

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re: :
 :
Subpoena for video deposition : April 29, 1997
of Thomas Osdene :
 : Misc. No.
 : 3:97MC05

TRANSCRIPT OF CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, ESQS.
Charleston, South Carolina
BY: EDWARD WESTBROOK, ESQ.
ALEXANDRA WAGNER, ESQ.

Counsel on behalf of the Plaintiff

MAYS & VALENTINE, ESQS.
Richmond, Virginia
BY: ROBERT L. BROOKE, ESQ.

HOWREY & SIMON, ESQS.
Washington, D.C.
BY: GARY H. NUNES, ESQ.

Counsel on behalf of Thomas S. Osdene

SANDRA M. BEVERLY, RPR
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT

1 THE COURT: All right. I have a court reporter.
2 Please identify yourselves for the record now and when you
3 speak.

4 MR. WESTBROOK: Judge, from down in Charleston, South
5 Carolina for the plaintiff, Ed Westbrook. I'm here with Alex
6 Wagner.

7 MR. NUNES: Good afternoon, Your Honor, Gary Nunes
8 from Howrey & Simon, representing Dr. Thomas Osdene.

9 MR. BROOKE: Good afternoon, Your Honor, Rob Brooke
10 from Mays & Valentine. I'm local counsel for Doctor Osdene.

11 THE COURT: All right.

12 MR. NUNES: Judge Payne, Gary Nunes speaking. Todd
13 had called me last week and said it was appropriate to have a
14 status conference at the time to apprise the court of what is
15 occurring with respect to this deposition.

16 As Your Honor will recall, we were last before you on
17 April 3rd, and at that time, we informed you that the state of
18 Minnesota had refused to participate jointly with the state of
19 Texas in one deposition of Doctor Osdene to be conducted
20 consistent with your orders in the Texas matter.

21 And at that time, we also agreed with Texas, they were
22 kind enough to agree with us to postpone or adjourn the
23 deposition until May 13th to allow us the opportunity to go to
24 the Virginia state court on a motion for protective order
25 regarding the Minnesota subpoena.

1 THE COURT: Right.

2 MR. NUNES: We did do that. We filed a motion for
3 protective order in the Circuit Court of Richmond, the court
4 from which the subpoena issued, and a hearing had been scheduled
5 for tomorrow at three o'clock before Judge Hughes.

6 On April 25th, we received a copy of a letter from the
7 lawyers for the state of Minnesota to Donna Lithgow, I guess the
8 deputy clerk of the Richmond Circuit Court, advising the
9 Richmond Circuit Court that they were withdrawing their
10 subpoena, and that they claim that they're withdrawal of the
11 subpoena is based on the fact that issues that have arisen with
12 respect to Doctor Osdene's deposition they believe are more
13 appropriately resolved by the trial judge in Minnesota.

14 We are perplexed by their actions, and we just believe
15 that what they are doing is trying to thwart our interest in
16 having one deposition. So, in any event, that's where it stands
17 with respect to Minnesota.

18 There was also, Your Honor, another matter, a
19 sensitive matter, which I thought it would be appropriate to
20 discuss with the court at this time, which I think makes it all
21 the more reasonable to try to have these depositions together
22 and which may obviate at least the need for Texas, the lawyers
23 for Texas, to spend four hours with Doctor Osdene.

24 And I would just ask that, consistent with Your
25 Honor's April 3rd ruling regarding the contents of the

1 deposition, that this discussion be maintained under seal.

2 THE COURT: Well, do you have any objection to that?

3 MR. WESTBROOK: Your Honor, this is Ed Westbrook. Not
4 knowing what counsel is about to say, I don't object. I don't
5 have any objection right now.

6 THE COURT: It's kind of hard to object in the blind,
7 isn't it?

8 MR. NUNES: Yes, Your Honor. I understand that. I
9 wanted to preface my comments. I will go ahead. I think Mr.
10 Westbrook would understand.

