

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and SHANNON ANDREWS,

Plaintiffs,

-vs-

ROBERT J. CONLIN, BOARD OF REGENTS
OF THE UNIVERSITY OF WISCONSIN SYSTEM,
RAYMOND W. CROSS, REBECCA M. BLANK,
UNIVERSITY OF WISCONSIN SCHOOL OF
MEDICINE AND PUBLIC HEALTH, ROBERT N.
GOLDEN, STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, and
STATE OF WISCONSIN GROUP INSURANCE BOARD,
Madison, Wisconsin

Case No. 17-CV-264-WMC

Madison, Wisconsin
May 24, 2018
8:34 a.m.

Defendants.

STENOGRAPHIC TRANSCRIPT OF TELEPHONIC MOTION HEARING
HELD BEFORE U.S. DISTRICT JUDGE WILLIAM M. CONLEY

APPEARANCES:

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For the Defendants:

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9 (Proceedings called to order at 8:34 a.m.)

10 THE COURT: Hello. This is Judge Conley. I'm calling
11 Case No. 17-CV-264, *Boyden v. ETF*.

12 I'll hear appearances for the plaintiff.

13 MR. DUPUIS: Good morning, Your Honor. You've got
14 Larry Dupuis from the ACLU of Wisconsin Foundation and Asma
15 Kadri for the plaintiffs. I will let my co-counsel introduce
16 himself, John Knight.

17 MR. KNIGHT: Good morning, Your Honor. John Knight
18 from the ACLU Foundation.

19 THE COURT: And who will be taking the lead in this
20 argument for the plaintiff?

21 MR. DUPUIS: Your Honor, that would be me, Larry
22 Dupuis.

23 THE COURT: All right. If I call on plaintiffs, then I
24 will assume and you do not need to state an appearance if it is
25 Mr. Dupuis. If anyone else speaks on behalf of the plaintiff,

1 they should identify themselves for the record.

2 Let me now hear appearances for the defendant.

3 MR. ROTH: From the Wisconsin Department of Justice,
4 Your Honor, you have Colin Roth, Jody Schmelzer, and Steven
5 Kilpatrick, and this is Colin Roth, and I will be taking the
6 lead on the argument this morning.

7 THE COURT: Very good. Let me start with the
8 defendant. If I could just confirm with respect to the two
9 memos -- or I guess the closed session meeting minutes and the
10 January 13, 2017, DOJ memo, I take it as to the closed session
11 meeting minutes, that at some point were those posted publicly?
12 The --

13 MR. ROTH: No, Your Honor. The closed -- sorry, go
14 ahead.

15 THE COURT: No, no. You're answering my question. It
16 was a little confusing in the briefing. I know that it was
17 produced to the plaintiffs, but there was at least one reference
18 to it being available at some point publicly online. Is that
19 not the case?

20 MR. ROTH: No, Your Honor. As I understand it, the
21 closed session meeting minutes were not publicly posted on the
22 internet. The open session meeting minutes from that meeting
23 were posted on the internet, so that may explain some of the
24 uncertainty. Again, there was an open session portion of that
25 meeting, and the minutes of that were posted online. However,

1 the closed session minutes were not posted online.

2 THE COURT: And, Mr. Dupuis, you're in agreement as to
3 that -- as to those closed session minutes, that they were never
4 available to the public?

5 MR. DUPUIS: Yeah, actually I think that's correct. I
6 think at the time of the deposition where this was first raised
7 by the defendants, that they had not intended to produce the
8 closed minute sessions, it wasn't clear to us because we had
9 been pulling minutes for purposes of deposition both from the
10 website and from the discovery, and so it wasn't clear at the
11 time of the deposition, but it does appear that it was never
12 posted -- that the closed session minutes specifically were
13 never posted online.

14 THE COURT: All right. And then I think -- I'm sorry.
15 And then the parties are in agreement that the DOJ memo was
16 never made public, although it was produced during the course of
17 discovery; is that right? Again, Mr. Dupuis?

