

1  
2 don't ask.

3 MR. BROCK: That's the language from the  
4 notice and from the settlement agreement so  
5 I'm not making up that language. That's the  
6 language that Judge Weinstein used to define  
7 the class.

8 JUDGE VAN GRAAFEILAND: Of course the  
9 important thing, Counsel, from my standpoint  
10 is that at that time at least it was my  
11 opinion, maybe the law has changed since then,  
12 that these chemical companies didn't owe  
13 anybody a dime because they were government  
14 contractors. Now the law has been broadened  
15 some since that time. At that time, and I  
16 said so on one of the opinions I ruled,  
17 because I didn't think they owed anybody  
18 anything, and they came up with \$180 million  
19 in settlement. Now, they must have intended  
20 to include an awful lot of people if they  
21 didn't think they owed anybody any money.  
22 That's what I think is important about this  
23 settlement.

24 MR. BROCK: I think it's also --

25 JUDGE VAN GRAAFEILAND: I can't believe

1  
2 that they didn't intend to include everybody.

3 MR. BROCK: It's also clear that Judge  
4 Weinstein intended to rap things up. He said  
5 numerous times he was -- this was supposed to  
6 end the controversy. He enjoined future suits  
7 of this sort, and that's another basis of our  
8 jurisdiction. Judge Weinstein clearly has  
9 authority here to enforce his prior injunction  
10 against suits like this. He issued the  
11 injunction --

12 JUDGE VAN GRAAFEILAND: Were you  
13 involved in those negotiations before Judge  
14 Weinstein?

15 MR. BROCK: Mr. Sabetta who just spoke  
16 of those negotiations was personally there. I  
17 was not in the room at that time. I was  
18 involved with a case at that time.

19 MR. SABETTA: May I just respond  
20 briefly?

21 JUDGE VAN GRAAFEILAND: Yes.

22 MR. SABETTA: There's no question but  
23 that the chemical companies intended and that  
24 all exposed veterans who then had a claim or  
25 might thereafter make a claim were included in

1  
2 the class and the settlement would not have  
3 occurred absent -- including that tail as it  
4 was referred to during the course of the  
5 negotiation. It was referred to as the tail.  
6 Who else is out there who might sue later.  
7 And we would not have settled this case but  
8 for the inclusion of that tail, people with  
9 after manifested injuries.

10 MR. BROCK: Thank you, your Honor.

11 MR. GORDON: Good morning. My name is  
12 Michael Gordon, and I will address the motion  
13 to dismiss based on res judicata.

14 I would like to begin by addressing the  
15 standing issue which was raised by Mr.  
16 Musslewhite, and I believe Judge Van  
17 Graafeiland, you were also concerned about the  
18 issue of at risk claimants.

19 I think the fundamental point is that  
20 the standing issue is one for the class  
21 representatives. If the standing requirement  
22 is met for the named plaintiffs then the focus  
23 becomes whether the typicality and adequacy of  
24 representation requirements under Rule 23A are  
25 met as to those named representatives. In

1  
2 this case both Judge Weinstein and your Honor  
3 together with two other judges of this Court,  
4 found that there was adequacy and typicality,  
5 and in fact as you anticipated a few moments  
6 ago, the key to the finding of adequacy and  
7 typicality was the centrality of the military  
8 contractor defense. Because of the centrality  
9 of that issue and the fact that that would be  
10 dispositive of all of the plaintiff's claims,  
11 the Court found that there was a commonality  
12 of interest between the class representatives  
13 and between the absent class members, and  
14 therefore a standing was not required on  
15 behalf of the absent class members.