11 THE COURT: All right. Well, Mr. Nunes, wait one
12 minute. As I understand it then there is no proceeding in front
13 of the Circuit Court of the City of Richmond anymore; is that
14 right?

15 MR. NUNES: Your Honor, the hearing has not been
16 canceled.

17 THE COURT: Oh, okay.

18 MR. NUNES: As of now, I believe it will be probably
19 likely that we will be appearing in the Circuit Court of
20 Richmond.

21 MR. WESTBROOK: Gary, didn't you say that Minnesota
22 had withdrawn their subpoena?

23 MR. NUNES: They have indicated they have withdrawn
24 it, but the hearing -- as I understand, there has been no
25 postponement of the hearing.

1 MR. WESTBROOK: Well, the judge I used to clerk for
2 said, when you win, sit down.

3 MR. NUNES: Well, I understand that.

4 THE COURT: I will leave that to you, but that's
5 fine. As I understand it, you all have agreed to reschedule the
6 dates in May. The reason I had Mr. Greenberg call you was
7 because I wanted to make sure that if I was still, as was the
8 original plan, either supposed, myself, to be available to deal
9 with any difficulties during the deposition or to have a
10 magistrate judge available, that I could make those plans. And
11 it was very important to us because we are one judge down right
12 now.

13 So we were trying to -- I was trying to get my
14 logistics straightened out. I'm glad to have this report, and I
15 understand you are still going forward on May 12th or 13th, or
16 whatever it is. Is that right, Mr. Nunes, or not?

17 MR. NUNES: I believe it's the 13th.

18 THE COURT: All right. Whatever dates they were, are
19 you still going forward then?

20 MR. WESTBROOK: Your Honor, Ed Westbrook. We
21 discussed this morning the dates, and that's our intention to go
22 forward beginning on Tuesday the 13th.

23 THE COURT: All right. Then there will be somebody
24 from here available to handle any problems that arise should
25 that be necessary. You can just call Ms. Hooper. She will know

1 what to do.

2 Now, Mr. Nunes, you had something else that you want
3 to raise, and what is it now?

4 MR. NUNES: Your Honor, as the court may know, there
5 is a parallel criminal investigation that's being conducted into
6 the tobacco industry by the Department of Justice. We recently
7 met with the Department of Justice to ascertain Doctor Osdene's
8 status with respect to that investigation, especially in light
9 of the fact that there were these pending civil depositions.

10 The Department of Justice made it clear to us that at
11 this point in time, Doctor Osdene's role, as the former Director
12 of Research for Philip Morris, is within the scope of their
13 investigation.

14 We advised them of the pending civil depositions and
15 asked whether he would be immunized, given his age, his health,
16 his position in the company, etcetera. And while Justice agreed
17 that he may be a candidate for immunity, they would not immunize
18 him at this time.

19 So in light of that situation, with respect to the
20 criminal investigation, it is our intention to advise Doctor
21 Osdene to assert his Fifth Amendment privilege in any civil
22 deposition to be held until this investigation is concluded or
23 he is immunized.

24 And that's why I'm asking that this be placed under
25 seal, and I thought that, in light of that disclosure, that the

1 State of Texas may not need their four hours with Doctor Osdene,
2 and perhaps we can have a shorter time period.

3 MR. WESTBROOK: Well, this is Ed Westbrook, Your
4 Honor. Certainly, until we get there and start asking the
5 questions, I don't know if we will touch on anything that Doctor
6 Osdene will find potentially a concern or not.

7 But as the court is to be concerned over the last two
8 hearings, we are concerned that Doctor Osdene, like all of us,
9 isn't getting any younger. So I think it's our preference to go
10 ahead and let's see where we go. This is the first I've heard
11 about there particular situation. I guess until we get to that
12 bridge, we won't know whether it's a problem or not.

13 THE COURT: Well, it seems to me that the usual
14 practice is to require a witness to assert the privilege
15 question by question, because only then can you really determine
16 anything. Isn't that the way it's usually done, Mr. Nunes?