18 MR. DUPUIS: Yeah. That's correct, Your Honor. The
19 conclusions of that memo or at least some of the conclusions of
20 that memo --

21 THE COURT: Yeah. We'll come to that. Let's take this
22 in pieces. We'll get to that.

23 Let me go back then to you, Mr. Roth, to explain what steps
24 had been taken by your client to ensure that it was not
25 producing privileged documents and how was it that, despite

1 those efforts, both of these documents were produced to the
2 plaintiff?

3 MR. ROTH: Your Honor, you're right; it was an
4 inadvertent production. What we intended to do was collect and
5 what we did do was collect a substantial quantity of documents
6 from our client, and when conducting our internal review before
7 producing them, we obviously did a privilege review to withhold
8 documents we thought were privileged, and multiple iterations of
9 both the closed session and memoranda were withheld as
10 privileged from a number of other documents that we collected
11 from the client.

12 However, you know, in the course of our review -- we don't
13 have an advanced e-discovery system here at DOJ, or at least we
14 did not at the time of the production, so we were sort of
15 working with -- let me put it this way -- you know, stone age
16 technology to review these documents, and, you know, one copy of
17 the memo was attached to another document that did not appear to
18 be privileged and was just missed during the review and
19 inadvertently produced, and the same goes for the closed session
20 minutes.

21 We endeavored to do the best we could, but we had a large
22 quantity of documents, and we were trying to get them to the
23 plaintiff as quickly as possible, so these two slipped through
24 the cracks. However, as I said, a number of iterations of these
25 documents were properly withheld and appeared on the privilege

1 logs that we produced to the plaintiffs.

2 THE COURT: And so we're clear, when you say
3 "substantial number of documents," how many separate documents,
4 not pages but documents, are we talking about? How many
5 documents did you produce?

6 MR. ROTH: I don't have the numbers at the tip of my
7 tongue, but I think it's somewhere around 5,000, between five
8 and 10,000.

9 THE COURT: Actual documents, not pages.

10 MR. ROTH: I believe so, yes, Your Honor.

11 THE COURT: All right.

12 MR. ROTH: Like I said, I don't have the exact number
13 before me, but I'm sure counsel for the plaintiffs will correct
14 me if they think that's not a good estimate.

15 THE COURT: And there was a representation that there
16 was a key word search conducted?

17 MR. ROTH: When collecting documents, that's correct,
18 Your Honor. When we went to our clients to -- for the initial
19 collection to determine what might be responsive and not
20 privileged to the plaintiffs' requests, there was a key word
21 search done, yes.

22 THE COURT: But you didn't perform one to discover
23 privilege, for example, using the name of the attorneys who were
24 involved.

25 MR. ROTH: We did not, Your Honor. It's -- for reasons

1 of technology, it's much more difficult for us to do that once
2 the documents are in-house at DOJ. We essentially look at them
3 one by one in Windows Explorer and do it that way.

4 THE COURT: Understood.

5 MR. ROTH: We don't --

6 THE COURT: I understand. Thank you very much.

7 If I could go back to Mr. Dupuis then, do you dispute that
8 some of these -- that either -- well, let's start with the
9 closed session meeting minutes. Were some of those copies
10 withheld and listed on the confidential withheld list?

11 MR. DUPUIS: So my understanding is we had those
12 documents before we had the privilege log --

13 THE COURT: That's not what I asked you. That's not
14 the question I posed to you. And you both need to understand
15 that, you know, I have a busy docket, so if both sides could
16 just make an effort to answer the question I pose, that would
17 move this along. Do you understand the question I'm asking?

18 MR. DUPUIS: Yes. And I'm -- I am not in a position to
19 dispute it, and I'm willing to take his representation. I did
20 not specifically look at the privilege log to see if these
21 appeared on the privilege log.

22 THE COURT: And, Mr. Roth, you are able to apprise me
23 that, in fact, there were -- there is on your privilege log the
24 GIB closed session meeting minutes as well as the January 13,
25 2017, DOJ memo? Those are both --

1 MR. ROTH: I am certain --

2 THE COURT: Go ahead.

3 MR. ROTH: Go ahead.

4 THE COURT: No, go ahead.

5 MR. ROTH: I am certain that the DOJ memo appears on
6 the privilege log. I am not 100 percent certain that the closed
7 meeting minutes do, but I would say with 95 percent certainty
8 that they're on there somewhere. I don't have it in front of me
9 right now.

