

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VIETNAM ASSOCIATION, CV-04-400
Plaintiff,
-against- :
United States Courthouse
Brooklyn, New York
DOW CHEMICAL, :
Defendant. :
March 18, 2004
Ten o'clock a.m
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JOE ISAACSON, ET ANO: :
Plaintiff, CV-98-6383
-against: :
DOW CHEMICAL CO., ET AL :
----- X
----- X
DANIEL STEPHENSON, ET AL. :
Plaintiff, CV-99-3056
-against :
DOW CHEMICAL, CO. ET AL. :
----- X

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

1 APPEARANCES:

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1 THE CLERK: Civil cause for hearing: Vietnam
2 Association, et al versus Dow Chemical, et al; Issacson and
3 Stevenson versus Dow Chemical.

4 THE COURT: Mr. Skinner, you are appearing pro se,
5 sir?

6 (Mr. Robert R. Skinner and Mr. Murray, Jr.,
7 appearing via telephone)

8 You are appearing for yourself, sir?

9 Mr. Skinner, do you have an attorney?

10 MR. SKINNER: Not at the present.

11 THE COURT: Do you want to proceed today on your own
12 behalf so you can get an attorney later?

13 MR. SKINNER: Yes, sir.

14 THE COURT: Okay. Thank you.

15 MR. MURRAY: I am here with another attorney in my
16 firm, Arthur Murray.

17 THE COURT: Yes.

18 MR. MURRAY: I am noting for Your Honor we have
19 another attorney here as well, Arthur Murray. Daniel
20 Stevenson. He is another attorney in my firm, Your Honor.

21 THE COURT: Thank you.

22 We have a number of pro hac vice motions for
23 admission. I will hear them.

24 MR. KOKKORIS: I am one of the attorneys for the
25 plaintiff Vietnam Association. We have with us some attorneys

1 from Alabama. We have Jonathan Cartee, Robert Roden,
2 Stan Morris of the firm of Shelby, Roden & Cartee and we have
3 John Norris of the firm of Davis & Norris. His partner is not
4 here today, Frank Davis, but we will be seeking his admission
5 pro hac vice. So say also Kathleen Velez, Central District of
6 California. We will want to inquire if a formal motion pro
7 hac vice would be necessary or if they can be waived orally.

8 THE COURT: They can appear in the case. They are
9 all admitted?

10 MR. KOKKORIS: Yes, they are Alabama attorneys, are
11 admitted in the Northern District of Alabama and Ms. Velez in
12 the central district.

13 THE COURT: Counsel, when you get a chance would you
14 apply formally. All counsel can come up here into the jury
15 box so you can participate. Anybody else who wishes to come
16 up here can come up. If there are members of the Vietnam
17 press, the press can come up. Anybody who wishes can fill up
18 the seats. Just come up so you can see and hear what is going
19 on.

20 Can you all hear me now?

21 Thank you, all for coming in. I know some of you
22 came in from long distances and we do appreciate all these
23 distinguished counsel coming to Brooklyn. Thank you.

24 I think the first item would be the defendant's
25 motion for proposed case management order and schedule. Any

1 objection to that? All right.

2 MR. BOANERGES: I am James Boanerges and I represent
3 Charles T. Anderson who is a plaintiff in a case that has
4 been transferred and we will be subject to defendant's request
5 to join this case with the discovery order and I will be
6 opposed to that.

7 THE COURT: Well, you will get a chance to speak
8 after we hear those in favor.

9 MR. BOANERGES: Thank you, Your Honor.

10 THE COURT: That is the normal practice.

11 MR. BROCK: Steven Brock for Dow Chemical. We have
12 made a proposal by letter which is along the lines, we
13 believe, of, you know, previous comments by the court and the
14 ruling by Magistrate Judge Azrack in the initial discovery
15 conference in this discovery period. Our proposal is
16 essentially that the current opinion cases and any cases that
17 come in within the short time be placed on the same schedule
18 as Your Honor had already set for the further consideration of
19 the government contract defense issues filing, following
20 Isaacson and Stevenson rulings about a month or two ago. The
21 sense is that judicial economy consolidated appeals number of
22 factors in our letter application would be well served by that
23 and that there is really no prospect, given the extensive
24 discovery that has been had of defendants in the past, that
25 there is really much to be found out, particularly involving

1 any defendant's historical documents. That production was
2 exhaustive, it is complete and has been the basis for a number
3 of court rules for many years. Your Honor, the Magistrate
4 indicates that plaintiff should be required to review that
5 material and to make some sort of showing if it were possible
6 that other materials, you know, still needed to be obtained in
7 discovery before --

8 THE COURT: Well, there are two problems. Don't
9 intermix them, please. Your first proposal, as I understand
10 it, is to integrate all of the pending Agent Orange related
11 cases, both those brought by the Vietnamese group and those
12 brought by Veterans and their children and families -- spouses
13 and the like -- with respect to discovery, correct?

14 MR. BROCK: Yes.

15 THE COURT: Well, let's address that first point.
16 The second point, the way the discovery is to be conducted in
17 these cases seems to me a separable matter, do you agree?

18 MR. BROCK: I think we can certainly discuss them in
19 sequence. I think there is some relationship because the idea
20 of -- the nature of the discovery to be had should inform us
21 as to whether we are going to consolidate these cases.

22 THE COURT: Well, everybody, I think, understands
23 that, so we will hear from the parties. We will hear first
24 from what I will call the veterans group, that is, United
25 States veterans of the war, Vietnam -- war, the spouses, the

1 children, the families and so on -- and then I will hear from
2 what I will call the Vietnamese group -- the individuals, the
3 children and others suing from Vietnam. So I will hear first,
4 yes, from the veterans.

5 MR. BOANERGES: Yes, I do represent a veteran of
6 that war. He was a fighter pilot there and he was exposed to
7 the Agent Orange and he alleges that he has been injured as
8 result of that exposure and now has cancer as a result. I
9 will oppose consolidation for purposes of discovery,
10 Your Honor.

11 THE COURT: Okay. If you oppose it, then, I am not
12 going to bring you in. I just want to bring to your attention
13 a problem. Are you going to go through the very expensive
14 discovery all over again when you have plaintiffs who are
15 willing to assume that burden? Is that what you and your
16 client want? Your client is entitled to it, but we are going
17 to perhaps have depositions; we are going to go through
18 documents and more. I don't see any point in doing the same
19 thing over and over again, particularly since a good deal was
20 done in connection with the original Agent Orange phases I and
21 II, and part Phase III. What do you want to do?

22 MR. BOANERGES: I agree with the Court and I would
23 like to meet and be able to use that evidence but I hesitate
24 to be joined into a case, summary judgment already against it.
25 I mean that's my fear. This is a five year old case. There is

1 a summary judgment that has been against it in my case. My
2 case was just transferred here subject to a stay of all
3 discovery. There has been no discovery.

4 THE COURT: Okay. You are not going to be bound in.
5 You can go off on your own. You are referred, respectfully, to
6 the Magistrate Judge who has full power to integrate, to the
7 extent that the Magistrate Judge wishes, and have you given
8 notice, you can take depositions. I don't want you coming in
9 a second time on depositions. We don't want to burden people.
10 So, at least, you will get notice of depositions and you can
11 participate in that way. You may be able to supplement what
12 has been done. Work it out with the Magistrate Judge, but I'm
13 not going to firmly bind you in. I don't think, since a good
14 deal has gone forward, that's possible, but I think you can
15 work it out as a practical matter with the plaintiffs' and
16 defendants' attorneys and the Magistrate Judge. Try to do
17 that, will you?

18 MR. BOANERGES: Yes. Thank you, Your Honor.

19 THE COURT: Now, I have a faxed letter from
20 Mr. Gordon with respect to Sampey versus Dow Chemical, right?
21 You are on the telephone. Where is Mr. Gordon?

22 THE CLERK: I don't think he is here, Judge.

23 THE COURT: He is not here. He takes, essentially,
24 the same position as the last speaker and my same ruling
25 applies to him. Copies of the documents and the transcripts

1 will be ordered by the present parties and furnished by the
2 them. Those who want copies should pay for the added cost.
3 Try to work it out among counsel. You may be able to work out
4 a modus operandi.

5 Is there anybody else who wishes to make a formal
6 objection?

7 The next parties who want to make a formal objection
8 are the Vietnam groups.

9 MR. SMOGER: I just wanted to say, and I can't speak
10 for them, I only represent Isaacson here, but to the extent
11 that other people were told about this hearing, they have only
12 been told a couple of days ago. I can't speak for them.

13 THE COURT: There is no waiver at all. The ruling I
14 have just made applies to everybody. You counsel will get
15 together. If they want to be bound in any respect, let them
16 work it out among counsel with the Magistrate Judge. I am not
17 in a position as a matter of law to bind them because too much
18 has gone forward.

19 MR. SMOGER: Okay.

20 THE COURT: The notice is short, but as a practical
21 matter, attorneys should be able to work this out, so we don't
22 have to burden everybody and the court repeatedly.

23 Bear in mind, too, that as far as the veterans, even
24 though they may not be bound by res judicata or even
25 collateral estoppel by whatever ruling this court makes within

1 six months, as a practical tactical matter, they will be bound
2 by whatever the Court of Appeals and this court decides. So,
3 just sitting back isn't going to help their clients very much.
4 These things have been pending for a long time and I don't
5 want them dragging on any longer than necessary.

6 These veterans are getting on in years. If they are
7 entitled to a remedy, they are to get it. They are to get it
8 promptly before they become too old and their families become
9 too old.

10 This court dismissed all of those cases. The Court
11 of Appeals for the Second Circuit reversed on the ground that
12 these veterans who are now in court did not have an adequate
13 opportunity to put forward their claims, and the Supreme Court
14 of the United States in a rather unusual decision affirmed
15 four to four, because one justice recused himself.

16 So these cases, which I have called Phase III of
17 Vietnam veterans cases, are now before the Court. Pursuant to
18 the Second Circuit and Supreme Court decisions, all veterans
19 will get a full and adequate hearing, but I want it done
20 promptly. I don't want this dragging on.

21 After the cases were returned by the Supreme Court
22 on remand to the Court of Appeals of the Second Circuit, and
23 then to this court, a number of Vietnamese individuals claimed
24 that they had been injured during the course of the spraying
25 of these herbicides during the Vietnam war. They have a

1 comprehensive and well drafted complaint that has to be
2 considered quite seriously. They are claiming violations of
3 American toxic tort law -- common tort law -- the same as the
4 veterans in Phases I and III. They are also claiming the
5 violation of the laws of war, genocide, human rights, torture
6 and other related violations or torts -- what I will call
7 international law crimes. They will receive a full hearing,
8 but again, it has to be done promptly. This war ended in 1971
9 it is now 2004.

10 My life is limited as well as everybody else's. We
11 have to take account of the shortness of life. I want these
12 cases to go forward. I look with some favor on the defendant's
13 view, that to the extent possible, there should be
14 coordination among all the cases, both the veterans and
15 Vietnamese cases, to reduce the cost and to get a better,
16 prompter, decision on the merits. Now, what are the Vietnamese
17 plaintiffs saying about coordination?

18 MR. KOKKORIS: We do intend to proceed
19 expeditiously. We have made arrangements to have counsel join
20 us, counsel experienced in different aspects of the claims,
21 whether it is international law claims or toxic tort claims,
22 and we do want to reiterate and we are an organization and are
23 a present organization for victims and are a individual
24 victims seeking class certification.

25 THE COURT: I am not going to consider certification

1 of a class at this stage.

2 MR. KOKKORIS: I understand.

3 THE COURT: I am not going to consider certification
4 of the class of Vietnamese plaintiffs until we get over the
5 first stages of these cases. The first stage is whether a
6 claim has been stated with respect to the Vietnamese. A claim
7 has been stated with respect to the veterans.

8 The veterans have thus far lost on the
9 manufacturer-government liability defense. The plaintiffs in
10 the veterans case have been given six months to do further
11 research and challenge this court's opinion.

12 In, approximately, six months I will have a motion
13 returnable from the plaintiffs in the veterans cases to set
14 aside this court's order dismissing their case on the
15 contractors' defense. At that time either the plaintiff will
16 take an appeal to the Court of Appeals, or, if I reverse
17 myself, I will certify the matter to the Court of Appeals for
18 an immediate appeal, so it will go quickly up to the Court of
19 Appeals.