17 MR. NUNES: Your Honor, I understand that. But I'm
18 just stating for the benefit I thought this might help the
19 plaintiffs in terms of -- in light of the fact that his role as
20 the former Director of Research, which is I believe the
21 questions that they are going to be asking him about, that any
22 question of that nature is going to prompt that response, given
23 this investigation.

24 THE COURT: Well, it might. I don't know. I
25 certainly don't know that, and I would assume if he claims the

1 Fifth Amendment, there is not much we can do about it, is there,
2 Mr. Westbrook?

3 MR. WESTBROOK: Well, I guess a number of things could
4 happen between now and then. DOJ may decide something one way
5 or the other. Doctor Osdene may feel that it's his privilege to
6 assert if he wants, but he may feel that the questions we are
7 asking him are not areas he has any concerns about and answer
8 them freely. I'm like Your Honor, I don't really know until we
9 get to it what Doctor Osdene's responses are going to be.

10 THE COURT: Well, your plan would still be to continue
11 with the deposition, Mr. Westbrook?

12 MR. WESTBROOK: Yes, Your Honor.

13 THE COURT: All right. Well, then we go forward with
14 the deposition. Where is it going to be?

15 MR. NUNES: It will be at Mays & Valentine, Your
16 Honor.

17 THE COURT: Have you all worked out the videotaping
18 arrangements and so forth?

19 MR. WESTBROOK: This is Ed Westbrook. I think we
20 have.

21 THE COURT: As long as you are happy with them, that's
22 fine.

23 MR. WESTBROOK: While we are on the phone, Your Honor,
24 I did want to inquire of counsel. We had an agreement on some
25 documents to be sent to counsel that would be used in Doctor

1 Osdene's deposition from the Philip Morris files. We had sent
2 those over there.

3 I believe the former counsel for Doctor Osdene said he
4 didn't see there should be any questioning of Doctor Osdene
5 about the authenticity of documents. He thought Philip Morris
6 should agree to the authentication. The documents came from
7 their files.

8 Although Doctor Osdene has now different counsel, we
9 are assuming that we are still operating under that theory, and
10 I am not planning on taking time with Doctor Osdene to
11 authenticate the Philip Morris documents.

12 THE COURT: All right. Mr. Nunes, where do you stand
13 on that?

14 MR. NUNES: I'm sorry, what was the agreement you had
15 with the former counsel?

16 MR. WESTBROOK: Part of the agreement was, we are
17 going to send forty Philip Morris documents that we choose with
18 Doctor Osdene in advance so he can have a chance to discuss this
19 with Doctor Osdene.

20 MR. NUNES: Right.

21 MR. WESTBROOK: And that the question that came up is
22 whether we could send more than forty, and counsel said, no, he
23 didn't think any more than forty would be necessary, especially
24 since he didn't see there was any need to take time with Doctor
25 Osdene on authentication because Philip Morris should be

1 expected to agree to the authentication of documents that come
2 from its files.

3 I understand you can't bind Philip Morris, but we are
4 operating under the ground rules that we had with the former
5 counsel, that is that we are not going to ask Doctor Osdene
6 about authentication of documents and take up part of our
7 precious four hours under that assumption.

8 MR. NUNES: Are you asking me to stipulate to their
9 authenticity?

10 MR. WESTBROOK: No, I don't think you can do that.
11 But are you aware of that correspondence?

12 MR. NUNES: I'm not -- well, I looked at the
13 correspondence, and while that, in particular, does not stand
14 out, I will contact Williams & Connolly with regard to that, and
15 I'm willing to try to work something out with you on that.

16 MR. WESTBROOK: Okay.

17 THE COURT: The other way to solve the problem, of
18 course, is for you to tender written questions on matters of
19 authenticity and ask those if you can't work this out.

20 MR. WESTBROOK: Okay.

21 THE COURT: In other words, if you have any questions
22 of Doctor Osdene about authenticity, you can ask him whatever
23 you need to ask by way of written questions.

