

P R O C E E D I N G S

1
2 **January 20, 2015**

8:03 a.m.

3 **THE CLERK:** Calling Case No. 14-2166, American Small
4 Business League versus Department of Defense.

5 Counsel, can you come forward afternoon state your
6 appearances for the record?

7 **MR. BELSHAW:** Good morning, your Honor. Robert
8 Belshaw appearing for plaintiff, American Small Business
9 League.

10 **THE COURT:** Sure. Welcome.

11 **MR. SMALL:** Good morning, your Honor. Michael Small
12 for the proposed intervenor, Sikorsky Aircraft Corporation.

13 **THE COURT:** Welcome to you, too.

14 And?

15 **MR. SIMMONS:** Good morning, your Honor. Abraham
16 Simmons for the federal government.

17 **THE COURT:** All right. This is a motion to
18 intervene, so the proposed intervenor may go first.

19 **MR. SMALL:** Thank you, your Honor.

20 We sought to intervene in this case when it became clear
21 to us that it was uncertain whether the government would be
22 appealing.

23 Under Ninth Circuit precedent our motion was timely.
24 Under Ninth Circuit precedent an intervention motion is timely,
25 even post judgment, if it is filed within the time allowed for

1 notice of appeal, and our intervention motion fits squarely
2 within that general rule.

3 Our briefs make the case that there is no prejudice to the
4 other side. Our intervention in this case would be for
5 purposes of appealing your Honor's November 23rd, 2014
6 disclosure order.

7 Our appeal would mark nothing that the plaintiff could not
8 have expected --

9 **THE COURT:** Explain this to me. You say it's timely,
10 but how can it be timely? My law clerk says it's not timely.
11 So tell me your best authority that it is timely.

12 **MR. SMALL:** Ninth Circuit cases cited in our brief.

13 **THE COURT:** Well, give me your best one.

14 **MR. SMALL:** Best one? *Yniguiz*.

15 **THE COURT:** Who?

16 **MR. SMALL:** Y-n-i-g-u-e-z. And a case called
17 *McGough*, M-c, capital, G-o-u-g-h.

18 **THE COURT:** All right. I'm going to read those
19 decisions to see if they -- so you're saying that those compel
20 or merely give discretion to?

21 **MR. SMALL:** Your Honor, those cases state, as a
22 general rule, that an intervention motion is timely following a
23 judgment, in this case your disclosure order, if the
24 intervention motion is filed within the time allowed for a
25 notice of appeal. And we submit that our intervention motion

1 fits squarely within that general rule.

2 Your Honor has to also decide whether there would be any
3 prejudice to the other side and, also, has to assess under
4 Ninth Circuit precedents what is the reason for the delay.

5 And in this case the reason for the delay, the reason why
6 Sikorsky did not intervene or seek to intervene until early
7 December is that up until that time the Department of Defense
8 was adequately representing Sikorsky's interests.

9 **THE COURT:** What do you say to the *Peruta* case?

10 **MR. SMALL:** Well, we said in our reply brief that the
11 *Peruta* case is distinguishable.

12 Your Honor, in that case the proposed intervenors sought
13 to come in while the case was already on appeal. Not just
14 already on appeal, but after the panel, the Ninth Circuit panel
15 in that case, had issued its decision, the intervenors came in
16 in that case at the rehearing en banc stage.

17 Also, as we pointed out in our reply brief, the
18 intervenors in that case, your Honor, had not been very active
19 in the case. The Ninth Circuit decision denying intervention
20 in that case noted that the intervenors had largely sat on the
21 sidelines. Two of the intervenors did nothing at all to file
22 the amicus brief, and we submit that's different than what we
23 had done in this case, Sikorsky had done, by working in tandem
24 with the Department of Defense to provide declarations to
25 support the confidentiality of the subcontracting plan at

1 issue.

2 **THE COURT:** Well, you're saying that the motion to
3 intervene in *Peruta* was made on appeal after the panel had
4 already decided?

5 **MR. SMALL:** It came up at the rehearing en banc
6 stage.

7 **THE COURT:** Is that true?

8 **MR. BELSHAW:** I believe that's correct, your Honor.
9 I would have to review the case.

10 **THE COURT:** All right. What does the government say?

11 **MR. SIMMONS:** Your Honor, while we still do not
12 oppose the motion, we do have new information for the Court.