20 I desire at that time the Vietnamese cases similarly
21 go to the Court of Appeals. They will go to the Court of
22 Appeals either because I have dismissed on the pleadings or
23 the ground that they have not stated a cause of action, or I
24 have dismissed on a partial or full summary judgment motion on
25 the ground that they cannot prove their case, or denied the

1 motions to dismiss and certified for an interlocutory appeal.
2 I will certify if it is necessary, so all cases will go up
3 together. The Court of Appeals and the Supreme Court should
4 have together the issue of whether the veterans have a claim
5 here and whether the Vietnam plaintiffs have a claim.

6 I think it doubtful that either the Court of Appeals
7 or the Supreme Court of the United States has full considered
8 the significance of reopening these Vietnam War issues after
9 40 years, but the matter is reopened, and it will be decided
10 the way any other case is decided. For the purposes of
11 deciding the Vietnamese international law cases this court
12 sits as a court of international law, it treats everybody
13 equally. It doesn't make any difference whether the party is a
14 barefoot child in the jungle or the world's biggest
15 corporation, the law will be applied equally to all the
16 parties.

17 The one thing I do not want covered in connection
18 with the discovery is the issue of causation -- what actually
19 caused, if anything, these alleged effects. That's not in the
20 case now. In the veterans' cases as they now stand, that is a
21 new unplumbed issue. It requires a completely different kind
22 of inquiry in both the Veterans and Vietnamese cases. It is
23 out of the discovery stage at this time; is that clear?

24 MR. KOKKORIS: Yes, Your Honor.

25 THE COURT: Counsel has a different view.

1 MR. MOORE: Jonathan Moore. I think the Vietnamese
2 stand in a different posture than the Vietnamese veterans who
3 have litigated these cases for many years. This is, in effect,
4 a new case being brought, alleging different claims, and the
5 discovery because of the nature of those claims will be
6 different. It is not a question, solely, and we certainly
7 will try to utilize all the discovery that's been done to
8 date, and we intend to do that, but there are issues that go
9 beyond what has been, notwithstanding all the litigation that
10 have never been vetted and in discovery to date, such as,
11 whether the defendant chemical companies knew about how these
12 herbicides --

13 THE COURT: I understand that. I am going to address
14 that in a moment. I'm going to address the issue. If you want
15 to brief the matter and take a different posture with respect
16 to the nature of discovery, take it up with the Magistrate
17 Judge after hearing what I say today, and then you can appeal
18 to me, but for now it's going forward on my terms.

19 I am taking a forceful attitude in control of the
20 case because I don't want it sprawling. This case involves
21 international human rights issues of great significance to the
22 country, the plaintiffs and to others in the international
23 field and it has got to be decided promptly. I will tell you
24 exactly how I expect to go and then you can answer me, but I
25 appreciate the point you are making and I will address it.

1 Now, the defendants may wish to make a motion
2 directed at the pleadings. They may do so. Make it promptly.
3 The defendants may wish to make a motion for summary judgment,
4 you cannot make that motion until the six-month discovery
5 period is almost completed. The Vietnamese plaintiffs will be
6 subject to that same six-month period.

7 I want to make it clear to everybody that at the end
8 of six months I want to have a decision by this court that can
9 go to the Court of Appeals on all the issues that can be
10 decided preliminarily, except the issue of whether the Agent
11 Orange, in fact, caused the diseases and other problems
12 alleged. Does anybody have any question about that?

13 MR. MOORE: I don't mean to belabor the issue, but
14 it is not a situation here where our plaintiffs -- our clients
15 have sat on their hands for many, many years. They were
16 prevented by law --

17 THE COURT: I will address that issue separately.
18 That is a separate issue -- the statute of limitations. I am
19 not talking about that issue. I am not at this stage of the
20 litigation going to get involved in the very difficult issues
21 of causation, and whether your clients suffered the damages
22 they claim to have suffered because of the spraying of these
23 chemicals. That is a very difficult issue.

24 We do not have the data on the Vietnamese that we
25 have on the veterans, who have been studied repeatedly over

1 the years. I am not going to address that problem. We assume,
2 for the purposes of these preliminary proceedings, that you
3 are right when you say Agent Orange caused your clients'
4 diseases. But I do not want any factual discovery on
5 causation. It is too complex, too expensive, and it may or may
6 not be necessary. So that is out. I do not want discovery on
7 allegations of poisoning of Vietnamese land or poisoning water
8 and so on as a fact. You made allegations. They are accepted
9 for the purpose of this stage of the litigation. That is it on
10 causation. Do not get into it.

11 MR. MOORE: I don't mean to suggest that we would go
12 into causation but I do think that given that this is a new
13 case, making different claims, six-month window to do
14 discovery, even on non-causation issues may be too narrow.

15 THE COURT: It may be and I will consider your views.
16 I do not think it is.

17 I have done some reading already in this field of
18 human rights law and related law in connection with the case
19 because I do not know the field. I am going to rely heavily
20 on the parties with respect to the laws of war, and
21 international human rights, and treatise and the like. But I
22 begun some preparation. If you want a list of the books and
23 articles and treatises that I have read so you know where I am
24 at the moment, I will give it to you. Let me know and I will
25 have my clerk take them off my desk and give you a list. That

1 will get you started.

2 But I am just a beginner in this field. So I will
3 need a lot of help. Whether I will be right or wrong, I will
4 be quick.

5 There are jurisdictional issues. I am talking now
6 about the Vietnamese cases. Does this court have subject
7 matter jurisdiction, is it competent to handle the issues, the
8 international issues as well as the toxic tort issues? I
9 think it is. The competence question with respect to these
10 international law matters is serious.

11 Jurisdictional issues are serious. Plaintiffs assert
12 federal jurisdiction under the Alien Tort Claims Act,
13 diversity jurisdiction, regulation of commerce, and federal
14 questions jurisdiction. The court is also asked to exercise
15 pendant claims jurisdiction over the state law claims which,
16 of course, we have. Under the Alien Tort Claim Act there is a
17 much more sophisticated analysis required than there is in
18 connection with the claims of the veterans. The court has
19 original jurisdiction in any civil action by an alien for a
20 tort only committed violation of the law of nations or of a
21 treaty of the United States.

22 Some of the claims, such as war crimes and torture,
23 assert a violation of the law of nations. Private entities
24 acting under the color of law in concert with the United States
25 satisfy, I believe, state act requirements of the ATCA.

1 That's the Kadic case, 70 F 3d. 245. Private individuals
2 acting under color of state law can act wrongfully.

3 Diversity jurisdiction seems to exist.

4 I think we have a federal question. Jurisdiction,
5 although this question seems to be open under Kadic in the
6 Second Circuit.

7 Filartiga, the main leading opinion of the Second
8 Circuit, suggested there is federal jurisdiction, although it
9 is not clear. I do think we have federal question
10 jurisdiction, but that is a tentative view only, subject to a
11 motion to dismiss which will be made. I take it the
12 defendants will probably have two phases of motions, one
13 directed to the pleadings as a matter of law, and one directed
14 to limited summary judgment, equivalent to the one made in
15 connection with the veterans' cases, right.

16 MR. BROCK: It is possible, Your Honor.

17 THE COURT: Well, you will consider it.

18 MR. BROCK: We will consider it. There may be some
19 advantages in making all of the motions at the same time at
20 the end of discovery, but we will certainly give that
21 consideration.

22 THE COURT: A number of courts have sustained claims
23 of international law violation under Section 1331. I am
24 assuming we have jurisdiction at the moment. We have a whole
25 series of serious statute of limitations problems. If we have

1 a claim under toxic tort -- what I will consider is the
2 normal tort law approach - when did plaintiffs learn about
3 their problems? Whose law applies? Is it state law? What
4 state? Is it consensus law? What is the substantive law?

5 With respect to the statute of limitations, as to
6 international law claims, is it measured from the time of
7 discovery of disease or from the time of application of Agent
8 Orange or delivering of the product by defendant? The statute
9 of limitations under the torture act is ten years.

10 The statute of limitations for a 1983 violation of
11 constitutional rights is three years, usually, under New York
12 CPLR 214.

13 Under the international law of genocide, there
14 appears to be no statute of limitations, although that's not
15 clear. If there is a statute of limitations that applies, is
16 there a tolling because of the trade embargo against Vietnam,
17 or because of other factors post the Vietnam War that may
18 apply from an equitable point of view.

19 Those overlapping issues are very complicated and
20 difficult.

21 The choice of law issues are difficult, there is, as
22 I've said, a statute of limitations problem. There are the
23 substantive rights definitions, there are a host of different
24 ways of analyzing the substantive and procedural law. In the
25 international law field we are asked to apply tort concept to

1 criminal analogues.

2 Then there's the analogue to the manufacturer's
3 defense in international law, which I will call the Zyklon-B
4 issue. How much did the manufacturers know about how their
5 product was going to be used? I am not suggesting in the
6 least -- I think everybody understands that -- that what the
7 United States or the defendants did is at all similar or like
8 in terms of its qualitative or quantitative effect what the
9 Nazis did in using Zyklon-B in killing millions of people, but
10 I think we all understand that. But Zyklon-B is a precedent
11 with respect to what a defendant can be held liable for
12 individually.

13 The Zyklon-B case it was a criminal case. The
14 British held a hearing and two of the defendants were hanged.
15 It was a capital case. Under American law, as it is now being
16 utilized by the Vietnamese plaintiffs, as I understand the
17 matter, it is not going to be enforced by application of
18 American criminal law but by American civil tort law. That's
19 an important. There is a good deal of literature on that.
20 Nevertheless, the analogy in the defense to the veterans case
21 raises similar kinds of problems.

22 Here the issue on which you may have discovery
23 during the six-month period, as I understand it, subject to
24 hearing again from the defendants: Did the defendant know how
25 Agent Orange was going to be used? Did they know what the

1 effects would be on possible Vietnamese plaintiffs and land in
2 Vietnam? If they did know, are they liable?

3 The Zyklon-B and Nuremberg cases were against
4 individuals. This is a case against corporations, so you have
5 a subsidiary issue of whether a corporation is subject to
6 international law, or only individuals. My tentative view is
7 that corporations are to be treated as if they were
8 individuals under Nuremberg and the post-Nuremberg-British
9 trials in Germany. So a corporation could be a defendant and
10 not the individuals. You don't have to sue the individuals.

11 I want to emphasize again I have no view about what
12 the defendants knew. I have no view as to whether any damage
13 was done. I have no view as to whether the law of war or
14 these other international, human rights laws relied on apply
15 here. But the case has to go forward seriously. We have to
16 address the problems since they are raised. I must say I am
17 dubious at the moment about whether the plaintiffs can make
18 out a case without even getting to the question of causation,
19 but that's based upon my limited reading.

20 So that series of issues about knowledge can be
21 addressed in discovery: Did the defendant corporations know
22 how the government was going to use Agent Orange and other
23 herbicides? What did they know about how the government was
24 going to or did use the product that they supplied? What
25 effect would their knowledge have? What then is the

1 significance of timing?

2 MR. BROCK: It is important, I would like to comment
3 on what Your Honor just said, the question of how it would be
4 used, the important aspect of that is what the effects would
5 be.

6 THE COURT: Yes.

7 MR. BROCK: Because you know the fact that it would
8 be used to be sprayed in Vietnam, everybody knew that that is
9 not a question. The question is whether defendants were
10 expecting this enormous harm that is alleged.

11 THE COURT: Right.

12 MR. BROCK: We are making a fine distinction because
13 Your Honor has asked us not to go into the question of
14 causation, and yet, to respond to a claim that we knew that
15 the spraying was going to cause harm. I think there is a
16 distinction as to the historical fact and to what would have
17 been known at the time, but I think, you know, the fact that
18 it remains uncertain at best and in fact, it seems unsupported
19 40 years later after intensive scientific investigation is a
20 pretty important consideration, and realizing people cannot
21 have possibly known that the contrary was the case 40 years
22 ago.

23 THE COURT: Well, that is a subtle point. It is an
24 accurate point, I will take it into account. We all recognize
25 it. In the Zyklon-B case the evidence the British judges

1 found, including the fact that they were shipping enormous
2 amounts of this poison to these camps, far in excess of what
3 was needed for the alleged delousing problem, and that a
4 number of people who ultimately were hanged actually knew what
5 was going on and had, I think in some cases, even visited the
6 camps. But I understand the problem, and it will have to be
7 addressed in connection with discovery.

