



1 (Jury not present.)

2 THE COURT: Yes, sir. Do you want to put something  
3 on the record?

4 MR. OGIBA: Your Honor, we've talked before you came  
5 in, and we understand that you are going to order a mistrial  
6 in the case.

7 We would just request that the proceedings be stayed, and  
8 that your -- and that no additional discovery be had before  
9 the new trial is scheduled. And that your rulings on our --  
10 on evidentiary motions and on our motions in limine be the law  
11 of the case, pending the new trial.

12 THE COURT: Any problem with that?

13 MR. BEN DEEVER: No, sir, we have no objections.  
14 However, I believe there was possibly two depositions, one of  
15 Walter Mackem and Charles Borg.

16 THE COURT: Okay.

17 MR. OGIBA: With Walter Mackem we had --

18 THE COURT: Do it this week.

19 MR. OGIBA: Yeah, we could do it this week.

20 THE COURT: I mean, you said you were going to do it  
21 this week.

22 MR. OGIBA: Right, we were going to do it this week,  
23 and we would like to reserve the right the depose him.

24 THE COURT: Same thing with the other one?

25 MR. OGIBA: Yeah, we had no notice of this other

1 witness prior to yesterday, I guess. But we have no desire to  
2 take his deposition.

3 THE COURT: Who's this guy?

4 MR. BEN DEEVER: Mr. Charles Borg.

5 THE COURT: Where did he pop up?

6 MR. BEN DEEVER: He was basically to come in and --  
7 as far as the allegations of the ARVN regiment coming  
8 together, this gentleman was basically in charge of all ARVN  
9 regiments in that area, he was the liaison. And he would be  
10 called to refute the testimony, and show that there was no  
11 consolidation of any ARVN regiment to come down to An Phu.

12 THE COURT: Okay. Well, not ruling that he could --  
13 can or cannot testify, I'll just leave that open to another  
14 day. If you want to take his deposition, you're welcome to do  
15 so, but that's not saying that I'd let him testify in the next  
16 trial. Because, you know, there's something in some rules  
17 that say you don't have to identify rebuttal witnesses.

18 MR. OGIBA: That's right.

19 THE COURT: So if this is a rebuttal witness, then it  
20 probably doesn't have to be identified, and they could  
21 probably be called in rebuttal. So you may -- but you get  
22 into that, and if you want to take his deposition by telephone  
23 or anything like that, y'all are working together pretty well.

24 MR. OGIBA: Okay. Besides him, could we just, I  
25 mean, cut it off at that point?

1 THE COURT: Yeah.

2 MR. OGIBA: I mean, no more surprise witnesses.

3 THE COURT: I think that's probably a good idea.

4 MR. BEN DEEVER: Yes, sir. So it would just be

5 Mr. Mackem and Mr. Borg.

6 THE COURT: That's fine. All right. Now, and so my  
7 next jury is coming in on January 4th; my next term starts  
8 January 5th. I know everybody is spread out all over the  
9 country, so if you can get together and pick a Monday between  
10 January the -- whatever the next Monday is -- all the way  
11 through the middle of first of March, pick a date and let me  
12 know what the date is, okay?

13 MR. OGIBA: So January 5th is out, that week of  
14 January 5th is out?

15 THE COURT: That's fine. I don't know whether you  
16 want to start on a Wednesday and make sure you get to stay in  
17 town over the weekend, I don't care. I mean, or pick a date,  
18 I don't care. It's easier to start on Monday and finish up on  
19 Thursday or Friday.

20 Also, what you may want to think about, if you got a  
21 verdict, they've got no money, okay?

22 MR. BEN DEEVER: Yes, sir.

23 THE COURT: If you got a verdict, they've got no  
24 money. So looks like to me we're trying this case over who's  
25 telling the truth. Okay? So if you were to try the case and

1 have the verdict form say plaintiffs are telling the truth,  
2 defendants are telling the truth, then you skip all the  
3 defamation, all that kind of stuff. Because I mean, I'm just  
4 thinking out loud, all right? I can't do that without your  
5 consent. You know, this is a defamation case, but what your  
6 client wants to say is he's telling the truth, and what your  
7 clients want them to say is he's not telling the truth, we're  
8 telling the truth. And if the jury decides that issue, then  
9 that issue is decided. Because getting a verdict for any  
10 money is irrelevant, because there's none there. But that's  
11 up to y'all. Okay?

12 MR. OGIBA: That's right, Your Honor.

13 MR. BEN DEEVER: Understood.

14 MR. OGIBA: I think that's been our understanding, I  
15 think that's been a trial on principle.

16 THE COURT: But a trial on principle, the principle  
17 is, who's lying, all right? And that's the reason why I  
18 didn't want to do this nonjury, because I'm not good at  
19 figuring out who's lying. Those folks over there are very  
20 good at figuring out who's lying. All right? So you might  
21 want to think about that. That would certainly streamline,  
22 number one, the trial, and number two, it would streamline  
23 the, you know, the final -- the instructions, and it would  
24 streamline everything else. But y'all think about that. You  
25 talk to Mr. Bachrach about that. I don't care.

1 MR. OGIBA: Okay.

2 THE COURT: Okay? Anything else? Do you want to get  
3 your exhibits and your books back and everything like that?

4 MR. BEN DEEVER: Yes, sir. And I believe there was  
5 one other as far as the jury notes. I don't know how the  
6 Court wants to handle the notes.

7 THE COURT: We'll destroy the jurors' notes. We'll  
8 shred those.

9 Now, the most important thing, is how is your father  
10 doing?

11 (Discussion held off the record.)

12 THE COURT: Anything else we need to do? All right,  
13 everybody have a happy Thanksgiving and a good Christmas, and  
14 I'll see you next year.

15  
16 (Court adjourned at 9:44 a.m.)

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