16 Now, the appellant's attorneys have  
17 referred to several cases which they contend  
18 support the proposition that all class  
19 members, not just the named representatives,  
20 have to have standing. And, in fact, if you  
21 look at those cases you can see that they are  
22 really saying something else. In the first  
23 place, the vast majority of the cases that  
24 were cited by the appellants really deal not  
25 with absent class members but just with the

1  
2 named representative, plaintiff himself, and  
3 therefore are inapposite for that reason. In  
4 addition, there are a very few number of cases  
5 where there is some language in which at least  
6 Article 3 and the case in controversy  
7 requirement are mentioned in passing. But if  
8 you look at those cases, in particular I  
9 believe Vietnam Veterans against The War v.  
10 Benekey and the Adashoonus [phonetic] case  
11 which are treated in the briefs, there the  
12 concern was clearly that the definition of the  
13 class was too vague and relied on state of  
14 mind. In the Vietnam Veterans case the class  
15 was defined based on whether the members had  
16 different political views than government  
17 officials in Kansas City. There was no way of  
18 really defining that class, and in the  
19 Adashoonus case which involved learning  
20 disability programs for children in Indiana,  
21 it was a very vague class and the court spent  
22 much time indicating you can't tell if someone  
23 is learning disabled until there's been a  
24 battery of tests and then the experts differ  
25 even after that and so forth. So it was

1  
2 really an unworkable definition.

3 That's not the situation here. The  
4 definition is fine. It is -- the class is  
5 all veterans who were injured by exposure, by  
6 exposure to agent orange in Vietnam, and those  
7 veterans if they didn't absolutely know they  
8 were exposed when they received notice or  
9 heard about this case through the widespread  
10 media attention they would have known enough  
11 to look into the issue and in the event of  
12 doubt make up a mind, either stay in the class  
13 or opt out. And that's a key issue that there  
14 was an opportunity to opt out here.

15 The other cases relied on by the  
16 appellants in addressing this standing issue  
17 are the bankruptcy cases involving asbestos,  
18 and those cases are inapposite because the  
19 issue there is whether people exposed to  
20 asbestos who have not yet manifested injury  
21 are claimants for purposes of the bankruptcy  
22 code. But that's not the issue here. Here  
23 the issue is whether absent class members have  
24 to have standing, and the law is clearly that  
25 they do not.

1  
2 JUDGE CARDAMONE: Mr. Gordon, are you  
3 prepared to discuss - have I got the wrong  
4 defendant here - how this case got in front  
5 of Judge Weinstein to begin with; how this  
6 case got removed --

7 MR. GORDON: Mr. Brock is actually  
8 better able to deal with the Section -- this  
9 is the case right here now under Section 1407  
10 transfer?

11 JUDGE CARDAMONE: How it got removed  
12 from Texas State Court to the Federal District  
13 Court in Brooklyn.

14 MR. GORDON: Yes. That was -- Mr.  
15 Brock is the one to address it, but it was  
16 removed by the defendants from State Court in  
17 Texas to District Court, Federal District  
18 Court in Texas. It was then transferred by  
19 the MDL Panel pursuant to Section 1407 to  
20 Judge Weinstein.

21 JUDGE CARDAMONE: What's the basis of --  
22 why wasn't the issue thrashed out in the Texas  
23 State Courts. Why did it have to be  
24 transferred?

25 MR. GORDON: It didn't have to be

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

transferred. It was removed, and then because it was a related case it was transferred. However, there is no reason the issue shouldn't be thrashed out here. The appellants are having their right of a collateral attack on the class action right here today as they had it below before Judge Weinstein. The issues are the same. It doesn't matter from their --

JUDGE CARDAMONE: The issue being what, whether or not the federal judgment -- the federal settlement barred the state court action?

MR. GORDON: Yes. The res judicata defense would be litigated --

JUDGE CARDAMONE: Why isn't the state court just as competent to decide that issue as a federal court?

MR. GORDON: It is just as competent, your Honor, but the case was removed and transferred. Judge Weinstein received it and Judge Weinstein was certainly competent to deal with the res judicata issue.

JUDGE CARDAMONE: No question about

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

that. But my question is why did it ever get to him in the first place.

MR. GORDON: Well, it got to him because it was removed by the defendants and it was then transferred by the MDL Panel as has been done with 600 other cases over the years.

JUDGE VAN GRAAFEILAND: Is that done by a District Court in Texas?

MR. GORDON: No. The transfer is actually done by the MDL Panel, and the removal --

JUDGE VAN GRAAFEILAND: I understand. But how do it get from state court to federal court?

MR. GORDON: We removed it. Filing a notice --

JUDGE VAN GRAAFEILAND: Who made the order of removal?