13 Over the weekend, the long weekend here, the Solicitor
14 General did authorize an appeal of this case on the merits. So
15 that may figure into your Honor's thoughts.

16 **THE COURT:** Authorizing an appeal? Does that mean
17 you're going to appeal or does that just mean you're still
18 deciding?

19 **MR. SIMMONS:** We will appeal this decision.

20 **THE COURT:** Well, so why do you need this then?

21 **MR. SMALL:** Well, your Honor that's a very, very good
22 question. I submit that we still would like to intervene and
23 should be allowed to intervene as a right because of the
24 uncertainty created over the government's decision to appeal
25 raises a common concern we have that the government will not

1 pursue the appeal vigorously.

2 In particular, it's possible that the government would
3 not, in light of their uncertainty about this case, decide not
4 to seek rehearing en banc down the road if the panel, Ninth
5 Circuit panel were to affirm your disclosure order of
6 November 23rd.

7 **THE COURT:** I know this. If the Solicitor General
8 says there is going to be an appeal, then they do a good job.
9 They don't just goof off. They -- that means that they think
10 that they -- the judge was wrong and they're going do appeal
11 it.

12 So I don't know why -- I mean, you're making it sound like
13 they are going to do some sort of poor job on appeal, or
14 half-hearted job. I don't think so.

15 **MR. SMALL:** Well, your Honor, I don't think so
16 either. Like yourself, I worked at the Main Justice for four
17 years and I have great respect for the lawyers from the
18 Solicitor General's office.

19 But our only point is here it's not the quality of the
20 brief that the Civil Division would file under the
21 authorization of the Solicitor General. It's just, rather, the
22 uncertainty it's taken up until this morning for us to learn
23 that the government is deciding to appeal and it -- perhaps
24 down the road, whereas we would seek rehearing en banc if the
25 panel were to affirm your ruling, it's possible that the

1 government would not.

2 But, your Honor, we do admit that the circumstances
3 surrounding the intervention motion filed in December had
4 changed.

5 Now, in light of Mr. Simmons' announcement that the
6 government has authorized appeal --

7 **THE COURT:** Which unit did you work in at Main
8 Justice?

9 **MR. SMALL:** I worked at the Office of Legal Counsel
10 for two and a half years, and then I worked for the Associate
11 Attorney General of the United States. I worked a lot with the
12 Solicitor General's lawyers. They are fabulous.

13 **THE COURT:** Those are both very interesting jobs.

14 What would you like to say in opposition, or do you oppose
15 this?

16 **MR. BELSHAW:** I do oppose it, your Honor.

17 **THE COURT:** Okay. Explain why.

18 **MR. BELSHAW:** Well, I explained -- first of all,
19 because I believe it is untimely.

20 But, first of all, I would like to point out there is no
21 governing precedent for these types of cases. In a motion for
22 intervention it's basically decided on a case by case, on a
23 highly factual basis. So the Court has wide discretion in
24 granting or denying these motions.

25 **THE COURT:** Back up for one second.

1 You're not asking -- if we were to grant this, you're not
2 trying to reopen anything here?

3 **MR. SMALL:** On the merits of your *FOIA* disclosure?

4 **THE COURT:** In other words, you just want to do this
5 strictly for appeal.

6 **MR. SMALL:** Correct. We would file --

7 **THE COURT:** So we would enter judgment. You both
8 would appeal. And then you would be an additional headache for
9 the Court of Appeals, but not for the district judge.

10 **MR. SMALL:** We would not be here arguing
11 reconsideration of your *FOIA* disclosure order. We would, if
12 allowed to intervene, file a notice of appeal promptly and
13 then, depending issues of the stay of a disclosure order,
14 further stay, we would seek an emergency stay in the Ninth
15 Circuit.

16 **THE COURT:** That would be unlikely. The Court of
17 Appeals might give you a stay, but I've already given a pretty
18 long stay.

19 **MR. SMALL:** We understand that, your Honor.

20 **THE COURT:** So how can you be prejudiced -- it's just
21 you're going to have extra briefs to deal with.

22 **MR. BELSHAW:** To be honest, your Honor, as long as
23 there is going to be an appeal filed by the DOD in this case,
24 it may not even require additional briefing on my part.