10 THE COURT: Well, perhaps with three lawyers with you,
11 one of you could look while we continue. I would like to know
12 the answer to that question.

13 Then the next question is, I guess, a little bit more
14 specific. With respect to the closed meeting minutes, not only
15 do the plaintiffs already have it, but I can't figure out what's
16 privileged. What in this incredibly short, cryptic statement is
17 already not disclosed publicly other than that the board
18 appeared to have deliberated in closed session, which I thought
19 was a violation of the open records law. What's privileged in
20 this so-called confidential closed session memo? There's no
21 discussion --

22 MR. ROTH: Well, in the meeting minutes --

23 THE COURT: I'm sorry. Let me just be clear. There's
24 no discussion of anything related to legal counsel's
25 recommendations. There's no substance. There's no disclosure

1 of exchanges between counsel and the board. On the contrary,
2 all it says is exactly what the open record session says.

3 MR. ROTH: Your Honor, I think we would take the
4 position that, you know, given the dispute we're in right now,
5 you know, there's concern about the scope of potential waiver
6 given the disclosure of any communications that occurred during
7 the closed session, so in an abundance of caution, we thought it
8 would be wise to withhold the closed session minutes as well to
9 ward off this very argument that we're facing right now from the
10 plaintiffs.

11 THE COURT: Well --

12 MR. ROTH: I agree --

13 THE COURT: -- you have a larger problem, which is that
14 I don't know how I would preclude the plaintiff from exploring
15 the reasons why the board made its decision, that is,
16 deliberated on possible actions in order to remain in compliance
17 with the law but also deliberate on contractual obligations and
18 fiduciary responsibilities if that is the only deliberation that
19 is reflected as to why they did what they did. In other words,
20 is the representation that you're making that the only
21 discussion in the board meeting was with respect to legal
22 compliance as opposed to arriving at a decision because there
23 was, as far as I can tell, no discussion on the record in open
24 as to why they made the decision they made.

25 MR. ROTH: Well, let me first say I'm not in a position

1 to make a representation about the -- you know, every word that
2 was discussed during the closed session meeting. You know, I
3 wasn't there. I was not one of the attorneys present at the
4 meeting. Not all of the members that were present at the closed
5 session meeting have been deposed, so there is not testimony on
6 the record from everyone about their recollection about what was
7 discussed. What I can say is that a substantial portion of the
8 closed session meeting was communication with the board's
9 attorneys about how, you know, potentially different state and
10 federal laws would interact and possibly produce, you know --
11 how those related to the board's potential decision on what to
12 do here.

13 Now, I will say that also plaintiffs were allowed to ask
14 questions about other things that were discussed at the meeting.
15 We agree that policy discussions unrelated to the -- unrelated
16 to the legal advice on compliance issues that was given during
17 the closed session meeting, policy reasons, if any, that were
18 discussed are open to plaintiffs' questions, and that was a
19 permitted topic of questioning at the depositions. So to the
20 extent that plaintiffs want to ask questions about
21 contemporaneous policy reasons aside from the compliance-driven
22 legal advice that was given, we agree that they were free to do
23 so. So I think that's our position.

24 THE COURT: Mr. Dupuis, do you agree that you were
25 allowed to explore those subjects with the deponents?

1 MR. DUPUIS: I believe at the first two depositions we
2 were not, of people who were in attendance at the depositions.
3 I believe that the instructions were much broader than that. It
4 was "Don't talk about anything that took place in the closed
5 session with the lawyers." It's pretty clear that that is what
6 Herschel Day understood. I believe the same could be said of
7 the deposition of Mr. Nispel, who was also in attendance at that
8 meeting. It is not as clear -- we did get further with
9 Mr. Farrell, but that -- if there were -- and the position I
10 would take obviously -- I mean, this is not your question yet,
11 so I'll stop now, but we do have a response to that.