MR. GORDON: You don't require an order of removal. It's done by a notice of removal. The judge's order is not required.

JUDGE VAN GRAAFEILAND: Well, did anybody make a motion to have it remanded?

MR. GORDON: Yes. The appellants did in

1  
2 that motion --

3 JUDGE VAN GRAAFEILAND: Before whom was  
4 that made?

5 MR. GORDON: It was made before Judge  
6 Weinstein after the transfer and I believe it  
7 is on appeal right now. That's one of the  
8 issues here today.

9 JUDGE VAN GRAAFEILAND: Well, now --

10 JUDGE CARDAMONE: That's a separate  
11 appeal?

12 MR. GORDON: No. It's part of the  
13 appeal here today. The appellants and aside  
14 from appealing from the grant of the  
15 defendant's motion to dismiss, dismissing the  
16 appellant's claims, they also have appealed  
17 from Judge Weinstein's denial of their motion  
18 to remand the case.

19 JUDGE VAN GRAAFEILAND: Let me ask a  
20 hypothetical if you will. If the plaintiffs  
21 in this action were not class members at the  
22 time of the settlement, would Judge Weinstein  
23 have had the authority to do what he did?

24 MR. GORDON: No. In fact, that's  
25 clearly indicated by what Judge Weinstein did

1  
2 with respect to two of the plaintiffs.

3 JUDGE KEARSE: Excuse me a second. It's  
4 very distracting when counsel keeps standing  
5 when someone else is arguing.

6 MR. BROCK: Excuse me.

7 MR. GORDON: I was going to say that, in  
8 fact, to see what would happen is is indicated  
9 by what happened with two appellants --  
10 excuse me, two plaintiffs in the underlying  
11 action. Those were civilians. They were not  
12 Vietnam veterans. They were civilians who did  
13 work in Vietnam during the hostilities there  
14 because Judge Weinstein --

15 JUDGE VAN GRAAFEILAND: They were  
16 civilians.

17 MR. GORDON: -- found -- they were not  
18 class members and their cases were remanded.

19 JUDGE VAN GRAAFEILAND: Well, that's the  
20 same thing that happened at the first hearing.  
21 There were some civilians involved and their  
22 cases were severed.

23 MR. GORDON: Yes. And actually those  
24 cases were dismissed because they couldn't  
25 show causation but here the civilian cases

1  
2 were not taken by Judge Weinstein. He  
3 remanded them. Now, we believe that was an  
4 error. We've been trying to get a hearing on  
5 that issue which is probably why Mr. Brock has  
6 been standing up.

7 If I could just give the rest of my time  
8 to Mr. Brock to deal with the Section 1442  
9 issue.

10 JUDGE VAN GRAAFEILAND: Let me ask you  
11 one more question if I may.

12 Judge Weinstein went around the country  
13 holding hearings on this thing, did he not?

14 MR. GORDON: Yes. He had five hearings  
15 in major cities.

16 JUDGE VAN GRAAFEILAND: Now, were any  
17 minutes taken of those?

18 MR. GORDON: Yes. Full transcripts were  
19 taken. Those transcripts are part of the  
20 record. They were --

21 JUDGE VAN GRAAFEILAND: Are they in the  
22 record?

23 MR. GORDON: Yes. And they were  
24 reviewed by you and the other members of your  
25 panel five years ago, I believe.

1  
2 JUDGE VAN GRAAFEILAND: So they're in  
3 the record before our Court so we can examine  
4 it if we want to?

5 MR. GORDON: Yes, absolutely.

6 JUDGE VAN GRAAFEILAND: All right.

7 MR. GORDON: Thank you.

8 JUDGE CARDAMONE: Mr. Brock, I wanted to  
9 ask you a question. The same question I  
10 asked, how did this case get from the state  
11 courts of Texas? Why is it in a federal  
12 district court in Brooklyn?