25 **THE COURT:** Well, they may come up with a different

1 argument. Sikorsky. Sikorsky might say in addition to what
2 the government argues, here is an additional point. And you
3 would have -- that would be the burden on you, I guess, but
4 that's not too much of a burden, is it?

5 **MR. BELSHAW:** To be perfectly honest, your Honor,
6 I've looked at the record in this case. I don't think there is
7 a burden involved at all.

8 **THE COURT:** So you think you're going to win.

9 **MR. BELSHAW:** I think I'm going to win it.

10 **THE COURT:** Well, then there is no prejudice to you.

11 **MR. BELSHAW:** But what I am concerned is if there is
12 additional effort or expense involved in this case, Sikorsky is
13 not going to be picking up the bill. It will all fall on the
14 DOD or else it won't get paid at all.

15 Now, the job is going to get done regardless of that, but
16 somehow there seems to be something inherently unfair about a
17 party that chooses to sit back, let the government handle the
18 laboring oar and then jump in at the last minute because
19 they --

20 **THE COURT:** That part is true. I don't like that.
21 Sitting on the sidelines and seeing how it's going and at the
22 last minute jumping in, I agree with that part.

23 But it's not like they are trying to change the result in
24 the District Court. They want to add additional arguments or
25 presence, at least, at the Court of Appeals level.

1 So it would be more like a David and Goliath. You get to
2 come in there and be the underdog again against the big company
3 and against the big government.

4 **MR. BELSHAW:** It is a role I cherish.

5 **THE COURT:** They are trying to suppress the evidence
6 and all that.

7 **MR. BELSHAW:** It is a role I cherish. However, I've
8 got to look at the practicality of the issue here.

9 **THE COURT:** What is that?

10 **MR. BELSHAW:** And the issue is that it will require
11 some additional work. It will require some additional research
12 and at this point, again, I'm struck by the unfairness of it.

13 Secondly, and I think this is important, Sikorsky in this
14 case -- and they are quite candid about the fact that they were
15 the man behind the curtains. They were providing the
16 declarations. This is their third bite at the apple. The
17 first declaration was not sufficient on the motion for summary
18 judgment to convince this Court that these were, in fact,
19 confidential financial documents.

20 They got a second chance. The Court gave them a chance to
21 file yet another declaration, specifically telling Sikorsky
22 that you had to go through these documents line by line,
23 instance by instance, and explain why they were protected
24 confidential information.

25 They took a third bite at the apple when they filed this

1 motion to intervene, and they sent the same declaration over.
2 They made no showing that --

3 **THE COURT:** Well, let me ask this. Have you been
4 trying to lard the record with more declarations to beef up the
5 record for appeal?

6 **MR. SMALL:** No. No, your Honor.

7 **THE COURT:** Because it wouldn't be fair to the judge
8 for you to come in, lard the record and then pretend all of
9 that was before the district judge.

10 **MR. SMALL:** No, we can't do that. The declaration
11 that we submitted in support of the intervention motion with
12 respect to the issues of confidentiality merely repeated the
13 same things that -- to which your Honor objected.

14 In the Ninth Circuit, if you grant our intervention motion
15 and we appeal, the record will be the record and so what we'll
16 try to argue to the Ninth Circuit is that your Honor was
17 respectfully wrong when your Honor thought the declarations
18 submitted by Sikorsky were insufficient. But there is no
19 additional -- no additional declaration, no third bite at the
20 apple. It's simply asking the Ninth Circuit to review those
21 declarations and decide whether your disclosure order was
22 correct.

23 **MR. SIMMONS:** Further to that point, your Honor, we
24 have some concern. Your disclosure order did say that your
25 stay was going to be in effect subject only to appeal. My

1 instructions are to file that notice of appeal today --

2 **THE COURT:** Well, I'm not going to extend the stay.
3 So you should be -- I know my stay runs out in about one day,
4 right?

5 **MR. SIMMONS:** I believe a day or --

6 **MR. SMALL:** 22nd, your Honor.

7 **MR. BELSHAW:** 22nd.

8 **THE COURT:** So you better be ginning up your motion
9 to -- I'm going to enter judgment on whatever the day it is.
10 See, you talked me into staying the judgment, which I
11 shouldn't have done, but I did and now I'm going to enter the
12 judgment pronto. And if you want an additional stay, I can't
13 say never, but it's unlikely. So you should be thinking about
14 asking the Court of Appeals for the stay.