8 MR. BROCK: There is another factor in those cases
9 that Your Honor may just have left out. There were a number of
10 defendants. There were two that were hanged. That, as
11 Your Honor said, there were others that were not convicted,
12 and one of the important factors, was that some of the people
13 that may have had some knowledge were found not to be in a
14 position to do anything about it.

15 THE COURT: That's right.

16 MR. BROCK: I think that obviously has a lot of
17 similarity.

18 THE COURT: That's not what we have here because I
19 do not think that if the plaintiffs are right -- this is all
20 tentative, based on my own reading, which has to be corrected
21 by counsel -- and if there is international law liability,
22 that the Nuremberg defense applies. You will have to address
23 that. I don't read those Zyklon-B cases in the same way that
24 you read them; that is, if you were aware that certain results
25 would occur and that this would be a violation of what I will

1 call international law, the fact that you were ordered to do
2 it is not a defense in that respect.

3 MR. BROCK: Respectfully, there was an employee in
4 the same case who was found to have had knowledge and
5 testimony, as I said --

6 THE COURT: Well, I read the reports and you are
7 right. But I am not sure that in view of the general
8 Nuremberg rejection of the defense, "I was told to do it," in
9 the post World War II cases, including the Israeli Eichman
10 case, your view will prevail. But you are going to have to
11 address that problem in your papers.

12 I am telling you, because it is a serious case and
13 one that is almost unique, what my reading has revealed to me
14 tentatively on the issues and what my very tentative view of
15 them is so that you can address them. I am not making any
16 findings. You are going to all have to handle this by motion
17 and educate me.

18 MR. KOKKORIS: If my might respond briefly. I think
19 counsel has just raised an area which illustrates why the
20 discovery in our case is going to be different. There is
21 another area of discovery right there. The defendants are
22 going to raise the necessity defense as it is termed.

23 THE COURT: Well, the necessity defense to them is
24 all on the record. There is no need for a lot of discovery on
25 it. They were ordered by the government to do it. You have all

1 the statutes, all the orders. They are all open to you. I am
2 not going to go beyond that. It is not necessary.

3 MR. KOKKORIS: There is another aspect to it which
4 we have alleged, claims for disgorgement of profits.

5 THE COURT: I suggest you forget disgorgement of
6 profits. You have got a serious case here. Let's get to the
7 essence. You are not likely to obtain any disgorgement of
8 profits as a substantial matter. In any event, there were
9 probably ultimately no profits. These defendants may have
10 lost money on Agent Orange. But I am not interested in
11 disgorgement of profits at this time. That is peripheral to
12 what we are now talking about. You can just forget it for
13 purposes of discovery.

14 MR. KOKKORIS: In terms of the incentive, whether
15 there is a necessity defense, I mean I think profit is
16 important to that aspect as well.

17 THE COURT: Possibly. You can assume that they were
18 in business for profits as well as because they were ordered.
19 There is a question of whether the government contract defense
20 applies in this international law area.

21 With respect to what the substantive law is on the
22 international law questions, they are very serious. Does a pre
23 1925 rule on the laws of war apply, how do they apply to
24 herbicides? There were understandings going back at least to
25 the 1860s on protection of civilians and against use of

1 certain weaponry. What was the effect of the 1925 Geneva
2 protocol with respect to gas? That came after World War I
3 when the Germans were using mustard gas and other gasses for
4 asphyxiation and disabling of humans and animals. There was no
5 concept of herbicides then. You have a very serious problem of
6 what that 1925 protocol meant, particularly because the French
7 translation and the English translation differ as to whether
8 it is a gas listed and others like it -- which I don't think
9 includes herbicides. That is a subject for discussion.

10 During the 1960s there was international discussion
11 of the use of herbicides, but we did not adopt the 1925
12 protocol until, as I understand it, 1975 when the riot control
13 agents and herbicides were excluded from 1975 ratification.
14 There were discussions in the U.N. of herbicides in the 1960s,
15 but there does not seem to have been any incorporation into
16 international law. So you have a distinct retroactivity
17 problem even if you are relying upon the 1975 adoption by the
18 United States or by other countries.

19 Aspects of international law might apply whatever
20 our treaty position was. But whether there was a rule of
21 international law affecting the use of herbicides as they were
22 used in Vietnam seems to me, on first blush, highly dubious,
23 the herbicides were used in connection with an ongoing war --
24 to essentially protect troops in, arguably, a reasonable way.

25 The substantive international law issue is a serious

1 one.

2 Then you have in a sense a political question,
3 although the term political question analysis is of dubious
4 utility. Essentially, it comes down, I think, to a question
5 of separation of powers. You have the executive or the
6 executive and legislature saying that the law of international
7 relation is such and such. What is the authority that this
8 court should exercise in saying it interprets the law
9 differently? It is somewhat analogous to the old Tate letters
10 that the department of state used.

11 There may be an aspect of this theory applicable to
12 a case made as the instant one, although I am not sure to what
13 extent the defendants knew about or advised, or, participated
14 in the actual deployment of the herbicides. What options did
15 the defendant have to refuse? I think you may be able to make
16 a serious argument that non-judicial parts of the government
17 can consider that a defense is unsuitable for application a in
18 suit based on violations of international law. But I am not
19 sure. I am not sure if equivalent norms of international law
20 strip the defendants of the equivalent government contract or
21 defense.

22 Under analogy to the Nuremberg issues, the way that
23 we draw these lines is important. They imply effects on U.S.
24 engagement in combat in any situation where a member of the
25 armed forces oversteps the boundaries as in Mai Lai, or where

1 the government procures weapons that are used in an attack
2 that is not authorized under international law.

3 If the plaintiffs were illegally trespassing on
4 foreign soil when they were sprayed, that is in South Vietnam,
5 how does that affect their remedy? It may be that is
6 encompassed in the hidden dangers rule of common law real
7 estate and tort concepts. If they were attacking Vietnam and
8 we were an ally of South Vietnam, using Agent Orange with the
9 consent of South Vietnam, we may have another factor.

10 Is international law as it existed in the 1960s
11 applied to the deprivation of food and starvation of soldiers?
12 Did it apply to civilians? Could it apply in a guerilla war
13 in which soldiers intermingled with and were helped by
14 civilians? What if alleged poisoning of water?

15 The effect of the 1975 compact and President Ford's
16 executive order is unclear to me. There is, as I have said, a
17 possible political question: If the United States rejects
18 formally a rule of international law, even if everyone else
19 accepts as is fixed and final, what is the role of the United
20 States courts? Should United States courts as a matter of
21 deference to the executive and legislature reject that law on
22 the theory of separation powers, which used to be the
23 political question issue? This brings us back to Nuremberg.
24 Is the law of the United States (or Germany) to trump
25 international law in United States (or German) Courts? It is

1 a case that is interesting and we are going to within six
2 months get it ready for the Court of Appeals for the Second
3 Circuit.

4 Normally, I just listen. In this case I have laid
5 out my initial concerns more fully than I normally would, so
6 that we can all begin to understand as responsible
7 professionals, what we are dealing with.

8 Are there any comments either side wishes to make
9 before we move on to the next phase? Any party wishes to have
10 anything to add to the discussion?

11 All right. Anybody on the telephone wish to add
12 anything.

13 Yes.

14 MR. SMOGER: I thought you were raising this point.
15 There are other points to address.

16 THE COURT: Let me hear whatever anybody else wants
17 to raise at this get-together.

18 MR. SMOGER: We have addressed to the court a
19 singular discovery and appeal from Judge Azrack's ruling. The
20 discovery, the predicate, when I ask for six months was that
21 we immediately get information from the defendants. There has
22 been a vast amount of discovery that was conducted in the last
23 20 years. We have been told that until we finish getting
24 material reviewed from national archives we can't even ask
25 that, and we haven't even gotten to the point where this court

1 has ordered anything from the national archives. So, the
2 first month has been -- we have lost a month. We still have
3 not gotten any documents from the national archives which,
4 apparently, is a predicate before we can go and ask for the
5 discovery in the last 20 years.

6 THE COURT: What discovery? Have you looked at the
7 files of this court?

8 MR. SMOGER: Let me give some very clear examples.
9 In Hercules versus Vertac, and Hercules litigation which is
10 litigation brought by the United States government, brought a
11 CERCLA action against Vertec, one of the principal responsible
12 parties was Hercules, which owned that facility and sold it to
13 Vertac. They were a party to that litigation. There are
14 cross motions for summary judgment brought in that litigation
15 in 1990. During the course of that period of time the U.S.
16 government, Vertac and Hercules took extensive discovery. The
17 principal issue, as a responsible party, was that Vertac was
18 making a statement that the U.S. Department of Defense was a
19 responsible party even though EP brought the action because
20 they are required by the government to make this, which is the
21 exact issue that is before here, cross motions for summary
22 judgment. It is the issue with respect to us as to the
23 government's control. It is part of the government contract.

24 THE COURT: You mean toxic tort theory?

25 MR. SMOGER: Well, the question is whether one of

1 the elements of the government contractor defense was the
2 exercise of control that they said they were -- fully
3 exercised. The government exercised the control over
4 manufacturer, required precise specification. That is part
5 one of this court's ruling.

6 THE COURT: Well, that went off essentially on the
7 ground that the government knew as much or more than the
8 corporation. That was the essential ground of that ruling.

9 MR. SMOGER: That is part three.

10 THE COURT: If you don't make it on that, you are
11 out.

12 MR. SMOGER: They have to have all three.

13 Boyle is a three part and it is not -- they have to
14 have there a final and reasonably precise specification and
15 control. Now, that issue went to summary judgment in the
16 Vertac litigation. It was appealed all the way by Hercules to
17 the United States Supreme Court and that issue, the federal
18 court in Arkansas going up to the circuit court and then was
19 cert denied. The United States Supreme Court said that the
20 government did not control the process of manufacturing. They
21 knew nothing about that process. What we are asking for is
22 extensive discovery. There were a lot of depositions and a lot
23 of affidavits filed in that case.

24 THE COURT: Where are the files of the case?

25 MR. SMOGER: We have gone to the files of the case

1 THE COURT: It must have had material before it to
2 make that finding.

3 MR. SMOGER: It had pieces of deposition, not the
4 entirety. They had extracts.

5 THE COURT: Of those depositions relied on.

6 MR. SMOGER: I would like the full deposition and
7 full underlying interrogatories.

8 THE COURT: You can apply to the Magistrate Judge for
9 that.

10 MR. SMOGER: The Magistrate has already denied us
11 that. We have been denied all discovery except what's in the
12 MDL.

13 THE COURT: As to those depositions, how many are
14 there?

15 MR. SMOGER: I don't know. We are trying to go
16 through the file that's eight years old.

17 THE COURT: I am not going to allow you to rehearse
18 that whole case. If you have a handful of depositions and
19 limited number of interrogatories you can point to, the
20 Magistrate Judge will give them to you.

21 MR. SMOGER: I don't know if the depositions alone
22 -- that's what we are asking for. We are trying get the
23 depositions and the affidavits that were filed in that case.

24 THE COURT: If you know what you want, and it is
25 limited, make an application.

1 in the federal courts. In the appellate courts they don't
2 keep them. We have gone to the files, we have gone to the
3 file court in the federal court in Little Rock, Arkansas and
4 they are not there. All that's there are pieces of certain
5 depositions.

6 THE COURT: Well, they have probably sent them for
7 archiving. They don't keep them in the courthouse.

8 MR. SMOGER: The underlying discovery was never
9 filed with the court. The full deposition, and none of the
10 discovery was filed. All of what we know about is the extracts
11 of certain depositions and certain discovery.

12 THE COURT: How many depositions do you need? You
13 don't need them all. What depositions were addressed to that
14 issue?

15 MR. SMOGER: We know that there was the assurance
16 compliance person for Hercules was addressed to that issue.
17 We know that the toxicologist for Hercules was deposed there.
18 We can say that -- the ones we know -- we don't know -- it is
19 hard to know what wasn't used for their summary judgment
20 motion. We don't know the discovery. Hercules is sitting in
21 this courtroom. They know who was deposed.