24 MR. WESTBROOK: I understand, Your Honor. I think we
25 should be able to work it out among counsel for the company and

1 counsel for the witness ourselves.

2 THE COURT: Yes. But have you given everybody who is
3 involved copies of the forty or so documents as to which you
4 wish to use in the questioning?

5 MR. WESTBROOK: Your Honor, I believe we sent them to
6 Doctor Osdene's counsel. I have to check to see whether counsel
7 has been -- all other counsel has received copies of those
8 documents.

9 THE COURT: I think you ought to do that,
10 particularly -- It's Philip Morris documents you say?

11 MR. WESTBROOK: Yes, the forty are Philip Morris
12 documents. That was a related matter. I wanted to be sure
13 everybody was clear on the record. We would intend to ask
14 Doctor Osdene about publicly available reports that everybody is
15 familiar with, like the Surgeon General's report, etcetera, and
16 we haven't sent copies of those voluminous documents in
17 advance. But we have sent the Philip Morris documents that
18 Doctor Osdene was personally involved in.

19 THE COURT: Yes. But I think it would be helpful to
20 your deposition, Mr. Westbrook, if you give him all the
21 documents you are going to ask him about so that you won't spend
22 any of your time with him reading documents.

23 I mean, they may be voluminous. I don't know how big
24 these reports are, but I think that it would be to your
25 advantage to give them all the documents you are going to ask

1 him about so he won't spend any time with him sitting there
2 having to read documents. You can't ask a witness a question
3 about the document unless the witness has seen the document.

4 MR. WESTBROOK: Your Honor, I think your suggestion is
5 well-taken and there probably won't be a large number of those.
6 I think that might speed things along. I would hope then --
7 and, of course, we can't predict in advance that when we hand
8 Doctor Osdene the Surgeon General's report from 1964 that he
9 won't take thirty of our first sixty minutes saying he had to
10 read the document.

11 THE COURT: Well, he better not because if he does,
12 he'll be facing some additional time. That's the purpose of
13 requiring you to give these documents ahead of time.

14 MR. WESTBROOK: I think your suggestion is well-taken,
15 and we will set about to do that and work that out with counsel.

16 THE COURT: I don't think you will see Mr. Nunes pull
17 a stunt like that.

18 MR. NUNES: No. But, Your Honor, I should say, even
19 with respect to documents, that may implicate the Fifth
20 Amendment as well.

21 THE COURT: Mr. Nunes, if it does, it does. That I
22 cannot deal with.

23 MR. NUNES: Okay.

24 THE COURT: That's a matter between you and your
25 client. But I'm just talking about having him sitting there

1 reading documents after they have given them to you ahead of
2 time.

3 MR. NUNES: I understand that, Your Honor.

4 THE COURT: All right. Thank you all very much for
5 the report, and I will assume that there is no need to have a
6 telephone call tomorrow as you had planned to do following that
7 state court hearing because it sounds to me like there may not
8 be one. If for some reason you need a telephone call, I will be
9 around tomorrow afternoon.

10 MR. NUNES: Your Honor, there is one additional issue,
11 and again it goes back to this sealing point.

12 THE COURT: That was the next thing I was going to
13 raise. Is there any need to seal this now? He's going to be in
14 a deposition. He's going to claim the Fifth Amendment.

15 MR. NUNES: Well, yes, Your Honor, because, Your
16 Honor, on April 3rd, at our urging, because of the fact there
17 has been information disclosed from depositions in the past, and
18 to decrease the stress on Doctor Osdene, you entered an order
19 saying the contents of the deposition should not be disclosed to
20 anyone other than the litigants until such time as that
21 application is made to the Texas court. If the Texas court sees
22 fit at that time to disclose it, then so be it.

23 So in order to effectuate that, Your Honor, we would
24 just ask that the deposition be sealed so that if the plaintiffs
25 do apply to the Texas court that any pleading they file would

1 not mention what went on at the deposition, including the
2 assertion of the Fifth and, likewise, that there be no mention
3 of this conference, that this be under seal as well.

