

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DEPARTMENT OF TREASURY,)	
)	
Plaintiff,)	Miscellaneous Action
)	No. 12-100
v.)	
)	July 12, 2017
DENNIS BLACK,)	11:30 a.m.
et al.,)	
)	Washington, D.C.
Defendant.)	
)	

**TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE EMMET G. SULLIVAN,
UNITED STATES DISTRICT COURT JUDGE**

APPEARANCES:

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by computer-aided transcription.

1 MORNING SESSION, JULY 12, 2017

2 (11:42 a.m.)

3 THE COURTROOM CLERK: Your Honor, this is Miscellaneous
4 Case 12-00, *U.S. Department of Treasury versus Dennis Black, et*
5 *al.*

6 Will all parties please come forward to this lectern and
7 identify yourselves for the record.

8 MR. GLASS: Your Honor, I'm David Glass from the Civil
9 Division of the Justice Department for the Department of the
10 Treasury, and with me at counsel table is Ms. Jacqueline Snead.

11 THE COURT: All right. Good morning to you both.

12 MS. SNEAD: Good morning.

13 MR. KHALIL: Good morning, Your Honor, Michael Khalil for
14 respondents, and with me is Anthony Shelley and Tim O'Toole.

15 THE COURT: Good morning. This is the case that keeps on
16 giving. I've spent more time on this case, and so has everyone
17 else in the well of the court over the past few years, than I
18 care to remember, but, you know, these cases are important and
19 they're important to the Court to make sure the Court correctly
20 decides the issues, and it's definitely important to the parties,
21 and this is about pension plans, so this has a special
22 sensitivity to it.

23 So here's the reason why we're here. I'm still extremely
24 sensitive to the order issued by the Michigan federal judge that
25 essentially says discovery cannot go forward in that case until

1 everything has been completed here. I'm not sure what that
2 means, and I don't need to reach out to him to find out, but
3 there's an appeal, and that's fine, that's how our process works.
4 There's no harm here. That's how our system of justice works,
5 and that's how it should work but a couple of things. There's
6 probably going to be a delay. Has the government sought
7 expedited consideration?

8 MR. GLASS: We have not yet, Your Honor. We're willing to
9 do that.

10 THE COURT: You know, with all due respect to the Circuit,
11 sometimes the Circuit grants expedited consideration; sometimes
12 it doesn't. I haven't looked at the Cheney pleadings recently,
13 the case I had years ago, and I think that case was expedited
14 also, a case in which I ordered Cheney, essentially, to submit to
15 discovery, and if appropriate invoke the privilege or whatever,
16 and that case -- it's been a while in the Circuit. I was
17 affirmed. I think it went *en banc*. I was affirmed. It took on
18 a life of its own after that, went to the Supreme Court. And the
19 Supreme Court, with all due respect, took a hard look at the
20 cases that I had relied upon, Circuit precedents, in ordering
21 that Cheney submit to discovery and said, Nah, the Circuit
22 probably didn't get those cases right years ago and vacated those
23 opinions and sent the case back, and I don't know how many years
24 it took. It took years, and I'm sensitive to that. These
25 Michigan litigants want to get on with their lives. It's about

1 pension plans. It's about people who are going to retire, people
2 who are probably retired, I assume, right, and so that dovetails
3 into other issues, too. The *Keepseagle* case is one case that
4 comes to mind. It's the Indian farmers case that I had assigned
5 to me randomly when I first joined this Court, and it's still
6 with me. And it's a case where the government fought the Indian
7 farmers tooth and nail over the claims of unfair treatment with
8 respect to requests for loans to farm, and the government fought
9 the plaintiffs tooth and nail, fought the Court, which is fine, I
10 can handle myself, and appealed to everything, and the case went
11 on and on and on, and then very interestingly there was an
12 election and President Obama was elected president and the case
13 settled -- a complete change in attitude -- for \$680 million or
14 so. You would think that would be the end of it. It's still
15 going on. And in a two to one decision two weeks ago, the last
16 thing I did was affirmed. It's going to come back. For whatever
17 reason, I have no idea. I don't know what else is required of me
18 to do, but the thing that's telling, the thing that really brings
19 tears to your eyes is that the Indian farmers have died, and
20 that's one of the reasons offered for the excess money available
21 for cy-près distribution, that people who were not treated fairly
22 by the government, filed claims, have since died, and that's sad.
23 That's not the way justice is supposed to operate. So, you
24 know -- but it is what it is, and that case -- I'm not sure what
25 the case number is, but it's been around, I don't know, 15 years

1 or so, Mark, hasn't it? It's been around a long time, and it
2 will come back for whatever reason, or maybe it will take on a
3 life of its own, too, because there's a very interesting cy-près
4 issue there.