22 THE COURT: I don't understand. The court made a
23 finding. You think in your favor?

24 MR. SMOGER: The court made a clear finding that
25 denied --

1 MR. SMOGER: Just to make it clear to this Court, in
2 terms of our due diligence we went to the circuit court,
3 Eighth Circuit to look for it.

4 THE COURT: They wouldn't hold that.

5 MR. SMOGER: They have no files. We went to Little
6 Rock court and they only have a part of their file.

7 THE COURT: Don't they use an archive to store their
8 files the way we do in this court?

9 MR. SMOGER: We have looked it, right, and it is
10 sparse. It is not a full archive and we ran into -- we are
11 trying to figure it out. The Hercules themselves in the motion
12 to this court --

13 THE COURT: Who are the plaintiffs in the case?

14 MR. SMOGER: United States Government.

15 THE COURT: Were there any private parties?

16 MR. SMOGER: Not this case. It was circular action.

17 THE COURT: Who do we have sitting here from the
18 United States Government?

19 MS. MAHONEY: Good morning, Your Honor, Assistant
20 Kathleen Mahoney.

21 THE COURT: Good morning. How are you? Would you
22 get together with the plaintiffs' counsel and see what they
23 want. It may be that the government has it handy.

24 MS. MAHONEY: Your Honor, I know nothing about that
25 particular case. I have made inquiries about the Agent Orange

1 I litigation but I have not --

2 THE COURT: Sit down with them and see if they have
3 it handy and they can turn it over.

4 MS. MAHONEY: Certainly, Your Honor.

5 THE COURT: If not, go down and see the Magistrate
6 Judge, and if it is a limited number of documents you want,
7 she will give them to you. What else?

8 MR. M. GORDON: Michael Gordon appearing now for
9 Maxus Energy. We got out of the Isaacson case by stipulation.
10 I would like to make another motion for summary judgment which
11 hopefully --

12 THE COURT: Make it if you can't get a stipulation.
13 Make it. You are free to make it.

14 Anything else anybody wants to raise? Any other
15 problem?

16 MR. SMOGER: Is Mr. Murray still on the line? I
17 think Mr. Murray had something.

18 THE COURT: Mr. Murray, do you have something?

19 MR. MURRAY: I am having a difficult time hearing.
20 I apologize.

21 THE COURT: You will get a copy of the transcript in
22 due course.

23 MR. MURRAY: Thank you, Judge.

24 THE COURT: Anybody want to add anything else?

25 MR. CUKER: Mr. Murray may want to address this court

1 regarding his pending motion.

2 MR. MURRAY: Are you raising my motion at this
3 point? I think I hear you.

4 THE COURT: If you have one, yes.

5 MR. MURRAY: We periodically -- I am sorry. I am
6 filling in for Steven Murray. This is Arthur Murray. He had
7 to step out for a moment, but we raised a point that we have.

8 THE COURT: Please repeat what you just said.

9 MR. MURRAY: We have a terminal plaintiff, Judge,
10 and we respectfully disagree with Your Honor with respect to
11 the summary judgment. We feel we have sufficient evidence to
12 take an appeal. We have asked for a final judgment, so that
13 we can proceed without the six months discovery period, so
14 that we can get this matter before the appellate court.

15 THE COURT: Denied. I am denying your motion.

16 MR. MURRAY: I can hear. I understand. I need to
17 make the record. That is all.

18 THE COURT: I can't go forward with respect to this
19 individual. I feel very sorry and please give him my best
20 regards. Is he getting veteran's pension under the Agent
21 Orange statue?

22 MR. MURRAY: Your Honor, I don't know that.

23 THE COURT: What is his disease? What disease is he
24 suffering from? What kind of cancer?

25 MR. MURRAY: Your Honor, I don't know the answer to

1 that.

2 THE COURT: Okay.

3 MR. MURRAY: I am just filling in. I don't know the
4 actual facts.

5 MR. SMOGER: Multiple myeloma.

6 MR. CUKER: It is not recognized.

7 THE COURT: I feel badly about him but I have too
8 many other plaintiffs and defendants.

9 MR. MURRAY: I understand that, Your Honor.

10 THE COURT: I cannot certify it. Give him my best
11 regards as a fellow veteran.

12 MR. MURRAY: I will certainly do that, Judge.

13 THE COURT: All right. If there is nothing further
14 the hearing is closed. I expect papers.

15 (Proceedings adjourned as above set forth.)

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0	A	
07101-3174 - 3:24	able - 9:23, 10:11, 11:3, 11:21, 29:15	appeals - 7:21 appear - 6:8 Appearances - 2:1 appearing - 5:4, 5:7, 5:8, 37:8 appellate - 34:1, 38:14 applicable - 29:11 application - 7:22, 21:7, 22:17, 29:17, 35:25 applied - 15:15, 30:11 applies - 10:25, 11:14, 21:3, 21:15, 25:22, 27:20 apply - 6:14, 21:18, 21:25, 23:14, 27:23, 28:19, 30:12, 35:8 appreciate - 6:22, 16:25 approach - 21:2 archive - 36:7, 36:10 archives - 31:24, 32:1, 32:3 archiving - 34:7 area - 26:19, 26:21, 27:20 arguably - 28:24 argument - 29:16 Arkansas - 33:18, 34:3 armed - 29:25 arrangements - 13:19 Arthur - 5:16, 5:19, 38:6 articles - 18:23 aside - 14:14 aspect - 24:4, 27:3, 27:16, 29:11 Aspects - 28:19 aspects - 13:20 asphyxiation - 28:4 assert - 19:11, 19:23 Assistant - 4:14, 36:19 Assoc - 2:10, 2:13, 2:17, 3:20 Associates - 2:2 Association - 1:4, 5:2, 5:25 assume - 9:15, 18:1, 27:17 assuming - 20:24 assurance - 34:15 Astor - 2:18 Atca - 19:25 attack - 30:1 attacking - 30:7 attention - 9:12 attitude - 16:19 Attorney - 4:14 attorney - 5:9, 5:12, 5:15, 5:19, 5:20 attorneys - 5:24, 5:25, 6:10, 10:16, 11:21 authority - 29:7 authorized - 30:2 Avenue - 2:14, 3:9, 3:16, 3:20, 4:8 aware - 25:24 Azrack - 7:14 Azrack's - 31:19
1	accepted - 18:8 accepts - 30:19 account - 13:11, 24:24 accurate - 24:24 Act - 19:12, 19:16 act - 19:25, 20:2, 21:9 acting - 19:24, 20:2 action - 14:23, 19:19, 32:11, 32:19, 36:16 actual - 29:14, 39:4 add - 31:10, 31:11, 37:24 added - 11:2 address - 8:15, 16:13, 16:14, 16:25, 17:17, 18:1, 23:16, 25:22, 26:11, 26:15, 31:15, 37:25 addressed - 23:21, 25:7, 31:18, 34:13, 34:16 adequate - 12:12, 12:19 adjourned - 39:15 admission - 5:23, 6:4 admitted - 6:9, 6:11 adopt - 28:11 adoption - 28:17 advantages - 20:19 advised - 29:13 affect - 30:5 affecting - 28:21 affidavits - 33:23, 35:23 affirmed - 12:14 Agent - 8:10, 9:7, 9:20, 17:10, 18:3, 21:7, 22:25, 23:22, 27:10, 30:8, 36:25, 38:20 agents - 28:13 ago - 7:20, 11:12, 24:22 agree - 8:17, 9:22 Agriculture - 3:12 al - 5:2 Al - 1:14, 1:15, 1:18 Alabama - 2:11, 2:15, 4:5, 6:1, 6:10, 6:11 Alien - 19:12, 19:16 alien - 19:19 allegations - 18:7, 18:8 alleged - 15:19, 17:12, 24:10, 25:3, 27:4, 30:14 alleges - 9:7 alleging - 16:4 allow - 35:17 ally - 30:8 almost - 17:5, 26:13 alone - 35:21 American - 13:3, 22:15, 22:18 Americas - 3:16 amount - 31:22 amounts - 25:2 analogous - 29:9 analogue - 22:2 analogues - 22:1 analogy - 22:20, 29:22 analysis - 19:17, 29:3 analyzing - 21:24 Anderson - 7:3 Andeson - 2:21 animals - 28:4 Ann - 3:24 Anne - 3:21 Ano - 1:11 answer - 16:24, 38:25 Aois - 3:3 apologize - 37:20 appeal - 14:16, 14:18, 15:1, 16:17, 31:19, 38:12 appealed - 33:16 Appeals - 12:2, 12:11, 12:22, 14:16, 14:17, 14:19, 14:21, 14:22, 15:3, 15:6, 17:9, 31:2	
2		B
20 - 31:23, 32:5 2004 - 1:10, 13:9 214 - 21:12 2151 - 2:14 225 - 2:8, 4:18 245 - 20:1 2500 - 3:17 2956 - 2:10, 4:4		badly - 39:7 barefoot - 15:14 based - 23:19, 25:20, 29:18 basis - 8:2 Bear - 11:23 become - 12:8 begin - 31:6 beginner - 19:2 begun - 18:22 behalf - 5:12 belabor - 17:13 Berezofsky - 2:4 best - 24:18, 38:19, 39:10 better - 13:15 beyond - 16:9, 27:2 biggest - 15:14 bind - 10:13, 11:17 Birmingham - 4:5 Birmingham - 2:11, 2:15 blush - 28:22 Boanerges - 2:20, 2:22, 7:2, 7:9, 9:5, 9:22, 10:18
3		
3175 - 2:2 35205 - 2:11, 2:15, 4:5 3d - 20:1		
4		
40 - 15:9, 24:19, 24:21		
5		
50 - 4:2, 4:11		
6		
612 - 2:8 666 - 4:8		
7		
70 - 20:1 718-330-7687 - 4:19 740 - 2:18 77055 - 2:22 79th - 4:11		
9		
919 - 3:20 9432 - 2:21 94602 - 2:3 99 - 3:13		

books - 18:22
Boulevard - 2:2, 2:5
bound - 10:4, 11:15, 11:24, 12:1
boundaries - 29:25
box - 6:15
Boyle - 33:13
brief - 16:15
briefly - 26:18
bring - 9:12
brings - 30:23
British - 22:14, 24:25
british - 23:8
Broadway - 2:8, 2:18
Brock - 3:3, 7:11, 8:14, 8:18, 20:16,
 20:18, 24:2, 24:7, 24:12, 25:8, 25:16,
 26:3
Brooklyn - 1:8, 4:15, 4:19, 6:23
brought - 8:11, 8:12, 16:4, 32:10,
 32:14, 32:19
burden - 9:15, 10:9, 11:22
business - 27:18

