbor Day.

12           **THE COURT:** Yes.

13           December 7th is the day it's due. Then you got to do the  
14 depositions right away, and the opposition is due on the 21st.

15           Then on the 28th -- do I want to wreck your holidays since  
16 you didn't know what Pearl Harbor Day was? No. I'm going to  
17 give you until January 4th to file your reply, and then we'll  
18 have a hearing, it looks like, on January 18. This will be  
19 law-and-motion-type hearing.

20           **MR. CUNEO:** December 7th, 21st --

21           **THE COURT:** And then it goes to January 4 and then  
22 January 18. While we're at this, who knows what January 8th  
23 is?

24           **MS. WEISEL:** Don't know.

25           **MR. CUNEO:** I know what December 21st is.

1           **THE COURT:** January 8th. Nobody knows. Elvis  
2 Presley's birthday. All right. Are we done?

3           **MR. CUNEO:** Thank you.

4           **THE COURT:** Are we done for now? Can one of you --  
5 who is the Government? You two?

6           **MS. LONDON:** We're the Government.

7           **THE COURT:** You prepare an order that captures what I  
8 just said.

9           **MS. LONDON:** Your Honor, is there a specific time on  
10 the 18th?

11           **THE COURT:** Yes. 8:00 a.m.

12           **MR. CUNEO:** That suits me -- I mean, not that the  
13 Court would care, that suits me great because that means I can  
14 come in the night before and leave in the afternoon, and I come  
15 from Washington, sir.

16           **THE COURT:** I hate for somebody to come that far in  
17 the wintertime, but maybe you could come in by helicopter.

18           **MR. CUNEO:** It's the life we chose, Your Honor.

19           **THE COURT:** You said it. That's very true. That's  
20 very true. And you get paid a lot of money so I'm not -- I get  
21 it. You all, thank you.

22                           (Proceedings adjourned at 2:31 p.m)

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CERTIFICATE OF REPORTER

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

DATE: Monday, November 27, 2017

*Pamela A. Batalo*

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Pamela A. Batalo, CSR No. 3593, RMR, FCRR  
U.S. Court Reporter