5 So, I don't know. And another case that comes to mind is
6 the case involving African-American police officers on Capitol
7 Hill who filed claims for discrimination against the government
8 years ago, very complicated case, and I had to enlist the aid of
9 one of my magistrate judges to help me wade through a lot of
10 issues, and we did. And, you know, you issue the order, there's
11 an appeal -- and again, that's fine, affirmed on most, sent back,
12 and then you hear, you know, some police officers come to court,
13 tell you that, you know, Judge, we really need some finality
14 because our colleagues are dying.

15 So, you know, under these black robes we don't have black
16 hearts, we have big hearts, and I just see delay, I see more
17 delay here, and with all due respect to the judge in Michigan, he
18 has every reason to say, look, we're not going to start a round
19 of discovery until everything is finished in D.C., when will that
20 be finished?

21 So I thought about all of that, and I said, you know what,
22 maybe it makes more sense for the Court to send the 27 documents
23 back to that federal judge who issued the first opinion
24 addressing the need for discovery, et cetera, et cetera, and let
25 him read the documents, take a look at the documents -- he's in

1 control of his docket -- and make the final call with respect to
2 release of those 27 documents. I don't know. I mean, I didn't
3 think of that earlier, and no one asked me to do it. I've
4 invested a lot of time in this case, and I think that the
5 decisions I've made were correct, but I always think that, and I
6 think they're correct, and I don't want to add any more time.

7 Let me stop for a second and just ask the government one
8 question. You're not contesting the relevancy of these
9 documents, are you? You're contesting the need for these
10 documents, correct?

11 MR. GLASS: We're -- as far as we're concerned, there is
12 not a valid claim that the respondents have in this case --

13 THE COURT: -- all right --

14 MR. GLASS: -- anyway.

15 THE COURT: So, the answer is no.

16 MR. GLASS: No, they're not relevant to anything, and
17 they're privileged.

18 THE COURT: So you're going back to the original claim
19 before the Michigan judge then, correct?

20 MR. GLASS: Right. We, the Treasury, at one time were a
21 defendant in the Michigan action. We were dismissed out. The
22 Pension Benefit Guaranty Corporation remains a party.

23 THE COURT: Does that counsel in favor of my asking the
24 federal judge to look at those 27 documents, then?

25 MR. GLASS: I don't think, Your Honor, that it's going to

1 speed things up.

2 THE COURT: I'm concerned about that, too. I can bite the
3 bullet. I may be wrong on this. I don't think I'm wrong. It's
4 discovery. I mean, we all agree, do we not -- if someone
5 disagrees with what I'm about to say, tell me -- the documents,
6 if arguably relevant, could otherwise lead to the discovery of
7 indeed more documents, correct, that are relevant?

8 MR. GLASS: No. I think we're done with that. There's
9 been -- the first round of discovery was against the Pension
10 Benefit Guaranty Corporation, which is the only remaining
11 defendant.

12 THE COURT: So you don't think there's anything out there
13 that hasn't been produced.

14 MR. GLASS: Well, there never was anything relevant
15 because there isn't a valid claim here of any kind. The
16 government didn't do anything to these -- to these particular
17 pensioners.

18 THE COURT: Let me stop you, though. That's not for this
19 Court to determine.

20 MR. GLASS: No, I understand.

21 THE COURT: No, no, I just want to make sure. That's not
22 for this Court --

23 MR. GLASS: Not for -- not for Your Honor to determine. I
24 just wanted to make a point that what happened to these
25 pensioners is what happened to lots of pensioners who worked for

1 industrial companies that in this country have mainly gone under,
2 and when they've gone under, they've tended to take their pension
3 plans with them, and that's exactly what happened here.