C

Cadman - 4:18
Caldwalader - 3:4
California - 2:3, 6:6
camp - 25:2, 25:6
cancer - 9:8, 38:24
cannot - 14:25, 17:4, 24:20, 39:10
capital - 22:15
Cartee - 4:4, 4:5, 6:1, 6:2
case - 6:8, 6:25, 7:3, 7:5, 9:24, 9:25,
 10:1, 10:2, 14:10, 14:14, 14:25, 15:10,
 15:20, 16:4, 16:20, 18:13, 18:18, 20:1,
 22:13, 22:15, 22:20, 23:4, 23:15, 23:18,
 24:21, 24:25, 26:4, 26:10, 26:12, 26:20,
 27:6, 29:12, 31:1, 31:4, 33:23, 33:24,
 33:25, 35:18, 35:23, 36:13, 36:16,
 36:25, 37:9
cases - 7:16, 8:11, 8:17, 8:21, 12:10,
 12:16, 12:17, 12:21, 13:12, 13:14,
 13:15, 14:5, 14:13, 14:20, 15:2, 15:11,
 15:20, 15:22, 16:3, 19:6, 20:15, 23:3,
 25:5, 25:8, 25:23, 26:9
causation - 15:18, 17:21, 18:5, 18:10,
 18:12, 18:14, 23:18, 24:14
caused - 15:19, 17:11, 18:3
Center - 2:5, 3:23
Central - 6:5
central - 6:12
Cercla - 32:11
cert - 33:19
certain - 25:24, 28:1, 34:4, 34:11
Certainly - 37:4
certainly - 8:18, 16:6, 20:20, 39:12
certification - 13:24, 13:25, 14:3
certified - 15:1
certify - 14:17, 15:2, 39:10
challenge - 14:11
chance - 6:13, 7:7
Charles - 7:3
Chas - 2:21
Chemical - 1:8, 1:14, 1:18, 3:1, 3:5,
 3:6, 3:19, 4:1, 4:8, 5:2, 5:3, 7:11, 10:20
chemical - 16:11
chemicals - 17:23
Cheryl - 3:18
child - 15:14
children - 8:12, 9:1, 9:3
choice - 21:21
Chryssa - 4:3
Circle - 2:10, 4:4
Circuit - 12:11, 12:18, 12:22, 20:6,
 20:8, 31:3, 36:3
circuit - 33:18, 36:2
circular - 36:16
Civil - 5:1
civil - 19:19, 22:18
civilians - 27:25, 30:12, 30:14

claim - 14:6, 15:4, 15:5, 17:22, 21:1,
 24:14
Claim - 19:16
claimed - 12:23
claiming - 13:2, 13:4
Claims - 19:12
claims - 12:13, 13:20, 13:21, 16:4,
 16:5, 18:13, 19:15, 19:18, 19:22, 20:22,
 21:6, 27:4
Clark - 3:12
class - 13:24, 14:1, 14:4
clear - 15:23, 17:7, 20:9, 21:15, 32:8,
 34:24, 36:1
clerk - 18:25
Clerk - 5:1, 10:22
client - 9:16
clients - 12:3, 17:14, 17:21
clients' - 18:3
closed - 39:14
Co - 1:14, 1:18, 3:1, 3:6, 4:1
Cohen - 3:21
collateral - 11:25
color - 19:24, 20:2
combat - 29:24
coming - 6:21, 6:23, 10:8
comment - 24:2
comments - 7:13, 31:8
commerce - 19:13
committed - 19:20
common - 13:3, 30:6
compact - 30:15
companies - 16:11
Company - 3:23
competence - 19:9
competent - 19:7
complaint - 13:1
complete - 8:2
completed - 17:5
completely - 15:21
complex - 18:5
compliance - 34:16
complicated - 21:19
comprehensive - 13:1
computer - 4:23
concept - 21:25, 28:5
concepts - 30:7
concerns - 31:5
concert - 19:24
conducted - 8:16, 31:22
conference - 7:15
connection - 9:20, 15:17, 18:18,
 19:18, 20:15, 25:7, 28:23
consensus - 21:4
consent - 30:9
consider - 13:25, 14:3, 18:15, 20:17,
 20:18, 21:1, 29:17
consideration - 7:18, 20:21, 24:20
considered - 13:2, 15:7
consolidate - 8:21
consolidated - 7:21
consolidation - 9:9
Constantine - 2:7
constitutional - 21:11
contract - 7:19, 27:19, 29:20, 32:23
contractor - 33:1
contractors' - 14:15
contrary - 24:21
control - 16:19, 28:12, 32:23, 33:2,
 33:3, 33:15, 33:20
convicted - 25:11
coordination - 13:14, 13:17
Copies - 10:25
copies - 11:2
copy - 37:21
corporation - 15:15, 23:5, 23:9, 33:8
corporations - 23:4, 23:7, 23:21
correct - 8:13
corrected - 25:20
cost - 11:2, 13:15
Counsel - 6:13, 15:25

counsel - 6:14, 6:23, 11:3, 11:14,
 11:16, 13:19, 13:20, 25:21, 26:19,
 36:22
countries - 28:18
country - 16:22
couple - 11:12
course - 12:24, 19:16, 32:15, 37:22
Court - 1:1, 3:13, 4:18, 5:4, 5:11, 5:14,
 5:17, 5:21, 6:8, 6:13, 7:7, 7:10, 8:8,
 8:15, 8:22, 9:11, 9:22, 10:4, 10:19,
 10:23, 11:13, 11:20, 12:2, 12:10, 12:13,
 12:17, 12:18, 12:21, 12:22, 13:25, 14:3,
 14:16, 14:17, 14:18, 14:21, 15:3, 15:6,
 15:7, 15:25, 16:13, 17:9, 17:17, 18:15,
 20:17, 20:22, 24:6, 24:11, 24:23, 25:15,
 25:18, 26:6, 26:23, 27:5, 27:17, 31:2,
 31:16, 32:6, 32:24, 33:6, 33:10, 33:17,
 33:19, 33:24, 34:6, 34:12, 34:22, 35:1,
 35:5, 35:8, 35:13, 35:17, 35:24, 36:1,
 36:4, 36:7, 36:13, 36:15, 36:17, 36:21,
 37:2, 37:5, 37:12, 37:18, 37:21, 37:24,
 38:4, 38:8, 38:15, 38:18, 38:23, 39:2,
 39:7, 39:10, 39:13
court - 7:13, 8:3, 11:22, 11:25, 12:2,
 12:10, 12:12, 12:23, 15:11, 15:12, 17:8,
 19:6, 19:14, 19:18, 29:8, 31:18, 31:25,
 32:7, 33:18, 34:3, 34:9, 34:22, 34:24,
 36:2, 36:6, 36:8, 36:12, 37:25, 38:14
court's - 14:11, 14:14, 33:5
courthouse - 34:7
Courthouse - 1:7
courtroom - 34:21
Courts - 30:25
courts - 20:22, 30:20, 34:1
covered - 15:17
Cplr - 21:12
crimes - 13:7, 19:22
criminal - 22:1, 22:13, 22:18
cross - 32:14, 32:21
Cuker - 2:4, 2:6, 37:25, 39:6
current - 7:16
Curt - 3:13
Cv-04-400 - 1:5
Cv-98-6383 - 1:12
Cv-99-3056 - 1:16

D

D'aloise - 3:14
damage - 23:12
damages - 17:21
dangers - 30:6
Daniel - 1:15, 5:19
data - 17:24
date - 16:8, 16:10
Davis - 2:12, 6:3, 6:4
days - 11:12
deal - 9:19, 10:14, 22:19
dealing - 31:7
Debevoise - 3:19
decided - 15:9, 15:10, 16:23, 17:10
decides - 12:2
deciding - 15:11
decision - 12:14, 13:16, 17:8
decisions - 12:18
defendant - 16:11, 21:8, 22:11,
 22:24, 23:9, 23:21, 29:15
Defendant - 1:9
defendant's - 6:24, 7:4, 8:1, 13:12
defendants - 7:24, 17:1, 17:3, 20:12,
 22:7, 22:14, 22:24, 23:12, 24:9, 25:10,
 26:21, 27:9, 29:13, 29:20, 31:21, 39:8
defendants' - 10:16
defense - 7:19, 14:9, 14:15, 22:3,
 22:20, 25:22, 26:2, 26:8, 26:22, 26:23,
 27:15, 27:19, 29:17, 29:21, 33:1
Defense - 32:18
deference - 30:21
definitions - 21:23
delivering - 21:8

<p>delousing - 25:3 Denied - 38:15 denied - 14:25, 33:19, 34:25, 35:10, 35:11 denying - 38:15 department - 29:10 Department - 32:18 deployment - 29:14 deposed - 34:17, 34:21 deposition - 34:9, 35:3, 35:6 depositions - 9:17, 10:8, 10:9, 10:10, 33:22, 34:5, 34:11, 34:12, 34:13, 35:5, 35:13, 35:18, 35:21, 35:23 deprivation - 30:11 desire - 14:20 desk - 18:25 Diamond - 3:5, 4:18 differ - 28:7 difference - 15:13 different - 13:20, 15:21, 15:25, 16:2, 16:4, 16:6, 16:15, 18:13, 21:23, 26:20 differently - 29:9 difficult - 17:20, 17:23, 21:20, 21:21, 37:19 diligence - 36:2 directed - 17:2, 20:13 disabling - 28:4 disagree - 38:10 discovery - 7:5, 7:14, 7:15, 7:24, 8:7, 8:13, 8:16, 8:20, 9:9, 9:14, 10:3, 15:18, 15:23, 16:5, 16:7, 16:10, 16:16, 17:4, 18:4, 18:6, 18:14, 20:20, 21:7, 22:22, 23:21, 25:7, 26:20, 26:21, 26:24, 27:13, 31:19, 31:20, 31:22, 32:5, 32:6, 32:16, 33:22, 34:8, 34:10, 34:11, 34:20, 35:11, 38:13 discuss - 8:18 discussion - 28:9, 28:10, 31:10 discussions - 28:14 disease - 21:7, 38:23 diseases - 17:11, 18:4 disgorgement - 27:4, 27:5, 27:7, 27:11 dismiss - 15:1, 20:11 dismissed - 12:10, 14:22, 14:24 dismissing - 14:14 distances - 6:22 distinct - 28:16 distinction - 24:12, 24:16 distinguished - 6:23 District - 1:1, 1:21, 6:5, 6:11 district - 6:12 diversity - 19:13 Diversity - 20:3 documents - 8:1, 9:18, 10:25, 32:3, 37:6 done - 9:20, 10:12, 12:19, 13:8, 16:7, 18:17, 23:13 doubtful - 15:6 Dow - 1:8, 1:14, 1:18, 3:1, 4:8, 5:2, 5:3, 7:11, 10:20 down - 29:4, 37:2, 37:5 drafted - 13:1 dragging - 12:5, 12:20 draw - 29:23 Drye - 3:8 dubious - 23:17, 28:22, 29:3 due - 36:2, 37:22 during - 12:24, 12:25, 22:23 During - 28:10, 32:15</p>	<p>Eichman - 26:9 eight - 35:16 Eighth - 36:3 either - 14:15, 14:22, 15:6, 31:8 elements - 33:1 embargo - 21:16 Emery - 4:1 emphasize - 23:11 employee - 26:3 encompassed - 30:6 end - 17:7, 20:20 ended - 13:8 Energy - 37:9 enforced - 22:17 engagement - 29:24 English - 28:7 enormous - 24:10, 25:1 entirety - 35:4 entities - 19:23 entitled - 9:16, 12:7 Ep - 32:19 equally - 15:13, 15:15 equitable - 21:18 equivalent - 20:14, 29:19, 29:20 Esq - 2:3, 2:6, 2:7, 2:11, 2:15, 2:19, 2:22, 3:3, 3:7, 3:10, 3:11, 3:14, 3:18, 3:21, 3:24, 4:3, 4:5, 4:9, 4:10 Esqs - 2:4 essence - 27:7 essential - 33:8 essentially - 7:16, 10:23, 28:24, 33:6 Essentially - 29:4 estate - 30:7 estoppel - 11:25 Et - 1:11, 1:14, 1:15, 1:18 et - 5:2 event - 27:8 evidence - 9:23, 24:25, 38:11 exact - 32:21 exactly - 16:24 examples - 32:8 except - 17:10, 35:11 excess - 25:2 executive - 29:5, 29:6, 30:16, 30:21 exercise - 19:14, 29:8, 33:2 exercised - 33:3 exhaustive - 8:2 exist - 20:3 existed - 30:10 exluded - 28:13 expect - 16:24, 39:14 expecting - 24:10 expeditiously - 13:19 expensive - 9:13, 18:5 experienced - 13:20 exposed - 9:6 exposure - 9:8 extensive - 7:23, 32:16, 33:22 extent - 10:7, 11:10, 13:13, 29:13 extracts - 34:10, 35:4</p>	<p>Fifth - 4:8 fighter - 9:6 figure - 36:11 Filartiga - 20:7 file - 34:3, 35:16, 36:6 filed - 33:23, 34:9, 34:10, 35:23 files - 32:7, 33:24, 33:25, 34:2, 36:5, 36:8 filing - 7:19 fill - 6:17 filling - 38:6, 39:3 final - 30:19, 33:14, 38:12 findings - 26:16 fine - 24:12 finish - 31:23 firm - 5:16, 5:20, 6:2, 6:3 firmly - 10:13 first - 6:24, 8:9, 8:15, 8:23, 9:3, 14:5, 28:22, 32:2 five - 9:25 fixed - 30:19 Floor - 3:23, 4:14 following - 7:19 food - 30:11 forceful - 16:19 forces - 29:25 Ford's - 30:15 foreign - 30:4 forget - 27:5, 27:12 formal - 6:6, 11:5, 11:7 formally - 6:14, 30:18 forth - 39:15 forward - 10:14, 11:18, 12:13, 13:12, 16:18, 23:15, 38:18 four - 12:15 Frank - 6:4 free - 37:13 French - 28:6 full - 10:6, 12:19, 13:7, 14:24, 15:7, 34:9, 35:6, 35:7, 36:10 fully - 31:5, 33:2 furnished - 11:1</p>
E	F	G
<p>Eab - 3:2 East - 4:18 Eastern - 1:1 economy - 7:21 educate - 26:17 effect - 16:3, 22:8, 23:25, 28:1, 30:15 effects - 15:19, 23:1, 24:4, 29:23</p>	<p>facility - 32:12 fact - 17:11, 18:8, 24:7, 24:16, 24:17, 24:18, 25:1, 26:1 factor - 25:8, 30:9 factors - 7:22, 21:17, 25:12 facts - 39:4 factual - 18:4 families - 8:12, 9:1, 12:8 far - 11:23, 14:8, 25:2 favor - 7:8, 13:12, 34:23 faxed - 10:19 fear - 9:25 federal - 19:12, 19:13, 20:4, 20:8, 20:9, 33:17, 34:1, 34:3 fellow - 39:11 field - 16:23, 18:17, 18:19, 19:2, 21:25</p>	<p>G03609 - 2:21 Gagliardi - 3:12 gas - 28:2, 28:3, 28:8 gasses - 28:3 general - 26:7 Geneva - 28:1 genocide - 13:5, 21:13 German - 30:25 Germans - 28:3 Germany - 23:9, 30:24 Gerson - 2:3 get-together - 31:17 given - 7:23, 10:7, 14:10, 18:12 Goodman - 2:17, 2:19 Gordon - 3:7, 10:20, 10:21, 37:8 Government - 36:14, 36:18 government - 7:19, 14:9, 23:22, 23:23, 26:25, 27:19, 29:16, 29:20, 30:1, 32:10, 32:16, 32:20, 32:23, 33:1, 33:3, 33:7, 33:20, 36:23 government's - 32:23 great - 16:21 ground - 12:11, 14:23, 14:25, 33:7, 33:8 group - 8:11, 8:24, 9:2 groups - 11:8 guerilla - 30:12</p>
		H
		<p>hac - 5:22, 6:5, 6:7 handful - 35:18 handle - 19:7, 26:16 hands - 17:15 handy - 36:23, 37:3</p>