4 MR. WESTBROOK: Your Honor, Ed Westbrook for the
5 plaintiff. We have some significant concern about sealing this
6 deposition. Even in these conferences have gone on with the
7 court, and there have been numerous depositions that have been
8 taken, and they have generally been normal depositions.

9 I've been at a number of them, except for when counsel
10 for the defense designate some trade secret information -- and I
11 do acknowledge, Your Honor, that you had issued an order I think
12 before the last hearing on sealing the deposition, but we don't
13 see that there is judicial cause for it to be done, and we do on
14 the record oppose that.

15 MR. NUNES: Your Honor, we would disagree, given the
16 health situation of Doctor Osdene, that anything to hit the
17 press -- and we see that everything is hitting the press with
18 respect to tobacco litigation -- is like to increase the stress
19 on Doctor Osdene.

20 Your Honor has already entered into an order or
21 entered an order for that purpose in this litigation. I think
22 it's appropriate, and Your Honor was seeking to preserve the
23 status quo until otherwise directed by the United States
24 District Court for the Eastern District of Texas. So we think
25 it is highly appropriate, given Doctor Osdene's health, that

1 this matter be kept under seal until such time that the Texas
2 judge rules otherwise.

3 THE COURT: Well, as I understand it, basically, I
4 have held -- well, I don't have my April 3rd order here. What
5 does it say?

6 MR. NUNES: Your Honor, I can read it for you.
7 Specifically, paragraph five of your order states: The
8 deposition of Mr. Osdene shall be used solely for purposes of
9 this litigation only. Neither the deposition nor its contents
10 may be released to or made available to anyone other than
11 counsel in this litigation and the staff of counsel.

12 This provision of this order shall remain in effect
13 unless and until it is otherwise directed by the United States
14 District Court for the Eastern District of Texas, Texarkana
15 Division, in which this action is pending. It being the
16 intention of this court to preserve for that court the decision
17 respecting the disclosure of the deposition or its contents.
18 Any person found to have violated this provision shall be
19 prosecuted to the full extent of the law.

20 Your Honor, that was entered after we had discussion
21 about Doctor Osdene's health and an incident that occurred with
22 respect to a deposition taken by the plaintiffs in Richmond that
23 ended up in the Richmond Times.

24 MR. WESTBROOK: Your Honor, Ed Westbrook. We don't
25 see any basis for sealing the deposition, other than on the

1 ground traditionally used, that is, sensitive trade secrets
2 should be redacted from the deposition, something along those
3 lines.

4 Doctor Osdene is a citizen, bound like any other
5 citizen to give evidence in a public form. There is no grounds
6 for sealing this deposition.

7 THE COURT: Well, that's really going to be a matter
8 for the Texas court to deal with. I kept it under seal or I
9 kept it confidential so the court can decide what it wants to do
10 with it. That's not within my province, I don't think.

11 The only thing I'm concerned about is causing problems
12 that slow down this deposition or that impair in any way the
13 health of the deponent, given the record that's been submitted
14 to me. If I recall correctly, there was -- and I'm not sure
15 about this, but by recollection is there was no objection to my
16 doing what's in paragraph five of the order.

17 MR. NUNES: That is my recollection, too, Your Honor.
18 In fact, it was I believe Mr. Motley who was on at the time. I
19 believe Alice Wagner was present during that conference as well.

20 THE COURT: Well, whatever. That transcript will
21 reflect whatever it is that is in there. My recollection is far
22 from perfect. And if it is the plaintiff's desire that they
23 wish some revisitation of that, that provision of the order,
24 then they are going to have to file a motion and deal with it in
25 the ordinary course of things because there is already an order

1 that's been entered.

2 Now, with respect to this transcript, I don't see
3 there is any need to seal this transcript. Why is there a need
4 to seal this transcript?