13 MR. BROCK: We removed it under -- it  
14 got here in several ways. First of all,  
15 because we removed it and we claimed that we  
16 have the right to remove because Judge  
17 Weinstein retained jurisdiction to enforce the  
18 settlement agreement and because he entered an  
19 injunction against these suits and has  
20 ancillary jurisdiction to continue to enforce  
21 those orders. Plaintiff's response to that is  
22 that that really didn't happen in this case,  
23 and that's just incorrect. We made those  
24 motions.

25 JUDGE CARDAMONE: But really wasn't

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

it -- is as argued, really a simple issue of res judicata that a state court in Texas is as competent to decide as a federal court in Brooklyn.

MR. GORDON: The other authority we have is under the all writs act, Judge Weinstein ordered these cases removed considering the possibility that the Texas court could have decided the res judicata issue, but in order to ensure consistency of results, in order to proper comity to the state courts, Judge Weinstein found that he should retain these cases and order them removed outside the scope of the removal statutes.

JUDGE CARDAMONE: I notice that nearly fifty percent of the state attorney generals in the United States oppose your position on this issue in the brief they filed.

MR. BROCK: They -- again, that is not something that is directly relevant because Judge Weinstein has made these findings to insure that consistency is central. What the attorney generals are saying --

JUDGE CARDAMONE: I think they think

1  
2 it's relevant because I think they think it's  
3 an undue federal interference with what's  
4 simply a state court issue. These are Texas  
5 plaintiffs, Texas defendants and Texas state  
6 law, and they wonder how Federal District  
7 Court in Brooklyn decided that issue.

8 MR. BROCK: They don't like Judge  
9 Weinstein's decision. Part of it I think is  
10 the veiled message there --

11 JUDGE CARDAMONE: It's a little  
12 reminiscent of this Court's decision in --

13 MR. BROCK: -- and I want to redo it.

14 JUDGE CARDAMONE: -- the Pennzoil case  
15 which the Supreme Court promptly reversed us  
16 on.

17 MR. BROCK: Yes, but the Pennzoil case  
18 is really a case saying that once a matter has  
19 been litigated other court system shouldn't  
20 get involved and start second guessing it. I  
21 think if you look at the Pennzoil case in that  
22 way that's really what's happening here, that  
23 the Texas state court shouldn't be redoing  
24 something that's been finally disposed of in  
25 federal court.

1  
2 JUDGE CARDAMONE: That's your predicate,  
3 Mr. Brock, that the matter was finally  
4 disposed of.

5 MR. BROCK: Yes. The other issue which  
6 we discussed, and I think it's important to  
7 emphasize, the 1442, our right to remove as a  
8 person acting under a federal officer, it's an  
9 absolute right to removal. We have an  
10 absolute right to be in federal court no  
11 matter what, under that, and that applies even  
12 if plaintiff's are not members of a class  
13 action. So that is -- in response to some of  
14 your concerns, that's another way to deal with  
15 this case that avoids the concerns that your  
16 Honor is raising.

17 JUDGE CARDAMONE: Thank you, Mr. Brock.

18 JUDGE KEARSE: Thank you.

19 MR. HAGER: In rebuttal I'd like to  
20 thank Judge Cardamone for bringing this case  
21 back to what the case is actually about. Now,  
22 I fought this case for three years on the  
23 issues of there's an improper transfer. This  
24 Court held in a new ruling, unprecedented  
25 ruling, that there was adherent power to send

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

the case to Judge Weinstein for decision on the jurisdictional issues pending the determination of federal jurisdiction. That's all he had jurisdiction to do. So the issues involved in this case are first, whether the federal courts or the state courts should resolve these issues that Judge Van Grafeiland and I discussed, collusion notice, representation. Secondly, whether Judge Weinstein is the proper judge to handle these issues because the case was improperly transferred. At the time of the transfer there was only one case pending on pre-trial proceedings; the Ivy case. There was no other case. That means that after -- even if the federal courts do have subject matter jurisdiction, we contest that they do not have. This was improperly removed. There's no removal jurisdiction under 1441 because the well-pleaded complaint rule. No question about it. Sarkisian expressly states that only where the previous case was brought under a federal law can a subsequent case be brought under the artful -- to be removed under the

1  
2 artful pleading doctrine. Two judges in this  
3 panel actually decided in an earlier ruling  
4 that these types of causes of actions do not  
5 state any federal cause of action. There's no  
6 federal element to any of our Texas state  
7 claims.