<p>hanged - 22:14, 25:4, 25:10 hard - 34:19 harm - 24:10, 24:15 hear - 5:23, 6:18, 6:20, 7:8, 8:23, 9:1, 9:3, 31:16, 38:3, 38:16 hearing - 5:1, 11:11, 12:19, 13:7, 16:17, 22:14, 22:24, 37:19, 39:14 Hearing - 1:20 heavily - 18:19 Heck - 3:10 held - 22:11, 22:14 help - 12:3, 19:3 helped - 30:13 herbicides - 12:25, 16:12, 23:23, 27:24, 28:5, 28:9, 28:11, 28:13, 28:14, 28:21, 28:23, 29:14 Hercules - 3:9, 32:9, 32:12, 32:16, 33:16, 34:16, 34:17, 34:20, 36:11 Herrington - 4:7 hesitate - 9:23 hidden - 30:6 Highland - 2:13, 2:14 highly - 28:22 himself - 12:15 historical - 8:1, 24:16 hold - 36:4 Honor - 5:18, 5:20, 7:9, 7:18, 8:3, 9:10, 10:18, 15:24, 20:16, 24:3, 24:13, 25:9, 25:11, 36:19, 36:24, 37:4, 38:10, 38:22, 38:25, 39:9 Honorable - 1:21 Hooker - 3:19 hopefully - 37:11 host - 21:23 Houston - 2:22 human - 13:5, 16:21, 18:18, 18:21, 23:14 humans - 28:4</p>	<p>20:23, 21:6, 21:13, 21:25, 22:3, 23:6, 23:14, 25:21, 26:1, 27:20, 27:22, 28:10, 28:16, 28:19, 28:21, 28:25, 29:6, 29:18, 29:19, 30:2, 30:10, 30:18, 30:25 interprets - 29:8 interrogatories - 35:7, 35:19 investigation - 24:19 involved - 17:20 involves - 16:20 involving - 7:25 Isaacson - 1:11, 7:20, 11:10, 37:9 Israeli - 26:9 Issacson - 5:2 issue - 15:4, 15:18, 15:21, 16:14, 17:10, 17:13, 17:17, 17:18, 17:19, 17:23, 22:4, 22:22, 23:5, 28:25, 30:23, 32:17, 32:21, 32:22, 33:15, 33:17, 34:14, 34:16 issues - 7:19, 15:8, 16:8, 16:21, 17:9, 17:20, 18:14, 19:5, 19:7, 19:8, 19:11, 21:19, 21:21, 23:20, 26:14, 29:22 item - 6:24</p>	<p>Latham - 3:22 Law - 2:12 law - 11:17, 13:3, 13:7, 13:21, 15:11, 15:12, 15:15, 17:16, 18:18, 19:10, 19:15, 19:20, 19:23, 19:24, 20:2, 20:13, 20:23, 21:2, 21:3, 21:4, 21:6, 21:13, 21:21, 21:24, 21:25, 22:3, 22:15, 22:18, 23:6, 23:13, 25:21, 26:1, 27:20, 27:21, 27:22, 28:16, 28:19, 28:21, 28:25, 29:6, 29:8, 29:18, 29:19, 30:2, 30:6, 30:10, 30:18, 30:21, 30:24, 30:25 Lawrence - 3:14 laws - 13:5, 18:20, 23:14, 27:23 leading - 20:7 learn - 21:2 least - 10:10, 22:6, 27:24 left - 25:9 legislature - 29:6, 30:21 letter - 7:12, 7:22, 10:19 letters - 29:9 liability - 14:9, 25:21 liable - 22:11, 23:2 life - 13:10, 13:11 likely - 27:7 limitations - 17:18, 20:25, 21:5, 21:9, 21:10, 21:14, 21:15, 21:22 limited - 13:10, 20:14, 23:19, 35:19, 35:25, 37:6 line - 37:16 lines - 7:12, 29:23 Lisa - 3:24 list - 18:22, 18:25 listed - 28:8 listen - 31:4 literature - 22:19 litigated - 16:3 litigation - 16:9, 17:20, 18:9, 32:9, 32:10, 32:13, 32:14, 33:16, 37:1 Llc - 2:9 Llp - 2:12, 2:17, 3:4, 3:8, 3:19, 3:22, 4:7 look - 13:12, 36:3 looked - 32:6, 36:9 lost - 14:8, 27:10, 32:2 Lueders - 2:20</p>
I	J	M
<p>idea - 8:19 ii - 9:21, 26:9 iii - 9:21, 12:16, 13:4 illegally - 30:3 illustrates - 26:19 immediate - 14:18 immediately - 31:21 imply - 29:23 important - 22:19, 24:2, 24:4, 24:20, 25:12, 27:16, 29:23 Inc - 3:9 incentive - 27:14 includes - 28:9 including - 25:1, 26:9 incorporation - 28:15 indicates - 8:4 individual - 13:23, 38:19 individually - 22:12 individuals - 9:2, 12:23, 20:1, 23:4, 23:6, 23:8, 23:10 inform - 8:20 information - 31:21 initial - 7:14, 31:5 injured - 9:7, 12:24 inns - 3:13 inquire - 6:6 inquiries - 36:25 inquiry - 15:22 instant - 29:12 integrate - 8:10, 10:6 intend - 13:18, 16:8 intensive - 24:19 interested - 27:10 interesting - 31:1 interlocutory - 15:1 intermingled - 30:13 intermix - 8:9 international - 13:7, 13:21, 15:11, 15:12, 16:21, 16:22, 18:21, 19:8, 19:10,</p>	<p>Jack - 1:21 James - 2:22, 3:3, 4:9, 7:2 Jersey - 3:24 Jf - 2:5 Joe - 1:11 John - 2:15, 6:3 join - 7:5, 13:19 joined - 9:24 Jonathan - 2:19, 4:5, 6:1, 16:1 Jr - 3:14, 5:6 Judge - 1:21, 7:14, 10:6, 10:7, 10:12, 10:16, 10:22, 11:16, 16:17, 31:19, 35:8, 35:20, 37:6, 37:23, 38:9, 39:12 judges - 24:25 judgment - 9:24, 10:1, 14:24, 17:3, 20:14, 32:14, 32:22, 33:15, 34:19, 37:10, 38:11, 38:12 judicata - 11:24 judicial - 7:21, 29:16 jungle - 15:14 Jurisdiction - 20:4 jurisdiction - 19:7, 19:12, 19:13, 19:14, 19:15, 19:19, 20:3, 20:8, 20:10, 20:24 Jurisdictional - 19:11 jurisdictional - 19:5 jury - 6:14 justice - 12:15</p>	<p>Magistrate - 7:14, 8:3, 10:6, 10:7, 10:12, 10:16, 11:16, 16:16, 35:8, 35:10, 35:20, 37:5 Mahoney - 4:13, 36:19, 36:20, 36:24, 37:4 Mai - 29:25 Maiden - 3:6 main - 20:7 management - 6:25 manufacturer - 14:9, 33:4 manufacturer's - 22:2 manufacturer-government - 14:9 manufacturers - 22:4 manufacturing - 33:20 March - 1:10 Mark - 2:6 Marsha - 4:18 material - 8:5, 31:24, 35:1 materials - 8:6 matter - 8:17, 10:15, 11:17, 11:21, 12:1, 14:17, 15:9, 16:15, 19:7, 20:13, 22:17, 27:8, 30:20, 38:14 matters - 19:10 Maxus - 37:9 Mcdermott - 4:1 Mdl - 35:12 mean - 9:25, 17:13, 18:11, 27:15, 32:24 meant - 28:6 measured - 21:6 mechanical - 4:22 meet - 9:23</p>
I	K	L
<p>idea - 8:19 ii - 9:21, 26:9 iii - 9:21, 12:16, 13:4 illegally - 30:3 illustrates - 26:19 immediate - 14:18 immediately - 31:21 imply - 29:23 important - 22:19, 24:2, 24:4, 24:20, 25:12, 27:16, 29:23 Inc - 3:9 incentive - 27:14 includes - 28:9 including - 25:1, 26:9 incorporation - 28:15 indicates - 8:4 individual - 13:23, 38:19 individually - 22:12 individuals - 9:2, 12:23, 20:1, 23:4, 23:6, 23:8, 23:10 inform - 8:20 information - 31:21 initial - 7:14, 31:5 injured - 9:7, 12:24 inns - 3:13 inquire - 6:6 inquiries - 36:25 inquiry - 15:22 instant - 29:12 integrate - 8:10, 10:6 intend - 13:18, 16:8 intensive - 24:19 interested - 27:10 interesting - 31:1 interlocutory - 15:1 intermingled - 30:13 intermix - 8:9 international - 13:7, 13:21, 15:11, 15:12, 16:21, 16:22, 18:21, 19:8, 19:10,</p>	<p>Kadic - 20:1, 20:5 Kalish - 4:10 Kathleen - 4:13, 6:5, 36:20 Katy - 2:21 keep - 34:2, 34:7 Kelley - 3:8 killing - 22:9 kind - 15:21, 38:24 kinds - 22:21 knowledge - 23:20, 23:25, 25:13, 26:4 known - 24:17, 24:21 Kokkoris - 2:7, 5:24, 6:10, 13:18, 14:2, 15:24, 26:18, 27:3, 27:14 Krohley - 3:11</p>	<p>Lai - 29:25 laid - 31:4 Lamont - 4:9 land - 18:7, 23:1 Lane - 3:6 last - 10:24, 31:22, 32:5</p>