5 MR. NUNES: Well, Your Honor, I think because it
6 involves what will take place at the deposition, and, therefore,
7 it would serve the same purpose in terms of Doctor Osdene is
8 going to be asserting the Fifth, that should likewise be kept
9 confidential and sealed at this time because it deals with what
10 is going on in that deposition. It would defeat, I think, the
11 purpose of Your Honor's order in paragraph five.

12 MR. WESTBROOK: Your Honor, Ed Westbrook. We
13 certainly disagree with that. Now to go back and seal the court
14 orders about how depositions are to be conducted, I've never
15 heard -- I've been in practice twenty years, but I've never
16 heard of that.

17 THE COURT: Mr. Westbrook, I don't think he's asking
18 for sealing the court order.

19 MR. WESTBROOK: I think he's asking to seal the
20 transcript of this hearing in which the court has made the
21 ruling.

22 THE COURT: I haven't made a ruling yet, but I'm going
23 to, but I haven't made one yet. So I assume, Mr. Nunes, that
24 what you want sealed is only that part of the transcript which
25 deals with the information you gave that he's going to claim the

1 privilege.

2 MR. NUNES: That is correct, Your Honor.

3 THE COURT: All right. Now that you know what he's
4 talking about, Mr. Westbrook, what's your objection to sealing
5 that part of it?

6 MR. WESTBROOK: Your Honor, we object to that because
7 if someone is invoking a constitutional privilege, it's the
8 constitutional privilege that you invoke such a privilege in
9 secret -- or he hasn't even invoked it yet. Counsel has said
10 it's his intention to invoke it if some questions are asked that
11 he feels may somehow implicate some sensitive interest of his.

12 I don't think there is any ground for sealing
13 counsel's statement about what his client may do if something
14 else happens hypothetically when the privilege is a
15 constitutional right.

16 MR. NUNES: Your Honor, I find this argument difficult
17 in the sense that Mr. Motley agreed to it. And, further, I was
18 making this disclosure here for the convenience of the
19 plaintiffs so that they would not be taken by surprise. I could
20 have waited until such time as the deposition.

21 And it seems to me, to preserve the status quo and to
22 be consistent with Your Honor's order as in paragraph five, and
23 I don't understand what possibly the plaintiffs could do with
24 this transcript and why they would object unless their objective
25 is to immediately run to the press with this.

1 MR. WESTBROOK: No, Your Honor. First of all, let me
2 correct the record. This is Ed Westbrook. I don't think Mr.
3 Motley ever agreed to anything concerning the Fifth Amendment.
4 I think the first we heard about it was a few minutes ago. And,
5 second, Your Honor --

6 THE COURT: Now, wait a minute, Mr. Westbrook. He
7 wasn't saying that. He was saying that Mr. Motley agreed to the
8 provision of the order of April 3rd that is in paragraph five
9 saying that this matter respecting disclosure of the deposition
10 contents should be preserved for the district court in Texas,
11 not here.

12 MR. WESTBROOK: Yes, sir, Your Honor. I understand
13 the court's ruling on that. Certainly, we respect the court and
14 adhere to its ruling.

15 THE COURT: Just get the transcript and see what Mr.
16 Motley agreed to. I don't remember one way or the other. I
17 cannot imagine that I would have put that provision in there sua
18 sponte however. I have a recollection in general terms that it
19 was something as to which the parties agreed at the time or I
20 wouldn't have put it in there.

21 Certainly, I would have required a hearing on it if I
22 had thought it was a matter in dispute. So now we are only
23 talking about the fact that -- about giving part of this
24 transcript the same treatment, Mr. Westbrook, I believe is what
25 we are talking about.

1 MR. WESTBROOK: Yes, sir, Your Honor. I understand
2 that that's what we are talking about now. For the reasons that
3 I expressed before, that is, that the intention or hypothetical
4 basis to perhaps assert a privilege if certain questions are
5 asked does not implicate any interest that bars sealing of a
6 transcript of a court hearing, which is normally a public
7 proceeding. But for the fact that we are on the phone, we would
8 normally be in the courtroom.