4 THE COURT: Which is so unfortunate.

5 MR. GLASS: It's extremely unfortunate because --

6 THE COURT: You work for 30 years and have nothing?

7 MR. GLASS: Well, no. No, no. Congress addressed that.
8 That's ERISA. That's the Employee Retirement Income Security
9 Act, and what Congress created in 1974 was an insurance scheme
10 like the deposit insurance for pension plans. And so if your
11 pension plan becomes financially embarrassed, what happens is the
12 plan gets terminated, the pension -- the insurance scheme is
13 managed by -- the insurance fund is managed by the Pension
14 Benefit Guaranty Corporation and you receive a statutory amount
15 of your benefits. It's not a hundred cents on the dollar, just
16 as deposit insurance has --

17 THE COURT: What percentage is it, \$0.20 on the dollar?

18 MR. GLASS: I think it's more than that, and I think it
19 depends -- it varies from individual to individual. And there
20 was a -- there was a period when the Delphi plan got terminated.
21 It took them a while to figure out who was to get what, but the
22 Delphi pensioners, the Delphi salaried pensioners are getting
23 their benefits under ERISA. They're getting their insurance
24 benefits. And the number that PBGC talked about in the Michigan
25 case was two and a half billion dollars. So these people are not

1 getting a hundred cents on the dollar. You don't get that under
2 this scheme. But they're getting statutory benefits to which
3 they're entitled. And so the issue is whether PBGC was
4 entitled -- or had a right to terminate the pension plan. Its
5 determination was that if it didn't terminate the pension plans,
6 the amount of liabilities would continue to increase which would
7 strain the insurance fund. And if that happened, then nobody
8 gets their insurance benefits.

9 THE COURT: All right. So you think that would tend to
10 add -- you may be right there. I mean, the judge has moved on to
11 doing other things, and, you know, you have to -- you'd have to
12 go back, I guess, and -- Actually, he enlisted the aid of a
13 magistrate judge also.

14 MR. GLASS: He had a magistrate -- there were discovery
15 disputes between the respondents and PBGC.

16 THE COURT: Shocker.

17 MR. GLASS: Exactly. And those would get sent to the
18 magistrate judge.

19 THE COURT: All right. So you think that would add delay,
20 though?

21 MR. GLASS: I think it probably --

22 THE COURT: Otherwise, do you object? Otherwise, do you
23 object?

24 MR. GLASS: No. I mean, the case is teed up to be decided
25 by the Court of Appeals. I would recommend that. I think there

1 would be less delay that way.

2 THE COURT: All right. All right. So I could bite the
3 bullet and -- what I'll probably do, if I'm persuaded -- I want
4 to hear from respondents' attorney -- I would keep the stay in
5 place, let you ask the Court of Appeals for a stay, probably
6 order production. I may be right, but I just -- you know, and
7 again, respectfully to the Court of Appeals, they have other
8 matters on their docket as well, so I don't know how long it will
9 take to -- even if requests for expedited consideration is
10 granted to consider this.

11 So that's -- you know, we struggle with these issues, and
12 I'm sorry that I start thinking about what else can I do to bring
13 some finality to this case. Probably nothing. All right. Thank
14 you, Mr. Glass.

15 MR. GLASS: I suppose the one solution is that Mr. Khalil
16 for respondents could accept my representation that there's
17 nothing in these documents that could help him, but I don't
18 suspect that --

19 THE COURT: I'll tell you what. I'll tell you what. Let
20 me add something to that. Suppose we were to seal the courtroom
21 and let them take a look at the documents, 278 documents? Do you
22 have any problem with that?

23 MR. GLASS: No, we -- in our view, that would moot the
24 case. I mean, the privilege is gone once the documents are
25 disclosed, so we can't do that, and that's why we moved for a

1 stay pending appeal.

2 THE COURT: Right. Nothing there. But that's a difficult
3 issue. I mean, hypothetically -- Let me just say one thing.
4 Hypothetically, nothing there. Suppose something as innocuous as
5 saying, Well, let's proceed with this meeting but let's not
6 invite A, let's leave A out of this thing, I don't know what that
7 means. You know what I'm talking about, right?