<p>member - 29:24 members - 6:16 merger - 3:5 merits - 13:16 Michael - 3:7, 37:8 might - 26:18, 28:19 Miller - 3:12 millions - 22:9 mind - 11:23 modus - 11:4 moment - 16:14, 18:24, 20:24, 23:17, 38:7 money - 27:10 Monsanto - 3:16, 3:23 Monterey - 2:2 month - 7:20, 17:4, 17:6, 18:13, 22:23, 32:2 months - 12:1, 14:10, 14:12, 17:8, 31:2, 31:20, 38:13 Moore - 2:17, 2:19, 16:1, 17:13, 18:11 morning - 36:19, 36:21 Morris - 6:2 motion - 6:6, 6:25, 14:12, 14:24, 17:1, 17:3, 17:4, 20:11, 26:16, 34:20, 36:11, 37:10, 38:1, 38:2, 38:15 motions - 5:22, 15:1, 20:12, 20:19, 32:14, 32:21 move - 31:9 Multiple - 39:5 Murray - 5:6, 5:15, 5:16, 5:18, 5:19, 37:16, 37:17, 37:18, 37:19, 37:23, 37:25, 38:2, 38:5, 38:6, 38:9, 38:16, 38:22, 38:25, 39:3, 39:9, 39:12 must - 23:16, 35:1 mustard - 28:3 myeloma - 39:5 Myron - 4:10</p>	<p>O</p> <p>o'clock - 1:10 Oakland - 2:3 objection - 7:1, 11:6, 11:7 obtain - 27:7 obtained - 8:6 obviously - 25:16 occur - 25:25 Offices - 2:12 old - 9:25, 12:8, 12:9, 29:9, 35:16 Old - 2:21 One - 2:5, 2:13, 3:23, 4:14 one - 5:24, 12:15, 15:17, 20:12, 20:13, 20:14, 25:12, 26:13, 29:1, 29:12, 32:11, 32:25, 33:5, 38:4 ones - 34:18 ongoing - 28:23 ooo - 39:16 open - 20:5, 27:1 operandi - 11:4 opinion - 7:16, 14:11, 20:7 opportunity - 12:13 oppose - 9:9, 9:11 opposed - 7:6 options - 29:14 orally - 6:7 Orange - 8:10, 9:7, 9:20, 17:11, 18:3, 21:8, 22:25, 23:22, 27:10, 30:8, 36:25, 38:21 order - 6:25, 7:5, 14:14, 30:16 ordered - 11:1, 26:1, 26:25, 27:18, 32:1 orders - 27:1 organization - 13:22, 13:23 Orick - 4:7 original - 9:20, 19:19 overlappingng - 21:19 oversteps - 29:25 own - 5:11, 10:5, 25:20 owned - 32:12</p>	<p>Philadelphia - 2:6 pieces - 34:4, 35:3 Pierrepoint - 4:14 pilot - 9:6 Place - 2:13, 2:18 placed - 7:17 Plains - 3:14 Plaintiff - 1:5, 1:12, 1:16 plaintiff - 5:25, 7:3, 8:4, 14:15, 38:9 plaintiffs - 9:14, 13:17, 14:4, 14:9, 14:13, 15:5, 16:22, 17:5, 17:14, 21:2, 22:16, 23:1, 23:17, 25:19, 30:3, 36:13, 39:8 Plaintiffs - 2:10, 2:13, 2:17, 19:11 plaintiffs' - 10:15, 36:22 Plaza - 3:2, 4:2, 4:14, 4:18 pleadings - 14:22, 17:2, 20:13 Plimpton - 3:19 point - 8:15, 8:16, 9:18, 16:25, 21:18, 24:23, 24:24, 31:14, 31:25, 35:19, 38:3, 38:7 points - 31:15 poison - 25:2 poisoning - 18:7, 30:14 political - 29:2, 29:3, 30:17, 30:23 position - 10:24, 11:17, 25:14, 28:20 possible - 8:5, 10:14, 13:13, 20:16, 23:1, 30:17 possibly - 24:21 Possibly - 27:17 post - 21:17, 23:8, 26:9 post-nuremberg-british - 23:8 posture - 16:2, 16:15 power - 10:6 powers - 29:5, 30:22 practical - 10:15, 11:20, 12:1 practice - 7:10 pre - 27:22 precedent - 22:10 precise - 33:4, 33:14 predicate - 31:20, 32:4 preliminarily - 17:10 preliminary - 18:2 preparation - 18:22 present - 5:10, 11:1, 13:23 President - 30:15 press - 6:17 pretty - 24:20 prevail - 26:10 prevented - 17:16 previous - 7:13 principal - 32:11, 32:17 Private - 19:23, 20:1 private - 36:15 pro - 5:4, 5:22, 6:5, 6:6 problem - 9:13, 18:1, 21:22, 25:3, 25:6, 26:11, 28:5, 28:17, 37:15 problems - 8:8, 17:11, 20:25, 21:3, 22:21, 23:16 procedural - 21:24 proceed - 5:11, 13:18, 38:13 proceedings - 18:2 Proceedings - 4:22, 39:15 process - 33:20, 33:21 procures - 30:1 produced - 4:23 product - 21:8, 22:5, 23:24 production - 8:1 professionals - 31:7 profit - 27:15 profits - 27:4, 27:6, 27:8, 27:9, 27:11, 27:18 prompter - 13:16 promptly - 12:8, 12:20, 13:8, 16:23, 17:2 proposal - 7:12, 7:15, 8:9 proposed - 6:25 prospect - 7:23 protect - 28:24 protection - 27:25</p>
<p style="text-align: center;">N</p> <p>narrow - 18:14 national - 31:24, 32:1, 32:3 nations - 19:20, 19:23 nature - 8:20, 16:5, 16:16 Nazis - 22:9 necessary - 6:7, 12:5, 15:2, 18:6, 27:2 necessity - 26:22, 26:23, 27:15 need - 19:3, 26:24, 34:12, 34:13, 38:16 needed - 8:6, 25:3 never - 16:10, 34:8 Nevertheless - 22:20 New - 1:1, 1:8, 2:8, 2:18, 3:2, 3:7, 3:10, 3:14, 3:17, 3:21, 3:24, 4:2, 4:9, 4:12, 4:15, 4:19, 21:11 new - 15:21, 16:4, 18:12 Newark - 3:23, 3:24 next - 11:7, 31:9 non - 18:14, 29:16 non-causation - 18:14 non-judicial - 29:16 none - 34:9 normal - 7:10, 21:2 Normally - 31:4 normally - 31:5 norms - 29:19 Norris - 2:12, 2:15, 6:3 Northern - 6:11 nothing - 33:21, 36:24, 39:13 notice - 10:8, 10:10, 11:20 noting - 5:18 notwithstanding - 16:9 number - 5:22, 7:21, 8:2, 12:23, 20:22, 25:4, 25:9, 35:19, 37:6 Nuremberg - 23:3, 23:8, 25:22, 26:8, 29:22, 30:23 nuremberg - 23:8 Nutrition - 3:12 Ny - 2:18, 3:21, 4:2, 4:9</p>	<p style="text-align: center;">P</p> <p>papers - 26:11, 39:14 Park - 3:9 part - 9:21, 32:23, 33:4, 33:9, 33:13, 36:6 partial - 14:24 participate - 6:15, 10:11 participated - 29:13 particular - 36:25 particularly - 7:25, 9:19, 28:6 parties - 8:23, 11:1, 11:7, 15:16, 18:20, 32:12, 36:15 partner - 6:3 parts - 29:16 party - 15:13, 31:9, 32:13, 32:17, 32:19 past - 7:24 pay - 11:2 Pc - 3:12 pendant - 19:15 pending - 8:10, 12:4, 38:1 Penn - 2:5 Pennsylvania - 2:6 pension - 38:20 people - 10:9, 11:11, 22:9, 24:20, 25:4, 25:12 perhaps - 9:17 period - 7:15, 17:5, 17:6, 22:23, 32:15, 38:13 periodically - 38:5 peripheral - 27:11 person - 34:16 Phase - 9:21, 12:16 phase - 31:9 Phases - 13:4 phases - 9:20, 20:12</p>	