15 Mr. Simmons?

16 **MR. SIMMONS:** What I'm seeking today is, really, just
17 clarification of your orders. If that notice of appeal is
18 filed, the question is: What happens to your stay? Your
19 order -- the wording of your order suggests that it is subject
20 to appeal.

21 **THE COURT:** I see what you mean. All right.

22 Okay. Well, if -- I think what I meant by that is that if
23 you do file a notice of appeal, then we'll put everything on
24 hold and you don't have to turn the documents over until the
25 Court of Appeals affirms. Then you would have to turn it. I

1 think that's what I meant by that. I was confused about
2 something else.

3 But my plan is to enter judgment as soon as the stay runs
4 out, which I believe is tomorrow. You ought to do your appeal,
5 but if you don't put in your appeal, then you should -- you've
6 got to comply. So your appeal ought to be pronto.

7 But once you do appeal, then the stay -- you don't have to
8 comply with the judgment because, otherwise, the cat would be
9 out of the bag and then -- so, but, you know, your 60 days, and
10 then 60 days. You can't wait until the end of your 60 days.
11 You've got to file your notice of appeal, right away.

12 **MR. SIMMONS:** It will be filed today.

13 **THE COURT:** I don't know the answer to this. On the
14 one hand, I don't like sitting on the sidelines part.

15 On the other hand, I have thought that -- I did not
16 realize that the *Peruta* case occurred at the en banc stage.
17 That's a major difference. So I've got to go back to square
18 one.

19 Yes, sir.

20 **MR. BELSHAW:** Your Honor, I don't think the stage of
21 the proceeding was so important in what the Court said in
22 *Peruta*.

23 I think what was important is they -- they announced a
24 standard in *Peruta*, and that standard would apply at the trial
25 court level. Following the same rule, that standard is going

1 to apply regardless of what stage the proceedings are in.

2 **THE COURT:** Possibly that's true, but it is a
3 different stage.

4 Okay. Anything else anybody is dying to say? Otherwise,
5 I'm going to take it under submission.

6 **MR. SMALL:** So you're taking our motion to intervene
7 under submission, and just to clarify --

8 **THE COURT:** Yes, I'll probably get an order out
9 today.

10 **MR. SMALL:** Okay.

11 **THE COURT:** But I want to go back and look at some
12 things before I decide.

13 **MR. SMALL:** And one other point, your Honor, in
14 response to what Mr. Belshaw said. It is true that the Ninth
15 Circuit has said parties seeking to intervene must act as soon
16 as he knows or has reason to know that his interests might be
17 adversely affected by the outcome of the litigation.

18 Mr. Belshaw cited that principle, but that principle must
19 also be read in the context of the other important factor in
20 the Rule 24(a) calculus, which is adequacy of the protection of
21 the intervenor's interest.

22 If we -- we knew, obviously, when he filed this lawsuit
23 that down the road the subcontracting plan might end up being
24 disclosed, if you ordered it disclosed. At that time the
25 Department of Defense was adequately protecting our interests.

1 At the time we filed the intervention motion, there was some
2 uncertainty about that and that's why we filed.

3 So the principle that he cited, quoting a case called
4 *United States versus Oregon*, must be read in the context of the
5 other factor about adequacy of protection of interest.

6 If we had filed our intervention motion at the time of his
7 lawsuit on the grounds that, hey, our interests might be
8 adversely affected down the road, Mr. Belshaw certainly would
9 have opposed the intervention motion because at that time we
10 would not have been able to demonstrate inadequacy of the
11 protection of our interests by the government.

12 And if you want to take a look at a case, your Honor,
13 there is a case called *LULAC versus Wilson* 131 F.3d 12 --

14 **THE COURT:** LULAC?

15 **MR. SMALL:** Yeah, *LULAC*. That's the initials, the
16 abbreviations. L-U-L-A-C. 131 F.3d 1297. And that case,
17 consistent with what we said in our reply brief, indicates that
18 this principle that Mr. Belshaw cited, which is a principal,
19 must be read against the backdrop of the adequacy of interest
20 component of Rule 24(a).

21 **THE COURT:** All right. Under submission. Thank you.

22 (Proceedings adjourned.)
23
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25

CERTIFICATE OF OFFICIAL REPORTER

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

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Thursday, February 19, 2015