12 THE COURT: Understood. Let me tell you where I think
13 I'm coming out: I do think that this should have been caught,
14 these productions, but the inadvertent disclosure for that many
15 documents where they are represented that they were attachments
16 I think probably permits me to maintain the privilege and claw
17 back documents. The practical impact of that I'm not quite sure
18 about because, having been produced and reviewed without any --
19 I mean, it wasn't until you actually discovered the production
20 at a deposition that the plaintiffs would have been on notice
21 that they needed to set these documents aside until the clawback
22 could be determined, so I can't really unring a bell, and given
23 the need for some clarity in line drawing as to what is
24 appropriate discussion, I'm inclined to not claw back the
25 confidential closed session because it helps both sides

1 understand where the line is drawn, and, frankly, the language
2 in that closed session is crucial to my trying to understand
3 where we stand.

4 It says "Deliberated on possible actions in order to remain
5 in compliance with the law." If it's really limited to a
6 discussion with legal counsel as to what options would comply
7 with the law, what options fulfill contractual obligations, and
8 what options address fiduciary responsibility as board members,
9 then I agree that's privileged, but there is apparently no
10 minute related to the actual deliberations, and apparently there
11 was no discussion when the board came out and voted. To my
12 understanding of the open records law, open meetings law, that
13 is a violation of that law.

14 Now, perhaps they didn't deliberate at all over the actual
15 decision in closed session, but they wouldn't be the first group
16 that violated the law in that manner, and I'm not going to
17 protect any discussions that took place among board members as
18 to what they wanted to do unless -- and I understand -- it is
19 clear, I think, that the defendant is not claiming that
20 Mr. Potter directed the board as to how they should vote,
21 correct, Mr. Roth?

22 MR. ROTH: That's not our position.

23 THE COURT: I'm sorry? Your -- I thought your
24 position --

25 MR. ROTH: It is not -- it is not our position that

1 Mr. Potter directed the board how to vote.

2 THE COURT: All right. Then I'm going to -- I'm not
3 going to claw back the closed session minutes. They provide a
4 road map to plaintiffs' counsel, a reasonable road map without
5 disclosing any substantive legal discussion between the board
6 and its legal counsel other than the topics on which he
7 apparently gave advice, which provides some clear guidance to
8 both sides as to what is off limits, but I do think that to the
9 extent any witness was precluded from describing the discussions
10 as to why or why not they should reverse their policy, that
11 that's -- that's not privileged, and if it was a discussion with
12 legal counsel and getting legal advice and questions of legal
13 counsel in order to understand the legal consequences of their
14 action or inaction, that's all privileged, but if it was -- if
15 there were discussions among the board members, whether or not
16 Mr. Potter was present, the deliberations themselves over the
17 vote is not privileged.

18 I know that's not a bright line, but it's as clear a line
19 as I think I'm capable of drawing. Does the defendant have any
20 questions as to my ruling?

21 MR. ROTH: I guess I have two, Your Honor. First is I
22 understand Your Honor's decision with respect to clawing back
23 the closed session meeting minutes. I would ask whether we
24 would have permission to claw back the second document at issue,
25 which is --

1 THE COURT: I'm coming to that, Mr. Roth. We'll get
2 there. My question is whether my --

3 MR. ROTH: Very good.

4 THE COURT: -- instructions are clear as to the
5 obligations of your witnesses, the board members, to disclose --
6 to be allowed to be asked and to answer questions related to the
7 deliberations themselves as to the change in policy or rule.

8 MR. ROTH: I do have just one question, Your Honor, if
9 I may. Much -- many of the questions at the deposition on which
10 witnesses were instructed not to answer specifically regarded
11 these four contingencies that were announced after the closed
12 session ended, and it was our position, and I think it remains
13 our position, that those contingencies line up with what Your
14 Honor described as legal discussions with counsel about whether
15 they could take certain actions in compliance with various state
16 and federal laws, which, as I understand what Your Honor is
17 saying, is those discussions were privileged, so, you know, if
18 we were to end up back in a deposition and plaintiffs again
19 asked our witnesses about, well, you know, "What was the reason
20 for this contingency?" or "Why did you draft, you know,
21 contingency one in this way?" I think it remains our position
22 that those were all developed in consultation with legal counsel
23 and Mr. Potter, so my understanding is that I could still
24 instruct my witnesses not to answer those kinds of questions.