8 Now, the second issue is the Section  
9 1442 issue. This would vastly expand the  
10 caseload of the federal courts if this court  
11 were to rule the vendor of goods to the  
12 federal government is actually an official  
13 working under an officer of the federal  
14 government. We briefed this at length. But  
15 there's no grounds on this one issue. Judge  
16 Weinstein made a finding of fact which you do  
17 apply the abuse of discretion standard. He  
18 found there is actually -- as a matter of  
19 fact, the defendants were not operating under  
20 a federal officer. Therefore, there's no  
21 Section 1442 federal officer removal. There  
22 are other issues there. The amendment to the  
23 complaint adding 1442 -- to the removal  
24 petition adding the 1442 grounds was two years  
25 late. There's a strict Section 1446(b), a

1  
2 thirty day rule on pleading your removal  
3 claims, they're two years late. The issue has  
4 already been denied in this court basically in  
5 the Brown appeal, the separate parallel  
6 appeal. The issue only arose in the parallel  
7 case of the civilian.

8 Thirdly, the corporations under the  
9 Primate case cannot plead the federal officer  
10 removal. Only individual natural persons can  
11 use that so the 1442 is completely out.  
12 There's no 1441 basis. So it's improperly  
13 removed.

14 Secondly is the issue of the Anti  
15 Injunction Act. Now, all of these issues that  
16 would have been discussed here today are  
17 properly resolved in the state court. That's  
18 our contention on appeal. Why? Because  
19 they've never been decided before. In fact,  
20 the issue of whether future claimants can  
21 maintain a class action without individual  
22 representation has never been decided by any  
23 court before. Now, this would be decided for  
24 the first time in state court. Why? Because  
25 the Anti Injunction Act. There's only -- the

1  
2 only exception that could arguably apply here  
3 is the relitigation doctrine which requires  
4 that the issue was previously litigated. The  
5 issue is not previously litigated. The notice  
6 issue is not previously litigated. This  
7 question that Judge Van Graafeiland drew out  
8 during argument of what about this question of  
9 claim injury, what does it mean in the  
10 contract. It's a contract issue. Contract  
11 issues are for state court. That's something  
12 that we bring in the parole evidence that was  
13 submitted for the first time in this court.  
14 This evidence that was discussed here today  
15 was not in the record on appeal -- in the  
16 record in the Ivy case in the District Court.  
17 It was presented by the defendant appellees  
18 here for the first time on appeal. That  
19 evidence, parole evidence on the meaning of  
20 the contract would go before a state court and  
21 be decided. It hasn't been decided before.  
22 The best evidence that it hasn't been decided  
23 before is presented here for the first time on  
24 appeal.

25 Now, the Anti Injunction Act because of

1  
2 the exception of relitigation doctrine doesn't  
3 apply, moots out all these other issues. If  
4 you can't give the remedy of the injunction of  
5 the state court which is what Judge Weinstein  
6 did. We have to remember this is kind of a  
7 schizophrenic ruling here, that he's saying  
8 he's removing it but there's no grounds for  
9 removal but then he's saying on the other hand  
10 I'm also enjoining. But it's not clear which  
11 one he's really doing. There's no grounds for  
12 removal. If he's going to enjoin then he's  
13 blocked by the Anti Injunction Act because  
14 these issues are not being relitigated.

15 The third issue I just have to refer to  
16 briefly is that Judge Weinstein --

17 JUDGE KEARSE: Your time has expired.

18 MR. HAGER: Thank you, your Honor.

19 JUDGE KEARSE: You'll have to rely on  
20 your brief.

21 MR. HAGER: Could I have one point on my  
22 reply brief?

23 We had an issue that my reply brief was  
24 overlong. Should I be filing a motion to file  
25 an amended reply brief of a shorter length so

1  
2 this Court would have the benefit of reply  
3 brief in its liberations?