8 MR. GLASS: Yeah, but that's not what we're talking about
9 here. What we're talking about here is documents that had to do
10 with the restructuring of the auto industry, and, you know, there
11 are references to Delphi that come up in these documents because
12 those were the search terms that we used, but it has nothing to
13 do with the termination of the Delphi pension plan, which is what
14 this lawsuit is ostensibly about.

15 THE COURT: It's difficult. All right. Thank you. Thank
16 you, Counsel.

17 MR. KHALIL: Your Honor.

18 THE COURT: I mean, how would I know a smoking gun if I
19 saw it? I don't think I need to see what the smoking gun is.
20 I'm not in a position to determine what was permissible, what was
21 not permissible. I can talk about -- I can read and see, ah,
22 this was discussed and that was discussed, and maybe that in
23 conjunction with something else means something.

24 MR. KHALIL: That's absolutely right, Your Honor, and
25 we -- we went over this. We went over this -- you graciously

1 allowed the Treasury to file a motion for reconsideration where
2 they made these arguments again --

3 THE COURT: It's called beating a dead horseback to life.
4 I'm sorry, but I look at the past and I say, Gee, you know, so
5 much time has gone on; how much more time will be invested before
6 these folks even get to court. All you're going to do is file
7 your motion for summary judgment, right?

8 MR. KHALIL: Yes, my clients are desperate to. I do want
9 to point something out. Counsel for PBGC is in the back of the
10 room, so to the extent you want to pick his brain, that's
11 Mr. Menkey, I'm sure he would be glad to come up.

12 THE COURT: How are you? Come on up here. Come on up
13 here. Good to see you, Counsel.

14 MR. KHALIL: But if you wanted to send it to Michigan, we
15 would have no objection. We do think that the most fastest route
16 is to order the production of these documents, to do it pursuant
17 to protective order whereby counsel, the three of us, would be
18 able to look at them, we would be able to use them in litigation.
19 If we used them in litigation, we'd file them under seal. If we
20 showed them to witnesses, that would be the only witnesses we'd
21 show them to, Mr. Feldman and Mr. Wilson, who have already seen
22 the documents, who are the authors of these documents in many
23 cases.

24 THE COURT: I may be wrong. I may be wrong about this
25 decision. I don't think I am, but I may be wrong. Is the

1 Michigan judge in a better position to determine?

2 MR. KHALIL: Your Honor, the Michigan court is probably in
3 a better position to ascertain the relevancy, but they have not
4 had the merits in front of them. Neither the District Court
5 judge or the magistrate judges had anything in front of them on
6 the merits for a number of years.

7 On the issue of the presidential communications privilege,
8 you've had it in front of you for a number of years. You've had
9 extensive briefing. You've had a motion for reconsideration in
10 front of you.

11 The point about -- I just want to address something and
12 Mr. Glass's point about, well, the respondents could take my word
13 for it that there's nothing in there. The judgment is that -- is
14 based upon an entire misunderstanding of ERISA of what is
15 relevant or not. The entire point of this case is that -- and I
16 know you don't want to get into the merits, that's not what
17 you're here for, there's a Rule 45 subpoena, but this -- the
18 entire point is this plan didn't need to be terminated, or at
19 least that's our contention, and that's what we want to be able
20 to prove.

21 This plan was among plans at that time in 2009 relatively
22 well funded, and we've submitted evidence of that. There are --
23 in addition to all the voluminous evidence we provided this
24 Court, there are thousands of documents that have been produced
25 to us under protective orders, under confidentiality orders

1 either by the Treasury or by the PBGC, that if we were to share
2 them with this Court, we would have to do so under seal, we would
3 have to explain the relevance of them, we would have to explain
4 our theory of the case, which we shouldn't have to do. It's not
5 our burden here at this point. On this stay motion, it's the
6 Treasury's burden, and it's a heavy burden that they have, in our
7 view, come nowhere close to meeting.