25 THE COURT: Mr. --

1 MR. ROTH: But on the other hand, if --

2 THE COURT: Mr. Dupuis?

3 MR. ROTH: Go ahead.

4 THE COURT: Mr. Dupuis, I tend to agree with that line
5 drawing. I'll hear from you.

6 MR. DUPUIS: So the one exception to that that I would
7 strongly disagree with is the issue of discussion of the Texas
8 litigation and its impact. The witnesses have all said so far
9 that they understood that they could make a decision regardless
10 of whether the ACA -- a decision to continue providing these
11 benefits regardless of whether the ACA was in effect or not --
12 or the ACA regs were in effect or not. Therefore, it was -- and
13 what appears to have instigated this entire process is the DOJ
14 asking the board to reconsider its decision, and it appears that
15 that was largely based on the Texas litigation. We want to be
16 able to know what the DOJ told them about why the Texas
17 litigation made a difference to what they did other than -- I
18 mean, I believe that that is part of the reasoning. Essentially
19 part --

20 THE COURT: Well, it may -- Counsel, it may be, but --
21 and to the extent the DOJ is wearing two hats, one of policy and
22 one of legal advice, I'm sympathetic, but to the extent that
23 Mr. Potter was present at the board meeting and was giving
24 advice on the law, then that's privileged, including the
25 implications of the Texas lawsuit. To the extent Mr. Potter

1 directed their vote or someone else from the Department of
2 Justice directed a vote, told them how they should vote, I
3 suppose told them that they should revisit their policy, then I
4 think you can ask that straightforward question, but you can't
5 get into the substance of any of the discussions.

6 Do you understand that line drawing, Mr. Dupuis?

7 MR. DUPUIS: Yes, I do, Your Honor. Could I ask a
8 question about it?

9 THE COURT: Sure.

10 MR. DUPUIS: The DOJ was not representing, at least as
11 far as we can tell, the Group Insurance Board or ETF or any of
12 the other defendants in this case in the Texas litigation, so
13 there's no privilege between them about that. To me I think one
14 of the questions we have is, is this reversal of decision
15 motivated in part by the Department of Justice's request that
16 their position in the Texas litigation not be undermined by the
17 GIB taking a position that appears inconsistent. That is not
18 legal advice to the GIB. That is policy advice as to the GIB
19 and ETF, in our view.

20 THE COURT: Well, I'm not going to require the board
21 members to disclose what Mr. Potter told them about that
22 litigation, including what advice he may have given them as to a
23 coordinated position across the government because even if he's
24 not representing them, he's certainly in a joint defense group.
25 They're all aligned, and he's giving advice to an aligned entity

1 and, in fact, providing legal advice in other respects. So I
2 think that's too clever by half.

3 What I will say, again, is that to the extent -- I think
4 you're entitled to know why they had this meeting, what
5 precipitated this meeting, why was it on the agenda, and if the
6 answer is because DOJ said we should revisit this, then that's
7 legitimate to ask about, but what you're talking about is asking
8 specifically in the closed session what advice Mr. Potter was
9 giving as to the impact of the Texas litigation, and that's
10 attorney/client privilege, at least within an umbrella of
11 defense, so you're not getting that. The only question that
12 would be legitimate to ask would be did Mr. Potter -- I don't
13 even think you can ask whether he recommended. It would only be
14 if he directed them that this is how they should vote.

15 Are we clear, Mr. Dupuis?

16 MR. DUPUIS: Yes, Your Honor.

17 THE COURT: All right. Do you have any more questions,
18 Mr. Roth, before we get to the memo?

19 MR. ROTH: I do not, Your Honor.

20 THE COURT: All right. As to the memo, it is classic
21 attorney/client privileged communication, and although I think
22 the department should adopt and it sounds like perhaps they're
23 trying to adopt a better practice because it's -- I mean, this
24 is so clearly attorney/client. It even says attorney/client
25 communication at the top, which would imply, if nothing else,

1 maybe at minimum the DOJ needs to figure out a way to do word
2 searches on documents once they're pulled. But I've no reason
3 to doubt Mr. Roth's representation that they don't have that
4 ability now and that this was produced inadvertently despite
5 attempts to obtain it, and, indeed, it's been represented that
6 versions of this memorandum were actually on their privilege
7 log, so to some extent the defendants had notice that this
8 was -- it was viewed to be privileged, if the huge stamp at the
9 top didn't give them a pretty good idea.