<p>protocol - 28:2, 28:6, 28:12 prove - 14:25 purpose - 18:9 purposes - 9:9, 15:10, 18:2, 27:13 Pursuant - 12:17 put - 12:13</p>	<p>32:19 result - 9:8 results - 25:24 retroactivity - 28:16 returnable - 14:13 returned - 12:21 revealed - 26:13 reverse - 14:16 reversed - 12:11 review - 8:4 reviewed - 31:24 Rhodes- 2:10, 4:4 rights - 13:5, 16:21, 18:18, 18:21, 21:11, 21:23, 23:14 riot - 28:12 Riverdale- 4:1 Rivkin- 3:1 Robert- 2:11, 5:6, 6:1 Rock- 34:3, 36:6 Rockefeller- 4:2 Rod- 2:21 Roden- 2:9, 2:11, 4:4, 6:1, 6:2 role - 30:19 Ruggiero- 3:24 rule - 27:23, 28:20, 30:6, 30:18 rules - 8:3 ruling - 7:14, 10:24, 11:13, 11:25, 31:19, 33:5, 33:8 rulings - 7:20</p>	<p>Skinner- 5:4, 5:6, 5:9, 5:10, 5:13 Smoger- 2:2, 2:3, 11:9, 11:19, 31:14, 31:18, 32:8, 32:25, 33:9, 33:12, 33:25, 34:8, 34:15, 34:24, 35:3, 35:6, 35:10, 35:15, 35:21, 36:1, 36:5, 36:9, 36:14, 36:16, 37:16, 39:5 soil - 30:4 sold - 32:12 soldiers - 30:11, 30:13 solely - 16:6 somewhat - 29:9 sophisticated - 19:17 sorry - 38:5, 38:19 sort - 8:5 South - 30:4, 30:8, 30:9 sparse - 36:10 speaker - 10:24 specification - 33:4, 33:14 spouses - 8:12, 8:25 sprawling - 16:20 sprayed - 24:8, 30:4 spraying - 12:24, 17:22, 24:15 stage - 14:1, 14:5, 15:23, 17:19, 18:9 stages - 14:5 Stan - 6:2 stand - 15:20, 16:2 started - 19:1 starvation - 30:11 state - 19:15, 19:25, 20:2, 21:3, 21:4, 29:10 statement - 32:18 States - 1:1, 1:7, 1:21, 8:25, 12:14, 15:7, 19:21, 19:24, 22:7, 28:18, 30:17, 30:20, 30:24, 30:25, 32:10, 33:17, 33:19, 36:14, 36:18 statue - 38:21 statute - 17:18, 20:25, 21:5, 21:8, 21:10, 21:14, 21:15, 21:22 statutes - 27:1 stay - 10:2 Stengel - 4:9 stenography - 4:22 step - 38:7 Stephenson - 1:15 Steven - 3:3, 7:11, 38:6 Stevenson - 5:3, 5:20, 7:20 still - 8:6, 32:2, 37:16 stipulation - 37:9, 37:12 store - 36:7 Street - 3:13, 4:11 strip - 29:20 studied - 17:25 subject - 7:4, 10:2, 17:6, 19:6, 20:10, 22:23, 23:5, 28:9 subsidiary - 23:5 substantial - 27:8 substantive - 21:4, 21:23, 21:24, 27:21, 28:25 subtle - 24:23 successor - 3:5 sue - 23:10 suffered - 17:21, 17:22 suffering - 38:24 sufficient - 38:11 suggest - 18:11, 27:5 suggested - 20:8 suggesting - 22:5 suing - 9:3 suit - 29:18 Suite - 2:8, 2:14, 2:21, 3:17 summary - 9:24, 10:1, 14:24, 17:3, 20:14, 32:14, 32:21, 33:15, 34:19, 37:10, 38:11 supplement - 10:11 supplied - 23:24 Supreme - 12:13, 12:18, 12:21, 15:3, 15:7, 33:17, 33:19 sustained - 20:22 Sutcliffe - 4:7</p>
Q		
<p>qualitative - 22:8 quantitative - 22:8 questions - 19:14, 27:22 quick - 19:4 quicly - 14:18 quite - 13:2</p>		
R		
<p>Radler- 3:1 raise - 26:22, 31:17, 37:14 raised - 23:16, 26:19, 38:7 raises - 22:21 raising - 31:14, 38:2 ran - 36:10 rather - 12:14 ratification - 28:13 read - 18:23, 25:23, 25:24, 26:6 reading - 18:17, 23:19, 25:20, 26:13 ready - 31:2 real - 30:6 realizing - 24:20 really - 7:23, 7:25 reasonable - 28:24 reasonably - 33:14 receive - 13:7 recognize - 24:24 recognized - 39:6 record - 26:24, 38:17 recorded - 4:22 recused - 12:15 reduce - 13:15 referred - 10:5 refuse - 29:15 regarding - 38:1 regards - 38:20, 39:11 regulation - 19:13 rehearse - 35:17 reiterate - 13:22 reject - 30:21 rejection - 26:8 rejects - 30:17 related - 8:10, 13:6, 18:18 relation - 29:7 relationship - 8:19 relied - 23:14, 35:5 rely - 18:19 relying - 28:17 remains - 24:18 remand - 12:22 remedy - 12:7, 30:5 reopened - 15:9 reopening - 15:8 repeat - 38:8 repeatedly - 11:22, 17:25 Reporter- 4:18 reports - 26:6 represent - 7:2, 9:5, 11:10 request - 7:4 required - 8:4, 19:17, 32:20, 33:4 requirements - 19:25 requires - 15:21 res - 11:24 research - 14:11 respect - 8:13, 10:20, 11:15, 14:6, 14:7, 16:15, 18:20, 19:9, 21:5, 22:11, 26:2, 27:21, 28:2, 32:22, 38:10, 38:18 respectfully - 10:5, 38:10 Respectfully- 26:3 respond - 24:14, 26:18 responsible - 31:6, 32:11, 32:17,</p>	<p>32:19 result - 9:8 results - 25:24 retroactivity - 28:16 returnable - 14:13 returned - 12:21 revealed - 26:13 reverse - 14:16 reversed - 12:11 review - 8:4 reviewed - 31:24 Rhodes- 2:10, 4:4 rights - 13:5, 16:21, 18:18, 18:21, 21:11, 21:23, 23:14 riot - 28:12 Riverdale- 4:1 Rivkin- 3:1 Robert- 2:11, 5:6, 6:1 Rock- 34:3, 36:6 Rockefeller- 4:2 Rod- 2:21 Roden- 2:9, 2:11, 4:4, 6:1, 6:2 role - 30:19 Ruggiero- 3:24 rule - 27:23, 28:20, 30:6, 30:18 rules - 8:3 ruling - 7:14, 10:24, 11:13, 11:25, 31:19, 33:5, 33:8 rulings - 7:20</p>	<p>Skinner- 5:4, 5:6, 5:9, 5:10, 5:13 Smoger- 2:2, 2:3, 11:9, 11:19, 31:14, 31:18, 32:8, 32:25, 33:9, 33:12, 33:25, 34:8, 34:15, 34:24, 35:3, 35:6, 35:10, 35:15, 35:21, 36:1, 36:5, 36:9, 36:14, 36:16, 37:16, 39:5 soil - 30:4 sold - 32:12 soldiers - 30:11, 30:13 solely - 16:6 somewhat - 29:9 sophisticated - 19:17 sorry - 38:5, 38:19 sort - 8:5 South - 30:4, 30:8, 30:9 sparse - 36:10 speaker - 10:24 specification - 33:4, 33:14 spouses - 8:12, 8:25 sprawling - 16:20 sprayed - 24:8, 30:4 spraying - 12:24, 17:22, 24:15 stage - 14:1, 14:5, 15:23, 17:19, 18:9 stages - 14:5 Stan - 6:2 stand - 15:20, 16:2 started - 19:1 starvation - 30:11 state - 19:15, 19:25, 20:2, 21:3, 21:4, 29:10 statement - 32:18 States - 1:1, 1:7, 1:21, 8:25, 12:14, 15:7, 19:21, 19:24, 22:7, 28:18, 30:17, 30:20, 30:24, 30:25, 32:10, 33:17, 33:19, 36:14, 36:18 statue - 38:21 statute - 17:18, 20:25, 21:5, 21:8, 21:10, 21:14, 21:15, 21:22 statutes - 27:1 stay - 10:2 Stengel - 4:9 stenography - 4:22 step - 38:7 Stephenson - 1:15 Steven - 3:3, 7:11, 38:6 Stevenson - 5:3, 5:20, 7:20 still - 8:6, 32:2, 37:16 stipulation - 37:9, 37:12 store - 36:7 Street - 3:13, 4:11 strip - 29:20 studied - 17:25 subject - 7:4, 10:2, 17:6, 19:6, 20:10, 22:23, 23:5, 28:9 subsidiary - 23:5 substantial - 27:8 substantive - 21:4, 21:23, 21:24, 27:21, 28:25 subtle - 24:23 successor - 3:5 sue - 23:10 suffered - 17:21, 17:22 suffering - 38:24 sufficient - 38:11 suggest - 18:11, 27:5 suggested - 20:8 suggesting - 22:5 suing - 9:3 suit - 29:18 Suite - 2:8, 2:14, 2:21, 3:17 summary - 9:24, 10:1, 14:24, 17:3, 20:14, 32:14, 32:21, 33:15, 34:19, 37:10, 38:11 supplement - 10:11 supplied - 23:24 Supreme - 12:13, 12:18, 12:21, 15:3, 15:7, 33:17, 33:19 sustained - 20:22 Sutcliffe - 4:7</p>
	S	
	<p>Sampey - 10:20 sat - 17:15 satisfy - 19:25 schedule - 6:25, 7:17 scientific - 24:19 se - 5:4 seats - 6:18 second - 8:16, 10:9 Second - 12:11, 12:18, 12:22, 20:6, 20:7, 31:2 Section - 20:23 see - 6:18, 9:18, 36:22, 37:2, 37:5 seeking - 6:4, 13:24 seem - 28:15 sense - 7:21, 29:2 sent - 34:6 separable - 8:17 separate - 17:18 separately - 17:17 separation - 29:5, 30:22 sequence - 8:19 series - 20:25, 23:20 serious - 19:10, 19:11, 20:25, 26:12, 27:6, 27:22, 28:5, 28:25, 29:16 seriously - 13:2, 23:15 served - 7:22 set - 7:18, 14:13, 39:15 Seyfarth - 3:15 Shamrock - 3:5 Shaw - 3:15 Shelby - 2:9, 4:4, 6:2 shipping - 25:1 short - 7:17, 11:20 shortness - 13:11 showing - 8:5 side - 31:8 significance - 15:8, 16:21, 24:1 similar - 22:7, 22:21 similarity - 25:17 similarly - 14:20 singular - 31:19 Sit - 37:2 sits - 15:12 sitting - 12:3, 34:20, 36:17 situation - 17:14, 29:24 six - 12:1, 14:10, 14:12, 17:4, 17:6, 17:8, 18:13, 22:23, 31:1, 31:20, 38:13 six-month - 17:4, 17:6, 18:13, 22:23</p>	

<p style="text-align: center;">T</p> <p>tactical - 12:1 Taft- 3:4 Tate- 29:9 telephone - 5:7, 10:21, 31:11 ten - 21:9 Ten- 1:10 tentative - 20:10, 23:6, 25:20, 26:14 tentatively - 26:14 term - 29:3 termed - 26:22 terminal - 38:9 terms - 16:18, 22:8, 27:14, 36:2 testimony - 26:5 Texas- 2:22 Th- 3:12 themselves - 36:11 theory - 29:11, 30:22, 32:24 Third- 3:20 three - 21:11, 33:9, 33:12, 33:13 timing - 24:1 today - 5:11, 6:4, 16:17 together - 11:15, 15:3, 15:4, 31:17, 36:22 tolling - 21:16 took - 32:16 Tort- 19:12, 19:16 tort - 13:3, 13:21, 19:8, 19:20, 21:1, 21:2, 21:25, 22:18, 30:7, 32:24 torts - 13:6 torture - 13:5, 19:22, 21:9 toxic - 13:3, 13:21, 19:8, 21:1, 32:24 toxicologist - 34:17 trade - 21:16 Transcript- 1:20 transcript - 4:22, 37:21 transcripts - 10:25 transferred - 7:4, 10:2 translation - 28:7 treated - 23:7 treatise - 18:21 treatises - 18:23 treats - 15:12 treaty - 19:21, 28:20 trespassing - 30:3 trials - 23:9 troops - 28:24 trump - 30:24 Try- 10:16, 11:3 try - 16:7 trying - 35:15, 35:22, 36:11 turn - 37:3 two - 7:20, 8:8, 20:12, 22:14, 25:10</p>	<p>utilize - 16:7 utilized - 22:16</p>	<p>York - 1:1, 1:8, 2:8, 2:18, 3:2, 3:7, 3:10, 3:14, 3:17, 3:21, 4:2, 4:9, 4:12, 4:15, 4:19, 21:11 yourself - 5:8</p>
<p style="text-align: center;">U</p>	<p style="text-align: center;">V</p>	<p style="text-align: center;">Z</p>
<p>ultimately - 25:4, 27:9 uncertain - 24:18 unclear - 30:16 under - 19:12, 19:24, 20:2, 20:5, 20:23, 21:1, 21:9, 21:11, 23:8, 30:2, 38:20 Under - 19:16, 21:13, 22:15, 29:22 underlying - 34:8, 35:7 understandings - 27:24 Uniondale - 3:2 unique - 26:13 Uniroyal - 4:11 United - 1:1, 1:7, 1:21, 8:24, 12:14, 15:7, 19:21, 19:24, 22:7, 28:18, 30:17, 30:19, 30:20, 30:24, 30:25, 32:10, 33:17, 33:19, 36:14, 36:18 unplumbed - 15:21 unsuitable - 29:17 unsupported - 24:18 unusual - 12:14 up - 6:14, 6:16, 6:17, 6:18, 14:18, 15:2, 16:16, 33:18 utility - 29:4</p>	<p>Valetta - 4:3 vast - 31:22 Velez - 6:5, 6:11 versus - 5:2, 5:3, 10:20, 32:9 Vertac - 32:9, 32:13, 32:16, 32:17, 33:16 Vertec - 32:11 veteran - 9:5, 39:11 veteran's - 38:20 Veterans - 8:12, 15:22 veterans - 8:24, 8:25, 9:4, 11:23, 12:6, 12:12, 12:17, 12:18, 13:4, 13:14, 14:7, 14:8, 14:10, 14:13, 15:4, 16:2, 17:25, 19:18, 22:20 veterans' - 15:20, 20:15 vetted - 16:10 via - 5:7 vice - 5:22, 6:5, 6:7 victims - 13:23, 13:24 Vietman - 2:10, 2:17 Vietnam - 1:4, 2:13, 3:20, 5:1, 5:25, 6:16, 8:25, 9:3, 11:8, 12:17, 12:25, 15:5, 15:8, 21:16, 21:17, 23:2, 24:8, 28:22, 30:4, 30:7, 30:8, 30:9 Vietnamese - 8:11, 9:2, 12:23, 13:15, 13:16, 14:4, 14:6, 14:20, 15:11, 15:22, 16:1, 16:2, 17:5, 17:24, 18:7, 19:6, 22:16, 23:1 view - 13:13, 15:25, 20:10, 21:18, 23:6, 23:11, 23:12, 23:13, 26:7, 26:10, 26:14 views - 18:15 violation - 13:5, 19:20, 19:23, 20:23, 21:10, 25:25 violations - 13:2, 13:6, 29:18 visited - 25:5</p>	<p>Zyklon - 22:3, 22:9, 22:10, 22:13, 23:3, 24:25, 25:23 Zyklon-b - 22:3, 22:9, 22:10, 22:13, 23:3, 24:25, 25:23</p>
<p style="text-align: center;">W</p>	<p>waived - 6:7 waiver - 11:13 wants - 31:16, 37:14 War - 15:8, 21:17, 26:9, 28:2 war - 8:25, 9:6, 12:25, 13:5, 13:8, 18:20, 19:22, 23:13, 27:23, 28:23, 30:12 Warren - 3:8 water - 18:7, 30:14 Watkins - 3:22 ways - 21:24 weaponry - 28:1 weapons - 30:1 Weinstein - 1:21 White - 3:14 Whitney - 3:18 whole - 20:24, 35:18 Wickersham - 3:4 William - 2:19, 3:10, 3:11 Williams - 2:4 willing - 9:15 window - 18:13 wish - 17:1, 17:3, 31:11 wishes - 6:15, 6:17, 10:7, 11:5, 31:8, 31:9 wit - 19:24 World - 26:9, 28:2 world's - 15:14 wrongfully - 20:2</p>	
<p style="text-align: center;">Y</p>	<p>year - 9:25 years - 8:3, 12:6, 15:9, 16:3, 17:15, 18:1, 21:9, 21:11, 24:19, 24:21, 31:23, 32:5, 35:16</p>	