4 JUDGE KEARSE: Well, the time for filing  
5 a reply brief has expired.

6 MR. HAGER: I filed a timely reply brief  
7 but it was later decided to be overlong.

8 JUDGE KEARSE: My understanding is that  
9 an order had been entered giving you a page  
10 limit for the reply brief, and that was not  
11 complied with. Thereafter there was a motion  
12 to file your reply brief even though it was  
13 exceedingly long, and that was denied. Is  
14 that correct?

15 MR. HAGER: Well, not quite. The  
16 missing fact is that the defendants,  
17 appellees, had filed a very long responsive  
18 brief which was the equivalent of 162 pages,  
19 about 62 pages longer than our principal  
20 brief.

21 JUDGE KEARSE: Didn't the order give you  
22 the right to file a reply brief that was half  
23 the length of the appellee's brief?

24 MR. HAGER: But that was on the  
25 assumption they'd be filing a brief that was

1  
2 approximate equal length to our brief. But  
3 they went ahead and filed an extremely long  
4 brief to which we had to make some answer that  
5 would be a bit longer than just half. I'd be  
6 happy to refile a brief of whatever length the  
7 court deems appropriate but I think we need to  
8 have a reply brief.

9 JUDGE KEARSE: The reason that there's a  
10 deadline for the filing of reply briefs that's  
11 prior to oral argument is that that gives the  
12 appellee an opportunity to respond. The  
13 appellee does not have an opportunity to file  
14 a reply to the reply, and --

15 MR. HAGER: There's no reply to reply.

16 JUDGE KEARSE: That's correct, but if  
17 the reply brief is not filed before oral  
18 argument then the appellee has no opportunity  
19 to address it in oral argument.

20 MR. HAGER: They have addressed things  
21 in our reply brief. I'd add nothing to the  
22 reply brief, just be a matter of shortening it  
23 and having a certain number of pages or just  
24 the number of pages deemed appropriate.

25 JUDGE VAN GRAAFEILAND: Counsel, you say

1  
2 funny things sometimes. You said in your  
3 application that you could find no rule that  
4 limited the length of a reply brief. Now  
5 that's not so, is it?

6 MR. HAGER: No, no. The rule is 25  
7 pages except here we --

8 JUDGE VAN GRAAFEILAND: 25 pages, that's  
9 what the rules says, and you say in your brief  
10 you couldn't find any rule limiting the length  
11 of a reply brief.

12 MR. HAGER: That doesn't complete the  
13 sentence, your Honor, in all due respect. As  
14 I said, where the appellee files a 160  
15 responsive brief --

16 JUDGE VAN GRAAFEILAND: Counsel, that's  
17 not in the rules at all. You said you could  
18 find no rule that limited the length of a  
19 reply brief.

20 MR. HAGER: Where there's 160 page  
21 brief. I cite the rule --

22 JUDGE VAN GRAAFEILAND: Where does the  
23 rule say that?

24 MR. HAGER: I cite the rule of the 25  
25 page limit, but where's there's 160 page

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

responsive brief --

JUDGE VAN GRAAFEILAND: It certainly is -- you said there was no such rule and there is such a rule.

MR. HAGER: No, I cited that. Excuse me, your Honor. I cited the rule for 25 pages. I don't mean to quarrel with the Court, and I appreciate the Court's --

JUDGE VAN GRAAFEILAND: I agree.

MR. BROCK: -- opportunity to address this issue. Thank you, your Honor.

JUDGE KEARSE: Very well. We're going to -- the appellee's brief was filed according to the date stamp that I see here nearly three months ago, and the scheduling order or the ruling with respect to the length of your brief was issued before that, and there was no compliance with that and we're going to deny your motion to file a reply brief at this time. It's too late.

Mr. Musslewhite has a couple of minutes for --

MR. MUSSLEWHITE: Thank you. I have about a half a minute, your Honor. Thank you.

1  
2 First, I want to address what Judge Van  
3 Graafeiland was talking about earlier, and  
4 that is standing the entire panel perhaps has  
5 understood on that issue, and I'd like to say  
6 something. I believe it's very important  
7 because I believe it's dispositive to this  
8 case.