9 MR. NUNES: Your Honor, I actually have a copy of the
10 transcript, and I can play back to you Mr. Motley's response at
11 that time.

12 MR. WESTBROOK: Your Honor, I think we are beyond Mr.
13 Motley.

14 THE COURT: I think we are, too. His only argument,
15 Mr. Westbrook, is that this is simply an extension of that to
16 which Motley agreed. It seems to me that the thing to do is for
17 you to go read the transcript. And now you know what it is that
18 the issue is, and then decide in a deliberate fashion what
19 arguments you have to take a position on sealing, one way or the
20 other. Okay.

21 MR. WESTBROOK: Yes, Your Honor.

22 THE COURT: I will give you an opportunity to brief it
23 if that's what you want to do. That's all right.

24 MR. NUNES: Your Honor --

25 THE COURT: Yes.

1 MR. NUNES: I'm sorry, Gary Nunes. I didn't mean to
2 interrupt you.

3 THE COURT: That's all right.

4 MR. NUNES: I was just going to say, if they are
5 permitted to -- the one thing I would not want to occur is for
6 them to brief it and to include what went on at the hearing in
7 their brief filed with the clerk's office.

8 THE COURT: Well, let me say this, Mr. Nunes. To a
9 certain extent, you are the author of your own misfortune by
10 articulating this sensitive issue, and it is in a public record,
11 and I have no -- if this were in court, I wouldn't have closed
12 court without a showing of a need to close court.

13 Now, depositions are a different animal. Depositions
14 are taken in the privacy of the office of the counsel for the
15 deponent here. So they are not matters open to the public. The
16 press could not come in and sit in on a deposition.

17 It may be that the district court in which this case
18 is pending wants to release this transcript. I believe that
19 that is the prerogative of that district court. All I was
20 trying to do in paragraph five was to preserve the status quo so
21 that the court could do it.

22 I don't believe Mr. Westbrook is going to go around
23 talking about this anyway. I'd be distressed to hear that he's
24 out trumpeting all this to the press. But there is a way to
25 deal with this in the ordinary course of things.

1 What I'm going to do right now because there is a
2 contention that this somehow relates to what Mr. Motley agreed
3 to, I'm going to order that the part of the transcript where you
4 said what you said about the grand jury and claiming the Fifth
5 Amendment is temporarily sealed until Mr. Westbrook can read the
6 transcript of the April 3rd hearing or the April whatever
7 hearing it was. I have forgotten when it was.

8 MR. NUNES: March 28th.

9 THE COURT: Then if he wants to file a brief, he can
10 file a brief. I don't have any reason to make him file that
11 under seal. I can't do that. I don't like sealing court
12 records. There is a far different issue in sealing a court
13 record than keeping a deposition confidential. So that's I
14 think how we will proceed, Mr. Nunes.

15 MR. NUNES: Very well, Your Honor.

16 THE COURT: Well, thank you all very much. But, Mr.
17 Westbrook, this is a temporary sealing. I'm doing it only to
18 give you a chance to take time to read what you need to read and
19 file what you need to file. If you need to file it, file it
20 quickly. Then give him a chance to respond, and I will decide
21 it, because I really do not like sealing court proceedings and
22 court records unless there is an absolute necessity to do so.
23 And the only reason I'm doing it now on this temporary basis is
24 to preserve the tension that may exist between the deposition,
25 the keeping of the deposition sealed and this argument.

1 Mr. Nunes, I urge you to go study it. You might
2 eliminate the need for briefing because I believe that Mr.
3 Westbrook, as to this transcript, has the better side of the
4 argument. Okay. But I'm not ruling on anything until I get
5 something from you. If you want it kept under seal, then you
6 can keep it -- you can move to keep it under seal if you file
7 something within ten days.