8 And just to again veer back to the stay motion, the bottom
9 line is that they have -- their position is, if accepted, is that
10 any time the presidential communications privilege is asserted,
11 litigants should be entitled to an automatic stay pending appeal,
12 an interlocutory appeal. That's not the law. No court has ever
13 so held that that I'm aware of, and certainly none that they've
14 shown us. And the controlling precedence that we've cited in
15 here, whether it's the Supreme Court's case in *Mohawk*, which
16 talks about privilege -- yes, it's in the context of the
17 attorney-client privilege, but that is a steeper privilege than
18 the presidential communications privilege, it's an absolute
19 privilege.

20 The Supreme Court's made clear that the presidential
21 communications privilege is not absolute. There is never a
22 guaranty of confidentiality when it comes to executive privilege,
23 and -- but here with little authority, they ask this Court to
24 enter a far reaching decision that would change the scope and
25 extend the scope of that privilege, and that's unfair.

1 And then we get back to the merits of this case. These
2 pensioners, they're entire point is that this plan did not need
3 to be terminated. And Mr. Glass said, well, they're in the same
4 position as everyone else, lots of people are in this position.
5 Well, that's simply not true. There were lots of similarly
6 situated retirees of Delphi who were in a different plan, who
7 were in the hourly plan who were not treated the same way, who
8 got their government's -- topped up by TARP-funded benefits. And
9 the question is, the question we want to submit to the Michigan
10 court is why, why were they treated differently? Was it
11 reasonable? Was it a -- was it a natural consequence that a
12 district court judge, if he'd been given the opportunity to view
13 the facts, would have said, no, this plan does not need to be
14 terminated as the statute requires. The plan does not need to be
15 terminated. There are other alternatives that need to be
16 reviewed, and we don't -- we just won't accept the words of, you
17 know, the representations of the PBGC who, even if they are -- it
18 is undisputed that the PBGC is in a subsidiary position to the
19 Department of Treasury, to the administration at that time, and
20 all of the negotiations that took place or facilitations, to use
21 the Treasury's term, were conducted behind -- back behind closed
22 doors. They were not done in the light of day. The discovery
23 that we got so far has revealed a great deal of support for our
24 position that this plan didn't need to be terminated, and we
25 think that the remaining documents would fit in potentially very

1 powerfully with our case, but, of course, we don't know; we
2 haven't seen them yet, but everything we've seen says -- tells us
3 yes, this would be important, and we've told you -- we offered
4 during the reconsideration motion to give you an ex parte
5 showing, and we're still happy to do that. But we don't think
6 it's necessary at this point. You've gone through --
7 respectfully, we believe you've gone through everything that --

8 THE COURT: You didn't hold back on your written
9 submissions, so I didn't think there was anything else to be
10 learned from an ex parte submission. You're not going to hold
11 back your best arguments, so I was -- I thought about that for a
12 while. But -- okay. Thank you. Anything else, Counsel?

13 MR. GLASS: Just one other point, Your Honor. It occurs
14 to us that since there is an appeal pending, it's not clear that
15 Your Honor has the jurisdiction to send the case to --

16 THE COURT: I know, I know.

17 MR. GLASS: -- to send the documents to Michigan.

18 THE COURT: Right.

19 MR. GLASS: That's the only thing. The only other thing,
20 of course, is I disagree with Mr. Khalil, but I'm not going to go
21 down that road. We would be here very late in the afternoon.

22 THE COURT: Right. All right. I thought about that, too.
23 You don't have anything to lose; there's nothing to lose, right?
24 Is that the way the song goes? All right. I'll issue one final
25 order, all right --

1 MR. GLASS: -- okay --

2 THE COURT: -- assuming I have jurisdiction. If not, I'll
3 get him to send it back so I can issue an order. Great to see
4 everyone. Enjoy your summer. Thank you.

5 (Proceedings adjourned at 12:03 p.m.)

6
7 **C E R T I F I C A T E**

8 I, Scott L. Wallace, RDR-CRR, certify that
9 the foregoing is a correct transcript from the record of
proceedings in the above-entitled matter.

10 /s/ Scott L. Wallace

7/25/17

11 -----
12 **Scott L. Wallace, RDR, CRR**
Official Court Reporter

Date