9 Counsel for the appellee said a few of  
10 the decisions cited in my little book, 20 page  
11 blue brief, it is the only brief filed except  
12 for the reply brief, mentioned that in passing  
13 that Article 3 standing was required of each  
14 class member but it was not mentioned in the  
15 classing. I'll just read from a couple of  
16 cases, and I quote, and I'll do it very  
17 slowly.

18 "Each class member must have standing to  
19 bring the suit in his own right in order to be  
20 bound by class action judgment," and that's  
21 the key to this case. There is no  
22 constitution, whether we like it or not,  
23 whatever the defendants thought they were  
24 getting in the bargain, there's no  
25 constitutional way a person who did not have

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

injury under prevailing law and the weight of authority in this country today could have had Article 3 standing at the time that the settlement was entered into. And if it didn't have Article 3 standing the court has no right to assert jurisdiction as to them at that time, and if they did not have the right to assert jurisdiction as to them at that time they have no right -- Judge Weinstein was clearly erroneous in denying the remand motion because all these reasons, all these reasons for denying the remand motion center upon whether or not they were members of the class constitutionally or directly.

JUDGE VAN GRAAFEILAND: Let me ask you specifically. If they were members of the class would Judge Weinstein have jurisdiction over them?

MR. MUSSLEWHITE: He would have no -- no, he would not. No.

JUDGE VAN GRAAFEILAND: Even if they were members of the class he would not?

MR. MUSSLEWHITE: Not removal jurisdiction. And the reason be it the

1  
2 collateral attack doctrine. They had the  
3 right to bring the suit in state court.

4 JUDGE VAN GRAAFEILAND: Counsel, if they  
5 were members of the class are you arguing that  
6 Judge Weinstein would have no jurisdiction  
7 over them?

8 MR. MUSSLEWHITE: He had jurisdiction  
9 back in '84 if they were members of the class,  
10 yes, your Honor.

11 JUDGE VAN GRAAFEILAND: If they were  
12 members of the class.

13 MR. MUSSLEWHITE: But I'm saying that  
14 the law of these United States in my opinion,  
15 and I may be wrong, is that any absentee  
16 member whether he was injured at the time or  
17 not injured at the time, has a right to  
18 collaterally attack that judgment in a  
19 subsequent suit. That's discussed in the  
20 Harvard Law Review article cited in -- with  
21 case citations. And they have --

22 JUDGE VAN GRAAFEILAND: Counsel, as I  
23 see this case is a very simple issue. Were  
24 they members of the class or weren't they? If  
25 they were, then I would suggest, maybe rightly

1  
2 or wrongly, that Judge Weinstein has  
3 jurisdiction.

4 MR. MUSSLEWHITE: Well, I respectfully  
5 disagree --

6 JUDGE VAN GRAAFEILAND: All right, you  
7 may disagree but I'm just suggesting to you  
8 how this problem should be resolved. Maybe it  
9 won't be resolved that way. I don't know.

10 MR. MUSSLEWHITE: So the record's clear,  
11 he certainly had -- if they were members of  
12 the class they had jurisdiction at the time of  
13 the settlement.

14 JUDGE VAN GRAAFEILAND: And he continues  
15 jurisdiction over them.

16 MR. MUSSLEWHITE: But I respectfully say  
17 once more time and then I'll go onto another  
18 subject, that because of the collateral attack  
19 route any absentee member who was not there  
20 and not -- did not receive notice, was not a  
21 part of the proceedings themselves, not a  
22 representative, has a right later to attack  
23 that settlement on the grounds of inadequate  
24 notice and inadequate representation.

25 One last thing that I'll say and that's

this, your Honor, that I do agree that it's a question of abuse of the removal power. I think here we have the Shamrock Oil & Gas case cited in my brief says the court only has limited narrow strict removal jurisdiction. I believe that was exceeded in this case, and I respectfully submit that that abuse of power should not -- this court should not allow that precedent to be set.

Thank you very much.

JUDGE KEARSE: Thank you. We'll reserve decision.

-ooOoo-

I hereby state that the foregoing is a true and accurate transcript of the minutes of this hearing, to the best of my ability.

  
NEIL M. SEFF, REPORTER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

LASER STOCK FORM B

THE CORBY GROUP 1-800-255-5040