8 MR. NUNES: Thank you, Your Honor.

9 MR. WESTBROOK: Thank you, Your Honor.

10 THE COURT: I mean just for the purpose of ruling on
11 it. That's the only reason I'm doing this. So let's get about
12 it and do whatever you've got to do. I think the best thing for
13 you to do is do a little research. I think you will find there
14 probably is no need to keep it under seal. You can so advise
15 me, and then that will be eliminated.

16 MR. WESTBROOK: Your Honor, just for clarification, as
17 to the last date in terms of, I can file a motion within ten
18 days or for what purpose that was --

19 THE COURT: I'm going to put a suspense date on the
20 deposition. I think -- let me start again, not the deposition.
21 I think I'm going to reverse the procedure here. It is you who
22 thinks that this ought to be under seal.

23 I'm going to release this transcript from seal within
24 ten days unless I receive a brief you from and a motion to keep
25 it under seal, with supporting authority. I will then hear five

1 days after that from the defendants. Then I will decide it. If
2 you want me to decide it on the argument, I'll decide it on the
3 argument. You can have one day after that for a reply brief.

4 MR. WESTBROOK: Your Honor, Ed Westbrook. You said
5 five days from the defendants. You mean from the plaintiffs in
6 this case, Your Honor, opposing the motion?

7 THE COURT: Yes. After the defendants file -- after
8 Mr. Osdene files, the plaintiffs have five days to oppose his
9 motion to keep this under seal. He then has, I said one, but
10 probably two, you ought to do it in two days, to file any reply
11 that you have, Mr. Nunes, on behalf of Doctor Osdene.

12 If you want to have a hearing, then I will hear the
13 matter. If you don't, I'll consider it on the papers. That way
14 it's you, who wants to keep it sealed, who has the burden of
15 showing that it ought to be sealed.

16 MR. NUNES: Your Honor, will the opposition be filed
17 under seal until such time as the court ultimately makes its
18 ruling on this issue?

19 MR. WESTBROOK: Your Honor, Ed Westbrook. You
20 previously ruled our briefs would not be under seal.

21 THE COURT: I don't think I ruled anything on that.

22 MR. BROOKE: Your Honor, this is Rob Brooke. Maybe I
23 can jump in here and help out. It sounds like the legal
24 arguments don't need to be under seal and reference would be to
25 the transcript that is under seal. So it sounds to me like

1 there doesn't have to be any concern about that.

2 THE COURT: I think you can write your briefs in such
3 a way as you don't need to have them under seal. But if you
4 can't, then file it under seal. And if you file yours under
5 seal, then you file -- both sides do.

6 But let me tell you something, Mr. Nunes. You are
7 playing with fire when you are dealing with sealing documents in
8 a court proceeding. The presumption is they are not to be
9 sealed, and I think you have made way too much of this. You
10 made the decision to disclose what it was that you had in mind.
11 I commend you on telling him that, but maybe the thing to have
12 been done is to tell him in a private telephone call, and then
13 to seal the public record is another animal, you see.

14 I urge you to think about it and to file something in
15 ten days that says you don't really have any problem with
16 unsealing this record of this telephone call. But you do what
17 you are advised to do.

18 MR. NUNES: I understand, Your Honor.

19 THE COURT: All right, folks. Mr. Westbrook, don't go
20 out and make a press release over all this stuff.

21 MR. WESTBROOK: Your Honor, with everything that's
22 going on, I don't think this could get on page 20.

23 THE COURT: I know.

24 MR. WESTBROOK: I'll spell your name right.

25 THE COURT: I don't want my name in it. The way

1 things are, it may not even make the fold on the back page of
2 the back page, would it?

3 MR. WESTBROOK: I believe that's right, at least in
4 the present environment, Your Honor.

5 THE COURT: That's good. Thank you all.

6

7 (The proceedings were adjourned)

8

9 I, Sandra M. Beverly, certify that the foregoing
10 transcript is a correct record of the proceedings taken and
11 transcribed by me to the best of my ability.

12

13 SANDRA M. BEVERLY, RPR Date

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