10 So I am going to allow the government to claw back the
11 January 13, 2017, memorandum from Assistant Attorney General
12 Roth to the Group Insurance Board, and that document will not be
13 referenced or used further. The plaintiff is directed to return
14 all copies or provide written assurance that they have been
15 destroyed.

16 Any question on that ruling for you, Mr. Dupuis?

17 MR. DUPUIS: No, Your Honor.

18 THE COURT: Any for you, Mr. Roth?

19 MR. ROTH: No, Your Honor.

20 THE COURT: All right. I will hear from both sides
21 before we conclude. I realize that I was very pointed in my
22 questioning and at times I cut counsel off. If you think
23 there's something I've missed in this discussion, this would be
24 the time to tell me, and I'll begin with the plaintiff.

25 MR. DUPUIS: Your Honor, just one clarification: We

1 are going to be permitted to reopen those depositions for the
2 sole purpose of asking questions about policy considerations
3 during the closed session and/or open session. Part of the
4 problem is Mr. Day couldn't remember what was in closed session
5 and what was in open session, so he didn't answer any questions
6 about that.

7 THE COURT: To the extent that you were blocked
8 discovery as to the deliberations among board members as to
9 their -- the reasons for ruling or to Mr. Potter directing them
10 how to vote, you may recall those witnesses. I would encourage
11 you to work that out with the defendant, if possible. You could
12 even do that by telephonic conference, but that's entirely up to
13 the plaintiff. You have the right to have them in person to
14 explain to the extent any of the questions I've just described
15 were blocked.

16 Is that clear for the plaintiff?

17 MR. DUPUIS: Yes, Your Honor.

18 THE COURT: Anything else for the plaintiff?

19 MR. DUPUIS: No, Your Honor.

20 THE COURT: All right. Mr. Roth, same opportunity.

21 MR. ROTH: At the risk of provoking a little more
22 dispute here, I mean, I think we take the position for at
23 least -- at least two of these defendants or -- sorry, not
24 defendants, witnesses who were deposed, and I would say all
25 three that have been deposed, plaintiffs were able to ask those

1 questions --

2 THE COURT: I'm not particularly concerned if they were
3 able to ask them. I'm concerned as to whether they answered.

4 MR. ROTH: Sorry. And, yes, Your Honor, that was where
5 I was going to go next. At page 6 to 7 in our brief, in our
6 opposition brief, we lay out the points during the deposition
7 where in our view they were allowed to answer those questions.
8 For instance, Mr. Nispel was asked, quote, whether there were
9 "other reasons," and by "other reasons" I think that meant other
10 reasons aside from discussion with legal counsel. Mr. Nispel
11 was asked whether there were "other reasons why GIB might decide
12 to provide coverage" --

13 THE COURT: What page -- I'm sorry. I'm -- hang on,
14 Counsel. I'm on page 7. Where are you?

15 MR. ROTH: I'm at the bottom of page 6 to the top of
16 page 7.

17 THE COURT: All right. Give me a moment.

18 MR. ROTH: Sure.

19 THE COURT: All right. Mr. Dupuis.

20 MR. DUPUIS: Your Honor, our position is that --

21 THE COURT: You can just tell me, who didn't answer a
22 question that you think you were entitled to consistent with my
23 ruling?

24 MR. DUPUIS: Herschel Day and Mr. Nispel.

25 THE COURT: All right. Any disagreement, Mr. Roth?

1 MR. ROTH: I think Mr. Nispel -- I mean, it's written
2 in our brief on the page. It says --

3 THE COURT: Which page?

4 MR. ROTH: -- Mr. Nispel was asked --

5 THE COURT: All right. I'm looking --

6 MR. ROTH: Top of page 7.

7 THE COURT: Top of page 7? Nispel is referred to on 6.

8 MR. ROTH: That discussion continues onto the top of
9 page 7.

10 THE COURT: All right. And his answer was "My
11 recollection is there were no other reasons," apparently
12 referring to -- let me try it again. The question was whether
13 there was discussion of "other reasons why GIB might decide to
14 provide coverage other than concerning about liability" such as
15 "it's wise from a policy determination to provide that
16 coverage." His answer was "My recollection is that there were
17 no other reasons."

18 What were you blocked from asking, Mr. Dupuis?

19 MR. DUPUIS: Well, I mean, I think part of the issue is
20 that we believed that there was a -- an implicit waiver of the
21 ability to ask further questions, including questions about the
22 Texas litigation.

23 THE COURT: All right. And you now have my
24 instructions as to that, so tell me what it is you think you
25 were blocked from asking when you had Mr. Nispel the first time

1 that would fit within the areas I've said you could inquire
2 about.

3 MR. DUPUIS: I'm not sure whether there are.

4 THE COURT: All right. Here's what I will do: Because
5 this was in part a function of plaintiffs' doing and defendant,
6 you should meet and confer as to Nispel. You may have -- who
7 was the other individual, Mr. Dupuis?

8 MR. DUPUIS: Herschel Day.

9 THE COURT: All right. Mr. Roth, did you have any
10 dispute that he did not answer some of the questions?

11 MR. ROTH: Are you referring to Mr. Nispel or Mr. Day?

12 THE COURT: Mr. Day.

13 MR. ROTH: I think Mr. Day at the -- maybe at the start
14 of the deposition there was an instruction that was broader than
15 what Your Honor has ruled, but I think as the deposition went
16 on, Mr. Day was allowed to answer a question about whether he
17 recalled discussion of any concerns that were raised by GIB
18 members that were not directed to legal counsel in closed
19 session, and he was allowed to answer that question as well. He
20 didn't give an answer I think that plaintiffs liked, but he was
21 allowed to answer that question.

22 THE COURT: All right. Mr. Dupuis?

23 MR. DUPUIS: Your Honor, first of all, it was a
24 compound instruction, which made it -- and what Mr. Day
25 responded, at least this is my recollection -- I'm not looking

1 at the deposition transcript right now --

2 THE COURT: Yeah, I actually am. Regardless of whether
3 you expanded your position and allowed some questions to be
4 asked, you did give him a blanket instruction not to disclose
5 anything during the closed session, and so whether or not you
6 may have expanded that, the instruction was wrong, and I'm going
7 to let them have Day again for the specific subject matters I've
8 designated.

9 As to Nispel, I would ask, Mr. Dupuis, that you go back,
10 determine if you think there was some area in which you were
11 blocked, advise Mr. Roth, try to reach an agreement, and if not,
12 we will get back on the phone briefly. Mr. Dupuis, you should
13 advise the Court if you need to speak with me on the subject,
14 and I will get you -- just call my chambers, and we'll get both
15 of you on the phone and complete the discussion. Anything else
16 for the plaintiff?

17 MR. DUPUIS: Yes. I realize that I should probably
18 defer to Mr. Knight on Mr. Farrell because I was not present for
19 the Farrell deposition --

20 THE COURT: Same instruction. I'm sorry. I don't have
21 all day. Same instruction as to Farrell, meet and confer. If
22 there's still a dispute, I will take it up.

23 Is that clear for the plaintiff?

24 MR. DUPUIS: Yes, Your Honor.

25 THE COURT: Is that clear for the defendant?

1 MR. ROTH: Yes, Your Honor.

2 THE COURT: All right. We're back to you then,
3 Mr. Roth, if there's anything more for the defendant.

4 MR. ROTH: Nothing further, Your Honor.

5 THE COURT: All right. Very good. Then that's how the
6 parties will proceed, and if we need any further clarification
7 either after your meet-and-confer or, indeed, during the
8 deposition itself, I'm available.

9 Thank you, all. We're off the record.

10 (Proceedings concluded at 9:13 a.m.)

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1 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit
2 Reporter in and for the State of Wisconsin, certify that the
3 foregoing is a true and accurate record of the proceedings held
4 on the 24th day of May, 2018, before the Honorable
5 William M. Conley, U.S. District Judge for the Western District
6 of Wisconsin, in my presence and reduced to writing in
7 accordance with my stenographic notes made at said time and
8 place.

9 Dated this 24th day of May, 2018.

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_____/s/ Jennifer L. Dobbratz____

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Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter

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